THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appeal Jurisdiction)

D.B.: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE.

Crl. A. No. 17 of 2016

State of Sikkim

.... Appellant

versus

Suren Rai,
S/o Shri Dhan Bahadur Rai,
R/o Near Karmatar Junior High School,
Darjeeling – West Bengal.

.... Respondent

An Appeal under Section 378 Criminal Procedure Code, 1973.

Appearance:

Mr. Karma Thinlay and Mr. Thinlay Dorjee Bhutia Addl. Public Prosecutors with Mr. S.K Chettri and Ms. Pollin Rai, Asstt. Public Prosecutors for the Appellant.

Mr. B. Sharma, Senior Advocate with Mr. Sajal Sharma, Advocate for the Respondent.

JUDGMENT

(04.06.2018)

Bhaskar Raj Pradhan, J

1. The death is homicidal. It is also gruesome. Multiple and gaping chop wounds on the back of the neck, below the skull with a sharp, moderately heavy weapon have done away with a young human life of barely 27 years in the prime of his youth. The heinous act was committed inside a temporary shed in the

compound of one Padam Kumar Rai (P.W.5) in which the deceased and Suren Rai (Respondent), another *"lumberjack",* hired by him were residing till the night of the incident. The evidence of the brutal act is smeared all over the temporary shed. Dark coloured round collared 'T' shirt of the deceased with cuts over the neck and the right side of shoulder stained with blood and more at the back and aluminium GIS sheet walls of the temporary shed with a spray of blood. There is no quarrel about the aforesaid facts and also stands proved by cogent evidence.

2. The day before the incident, past sunset, at around 8.00 p.m. on 23.05.2013, the version of the altercation between Suren Rai and the deceased regarding the deceased's mobile which had gone missing would be complained about by Suren Rai to Padam Kumar Rai. This was at the house of Padam Kumar Rai, a little distance from the temporary shed, but within his compound, where the gruesome act would take place. As requested, Padam Kumar Rai would, a little later after 8.00 p.m., visit the temporary shed and find Suren Rai having his meal and the deceased sitting close by. Padam Kumar Rai would inquire about the mobile and admonition both Suren Rai and the deceased not to quarrel about trifles and look for the mobile instead. Padam Kumar Rai would return to his house. Suren Rai would shortly follow. Padam

Kumar Rai would again ask Suren Rai if the mobile was found. Suren Rai would, thereafter, leave Padam Kumar Rai's house. Thereafter, Padam Kumar Rai would retire to bed as it would be raining heavily. There is also no dispute about the aforesaid facts which also stands proved by cogent evidence. Padam Kumar Rai would depose and prove these facts and is admitted by Suren Rai.

3. What happened thereafter till the next morning is unknown, save the disclosure and the confessional statement of Suren Rai recorded under Section 27 of the Indian Evidence Act, 1872 and Section 164 of the Code of Criminal Procedure (Cr.P.C.) respectively and the last scene theory pressed by the Prosecution, it is pleaded.

4. The next morning at around 6.00 a.m. on 24.05.2013, much after the first rays of the sun would illuminate Okherbotey, Padam Kumar Rai would notice something unusual. Smoke was not coming out of the temporary shed as usual. He would find it curious and walk to the temporary shed from his house to discover the cadaver of the deceased in a sleeping position covered with a blanket and the tell-tale signs of the gruesome act smeared all over. These facts also stand proved by the evidence of Padam Kumar Rai.

5. At 8.45 a.m., the same morning, a written complaint (exhibit-12) by Padam Kumar Rai received by the Naya Bazar

Police Station in West Sikkim would lead to the registration of the First Information Report (FIR) (exhibit-13) and set in motion the investigation taken up by Police Inspector, Mr. Chewang D. Bhutia, Investigating Officer (P.W.10) alleging that Suren Rai had done away with the deceased and absconded. The same day, Suren Rai would be apprehended from Karmatar School ground in the neighbouring State of West Bengal by two Police Officers, Constable Topden Lepcha (P.W.6) and Home Guard, Yamnath Sharma (P.W.7) and brought to the Naya Bazar Police Station to face justice. These facts also stand proved by the Prosecution. The arrest of Suren Rai is also not an issue.

6. The deceased was Monit Rai, the dead *"lumberjack"* and temporary shed-mate of Suren Rai, the then accused, and now acquitted and a free man. These facts also stands proved by the prosecution.

7. When the Investigating Officer would visit the crime scene it would still be fresh with evidence, both physical and biological, of the gruesome incident the night before. On 24.05.2013 at 1100 hours the Investigating Officer would seize blood stained red/white/pink printed quilt; blood stained old while 'T' shirt with *"Pirelli"* printed on it; one pair of blood stained old blue slipper; one pair of red blood stained slipper; one faded black cap with *"Chattanooga"*; one light brown

Adidas track pant; one blue 'T' shirt with *"Adventure Tour"* printed on it and one light green 'T' shirt with *"Angry Birds"* printed on it through Property Seizure Memo (exhibit-16) in the presence of two witnesses Bhadrey Bishwakarma (P.W.8) and Dhiraj Rai (P.W.9). The seizures vide Property Seizure Memo (exhibit-16) also stands proved by the Investigating Officer and the two seizure witnesses named above.

8. On 24.05.2013 at 1115 hours the Investigating Officer would further seize white/green/grey old sleeping bag with blood stain; plastic mat with blood stain (red and green); controlled sample of blood collected from place of occurrence in a glass container; controlled sample of mud collected from the place of occurrence in a plastic container; one plastic profile mat (black) with blood stain; one blood stained jute sack with *"M.P."* printed on it through Property Seizure Memo (exhibit-18) from the place of occurrence in the presence of two witnesses, Bhadrey Bishwakarma and Dhiraj Rai. The seizure vide Property Seizure Memo (exhibit-18) would also be proved by the Investigating Officer and the two seizure witnesses named above.

9. On the same day i.e 24.05.2013 at half an hour past mid noon, the Investigating Officer would forward Suren Rai to the Medical Officer stationed at the Jorethang-Primary Health Center (PHC) for his medical examination. Dr. S. N. Adhikari

(P.W.1) would then examine him and record his observation in the Medical Report (exhibit-1). However, in the said Medical Report of Suren Rai, Dr. S. N. Adhikari would endorse:-

> **"***Suren Rai, 27 years s/o Dhan Bdr. Rai r/o Karmatar (W.B.). As stated by accused, he has assaulted on Monit Rai of same place with 'khukuri' which leads to death of the victim at the place of occurrence (Zoom/West Sikkim).***"**

10. Dr. S. N. Adhikari in his deposition before the Trial Court however, would not expound about the extra judicial confession recorded in the Medical Report and only state that on examination of Suren Rai, there was no complaint or injuries and that he was physically and mentally sound and fit for custody. We would not be confident about the purported extra- judicial confession because the truth of what was scribed by Dr. S. N. Adhikari in the Medical Report would not be brought forth in his oral testimony and it was made whilst in custody of the police and thus clearly barred by Section 26 of the Indian Evidence Act, 1872.

11. On 24.05.2013 at 1245 hours the Investigating Officer would seize three wearing apparels of Suren Rai, i.e., blood stained black 'T' shirt with *"Marshall"* printed on it, blue faded blood stained jeans pant with 'Salsa' printed on the inner side and one faded blue blood stained underwear with *"Jookey"* written on it through property seizure memo (exhibit-19) from Suren Rai at Naya Bazar Police Station in the presence of two

witnesses, Bhadrey Bishwakarma and Dhiraj Rai. The seizure vide Property Seizure Memo (exhibit-19) would be proved by the Investigating Officer and the two seizure witnesses named above. The Investigating Officer would specifically depose that the police escort party produced Suren Rai at Naya Bazar, Police Station on 24.05.2013 at 1245 hours, after completion of medical examination and seize the said wearing apparels from the possession of Suren Rai. The defence wouldn't be able to tarnish this deposition. At 1250 hours thereafter the Investigating Officer would arrest Suren Rai at the Naya Bazar Police Station where he would be produced by Constable Topden Lepcha and Home Guard Yamnath Sharma.

12. It is said; Suren Rai confessed to his crime, made a disclosure statement (exhibit-14) which would be recorded under Section 27 of the Indian Evidence Act, 1872, before the Investigating Officer at 1255 p.m. on 24.5.2013, in the presence of two independent witnesses and signed the same stating that he had hidden the *"khukuri"* near Padam Kumar Rai's residence and he could show it to the police. The confession to the Investigating Officer and the disclosure statement are highly contested.

13. The same May midsummer afternoon on 24.05.2013 at 1325 hours the alleged weapon of offence, an 18 inch long *"khukuri"*, the traditional curved machete and the symbol of

the Nepalese/Gorkha communities' valour, would also be recovered from an open space just outside the kitchen window within the compound of Padam Kumar Rai, unfortunately, allegedly used for the dastardly act. The Property Seizure Memo (exhibit-15) would be proved by the Investigating Officer and two seizure witnesses, Bhadrey Bishwakarma and Dhiraj Rai and the said *"khukuri"* identified by them. However, both the said seizure witnesses would state that the alleged "*khukuri"* was lying in an open place which could be easily seen by everyone. The prosecution case as deposed by the Investigating Officer that the recovery of the *"khukuri"* was pursuant to the disclosure statement would, therefore, be contested by the defence as being tainted.

14. On 06.06.2013 an application (exhibit-7) would be made by the Investigating Officer to the Learned Judicial Magistrate, West District at Gayzing (P.W.3) with a request to record the confessional statement of Suren Rai under Section 164 Cr.P.C. as he volunteers to depose about the facts with regard to the case.

15. The Learned Judicial Magistrate would put preliminary questions (exhibit-8) to Suren Rai after he was brought to the Court on 06.06.2013 at 13.30 hours by one Krishna Bahadur Rai from the District Jail Namchi, which was recorded and later proved during trial, through the Learned Judicial

Magistrate. As many as 16 questions would be put to Suren Rai by the Learned Judicial Magistrate.

16. The Learned Judicial Magistrate, thereafter, would give four days time for reflection to Suren Rai informing him that he should not mix around with the police or any other person and accordingly would send him to jail and direct him to appear on 10.06.2013 at 10.00 a.m.

17. Suren Rai would be produced on 10.06.2013 before the Learned Judicial Magistrate after which he would be placed in custody of the staff of the Learned Judicial Magistrate and the Head Constable would be directed to leave the Court premises. On being satisfied that there were no policemen in the Court and chamber from where the Court could be seen or heard, the Learned Judicial Magistrate would put six questions to Suren Rai, record the memorandum of statement of the accused (exhibit-9) in compliance of Section 164 Cr.P.C., explain to Suren Rai that he was not bound to make any statement before her, record her satisfaction that the statement was voluntary and the fact that it was made in her presence and thereafter record the confession of the then accused, Suren Rai, under Section 164 Cr.P.C. on 10.06.2013 (exhibit-10). The said confession would read as under:-

> ***"****At the relevant time I was working at Zoom, West Sikkim in the house of one Padma, I was given the job of cutting firewood along with one Manit Rai. We both are*

permanent residents of Karmatar, Darjeeling, West Bengal and were at Zoom for the work.

On the relevant day, I drank some alcohol with Manit Rai at our temporary shed at around 2100 hours at Zoom, West Sikkim and we were little intoxicated and the said Manit Rai went out. Around 2130 hours, while I was still at my temporary shed, Manit Rai returned back and he had drank more alcohol outside and started provoking me into a fight for no reason. He also hurled a khukuri at me to kill me, however I dodged myself from that, after which I took the khukuri from him and stabbed him at the back of his neck thrice and stayed there for about an hour. At the time he was still alive.

*Thereafter I ran off towards Naya Bazar and the next day at about 0830 hours, the police apprehended me.***"**

18. The investigation of the case which would commence on 25.04.2013 would result in a final report dated 22.07.2013 within barely three months of the incident and a Sessions trial Case would be registered on 26.08.2013. Supplementary charge-sheets would however, be filed only on 01.10.2015. The first supplementary charge-sheet would relate to blood collected in a glass container seized from the place of occurrence on 24.05.2013 vide Property Seizure Memo (exhibit-18), controlled sample gauge piece with blood stains of the deceased, black hair samples having blood stains of the deceased, black hair samples of the deceased, six black hair strands of Suren Rai and blood sample of Suren Rai collected vide requisition dated 06.06.2013 (exhibit-11). The evidence collected and seized on 03.07.2013 would be sent to CFSL,

Kolkatta for DNA comparison and analysis and vide expert opinion dated 03.08.2015 under the signature of Dr. Anil Kumar Sharma, Deputy Director (Biology) and Scientist 'D', from CFSL Kolkata (P.W.11) the result would be placed before the Court. The other supplementary charge-sheet would relate to the soil sample collected from the place of occurrence, blood stained *"khukuri"* seized vide Property Seizure Memo (exhibit-15), blood stained black 'T' shirt with *"Marshall"* printed on it, blood stained faded blue jeans pant with *"Salsa"* printed on it and blood stained underwear with *"Jookey"* printed on it all seized on 24.05.2013 from the possession of Suren Rai vide Property Seizure Memo (exhibit-19). The expert opinion dated 08.09.2015 (exhibit-26) would also be placed before the Court. The expert who gave the said opinion would be one Dr. P. Paul Ramesh from CFSL, Kolkata. The expert would not be examined. However, the expert opinion would be exhibited by the Investigating Officer without a protest by the defence.

19. These seizures of the biological as well as physical evidence and the expert opinions would reveal disturbing and unfortunate situation. The seizures and collection of blood samples and hair samples would take place on 24.05.2013 and 06.06.2013. The seized evidence would be forwarded and received by the CFSL, Kolkatta on 24.07.2013. The CFSL, Kolkatta would keep these evidences till 17.03.2015 and

10.07.2015 and finally give its opinion on 29.06.2015 and 25.07.2015 during which period material evidence collected would degrade to such an extent that the experts examining them would not be able to decipher the evidence completely.

20. The truth of what transpired that rainy night when a young 27 year old youth lost his life and that too by multiple assaults below the skull and on the neck would be accessible to the Investigating Officer within the confines of the little temporary shed strewn with evidence which had the propensity to narrate the gruesome story. The voiceless cry for justice of the deceased could have been heard from the blood soaked clothes, GIS sheets, profile mat, jute sack, slippers, track pants and the quilt recovered and seized. An investigative mind with a determination to do justice and seek the truth would do so from each of these evidences. The Investigating Officer should be mindful of what is commonly known as *"Locard's Principle"* formulated by Dr. Edmond Locard. Simply put it is: *"Every contact leaves a trace".* This principle explained means that the perpetrator of a crime will bring something into the crime scene and leave with something from it and that both can be used as forensic evidence. We would believe that forensic evidence and not limited to finger prints alone would be available at the scene of crime, which, it is quite obvious, the perpetrator had not even

bothered to tamper. The scene of crime and in this case the little temporary shed, immediately sanitized from any outside interference, would be a place where the perpetrator would have stepped, touched and been in physical contact with the material objects available and therefore, rich with both biological and physical evidence. The biological evidence like blood and hair seen at this place of occurrence and seized are required to be not only preserved carefully and scientifically but also examined in right earnest to come to a definite conclusion before time chooses to erode the evidence and fog the vision. Those inanimate objects would have witnessed silently the gruesome act and could serve as witnesses to the perpetrator committing homicide. Similarly, the scene of crime ought to be scanned for finger print and foot prints which would obviously be available. The physical evidence would never lie or commit perjury or forget. The Investigating agencies human failure alone in finding it, preserving it and studying it would allow it to remain inanimate and voiceless. We would believe that the forensic evidence would be decipherable with the use of scientific methods and technology. We would desire, nay implore the State to introduce and make available to the investigative agencies new, updated scientific methods and technologies for forensic examination although we are certain that we would not err even if we were to adjure the State to do so. This was a little

diversion, much necessitated by the facts of this case, now back to the facts.

21. Suren Rai would be charged for manslaughter. The trial, however, would result in acquittal of Suren Rai. The State is aggrieved by the Impugned Judgment dated 29.02.2016 of the Learned Sessions Judge, West Sikkim at Gyalshing in Sessions Trial Case No. 06 of 2014.

22. The Appeal is therefore, against acquittal. The presumption of innocence in favour of Suren Rai from the lodging of the FIR till judgment day is now fortified. If the view adopted by the Trial Court is a reasonable one in the conclusion reached by it and had its ground well set out on the materials on record, numerous precedents from the Supreme Court would say- the acquittal may not be interfered with.

23. There being no eye witness to the crime the present case is based on circumstantial evidence. The law, to prove a case on circumstantial evidence, is also well settled. The circumstances from which the conclusion of the guilt is to be drawn must be fully established. The facts so established should be consistent only with the hypothesis of the guilt of Suren Rai and no other. The circumstances should be of conclusive nature and should exclude every possible hypothesis except that it is Suren Rai and Suren Rai alone

who is guilty of murder. The chain of evidence must be so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of Suren Rai and the Court must be judicially confident that it is Suren Rai who is guilty and the heinous act has been perpetrated by him and none other.

24. The question, so vital, to be answered by the Trial Judge was whether on the fateful intervening night of 23.05.2013 and 24.05.2013 did Suren Rai assault the deceased Monit Rai with the *"khukuri"* and murder him?

25. The solitary charge for murder was framed on 23.05.2014 and in the trial that ensued, 11 witnesses would be examined by the prosecution. The statement of the then accused, Suren Rai, on his examination under Section 313 Cr.P.C. to explain the various incriminating circumstances appearing in the evidence against him, would be conducted on 30.07.2015 and 16.02.2016 in the end of which Suren Rai would plead innocence and state that he had not committed the offence. Suren Rai would also resile from his confessional statement.

26. The judgement of acquittal by the Learned Sessions Judge is based on the Trial Courts judicial analysis on four pivotal issues. The Learned Sessions Judge would not believe the prosecution version of the recording of the disclosure

statement (exhibit-14) purportedly under Section 27 of the Indian Evidence Act, 1872 in the presence of two witnesses and the subsequent recovery of the alleged weapon of offence, the *"khukuri"*, vide Property Seizure Memo (exhibit-15). The Learned Session Judge would also not believe the last scene theory put-forth by the prosecution. The judicial confession of Suren Rai made before the Learned Judicial Magistrate would be disregarded. The evidence of Padam Kumar Rai, the employer of both the deceased and Suren Rai, the *"lumberjacks"* and in whose compound the gruesome act was committed would not also inspire confidence in the Learned Sessions Judge due to which the Learned Sessions Judge would hold the evidence of Padam Kumar Rai, Bhadrey Bishwakarma and Dhiraj Rai *"totally doubtful"*.

27. The Learned Sessions Judge would believe the explanation given by Suren Rai in his statement under Section 313 Cr.P.C. by which he would state that due to the continuous harassment and threat by the deceased he had left for Karmatar around 8.30 p.m. on 23.05.2013.

28. It was the same night that the deceased was mercilessly hacked to death. This is well established.

29. The burden of proof so heavily set on the prosecution to prove every ingredient of the alleged offence of murder would be held not satisfied and the Learned Sessions Judge would

find that the gap between the deceased last seen alive by Padam Kumar Rai and his finding the dead body the next morning was so wide that the trial Court could not rule out the possibility of a third person coming in between. A purported confession of Suren Rai to the Investigating Officer would also not be believed and thus Suren Rai would be held not guilty and acquitted of the solitary charge of murder.

30. We have meticulously examined the evidences, oral and documentary, as well as the impugned judgment. This is a case of a brutal murder. This is also a case in which Suren Rai has been acquitted by the trial Court. The able assistance rendered by Mr. Karma Thinlay Namgyal, the Additional Public Prosecutor and Mr. B. Sharma, Senior Advocate, appearing for the Respondent are well appreciated. The various judicial pronouncements of the Supreme Court relied upon by the Learned Counsels have guided our judgment in the present case.

31. The Learned Sessions Judge would hold that the death was homicidal and proved by the medical evidence. Dr. O. T. Lepcha, (P.W.2) the Medico Legal Specialist at the S.T.N.M. Hospital, Gangtok has coherently and convincingly proved his Autopsy Report (exhibit-2).

32. It was the deceased who succumbed to the multiple wounds by a sharp, moderately heavy weapon in the

intervening night of 23.05.2013 and 24.05.2013 in the temporary shed in which the deceased and Suren Rai were residing within the premises owned by Padam Kumar Rai and the subsequent recovery of the dead body of the deceased are also proved by the evidence of Padam Kumar Rai, the evidence of the Investigating Officer, inquest witnesses Bhadrey Bishwakarma and Dhiraj Rai proving the Inquest Report (exhibit-20) of the inquest conducted on 24.05.2013, the evidence of Dr. O. T. Lepcha and the Autopsy Report (exhibit-2) and the Dead Body Challan (exhibit-3) proved by Dr. O. T. Lepcha. The FIR proved by Padam Kumar Rai corroborates the above facts. The photographs marked (exhibit-21) (collectively) captures and freezes the Investigating Officers first memory of the scene of crime evidencing the heinous act upon the deceased, when he exhibits the same during his deposition.

33. The arrest of Suren Rai from Karmatar by two Police Officers Constable, Topden Lepcha and Home Guard, Yamnath Sharma on 24.05.2015 would be proved by their evidence as well as the arrest Memo (exhibit-24) proved by the Investigating Officer. The Learned Sessions Judge would find fault in the failure of the prosecution to examine any witness from Karmatar or any evidence as to what time the accused reached Karmatar. The Learned Sessions Judge would consequently doubt the entire evidence of the prosecution

witnesses. Constable Topden Lepcha would depose that on 24.05.2010 at around 9.00 a.m. as per the instructions given by the Station House Officer, Naya Bazar Police Station he and Home Guard Yamnath Sharma went to Karmatar to apprehend Suren Rai, met him at the Karmatar School ground, apprehended him and brought him to Naya Bazar Police Station. In cross-examination Constable Topden Lepcha would state that it would take 10 to 15 minutes to reach Karmatar from Naya Bazar Police Station and 30 to 35 minutes from the place of occurrence. Padam Kumar Rai would depose that Suren Rai left his house after 8.00 p.m. on 23.05.2013. Suren Rai would himself explain in his statement under Section 313 Cr.P.C. that he left for Karmatar at 8.30 p.m. on 23.05.2013. It is thus clear that Suren Rai would have reached Karmatar 30 to 35 minutes thereafter. The failure of the prosecution to examine any witness from Karmatar, which could be for any number of reasons ought not to have distracted the focus of the Learned Sessions Judge to see whether from the evidence available the prosecution had been able to establish their case. In re: ***Raja v. State of Haryana***[1] the Supreme Court would hold:-

> ***"13.*** *..... It is well settled in law that non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record, if the same is natural, trustworthy and convincing ....."*

[1] **(2015) 11 SCC 43**

34. All other circumstances having been cogently proved by the prosecution, the four pivotal issues examined by the Learned Special Judge are required to be reconsidered in the present appeal within the parameters of settled law of appreciation of appeal against acquittal. If the evidence produced and proved gives rise to a strong suspicion but does not conclusively prove the guilt, Suren Rai's acquittal is to be upheld. If the evidence produced and proved gives rise to two probable conclusions one in favour of Suren Rai and the other against, even then Suren Rai's acquittal is to be upheld.

Judicial Confession

35. On 06.06.2013 the Investigating Officer vide a communication (exhibit-7) would appraise the Learned Judicial Magistrate that Suren Rai was arrested on 24.05.2013 and sent to judicial custody on the same date and further that Suren Rai *"volunteers to depose facts with regard to the instant case in the Hon'ble Court of law."* The Investigating Officer, therefore, would request the Learned Judicial Magistrate to record the statement of Suren Rai under Section 164 Cr.P.C. The said application would be examined by the Learned Judicial Magistrate on the same date. On 06.06.2013 itself, Suren Rai, having been brought before the Learned Judicial Magistrate at 1330 hours, would be placed in

custody of peon Dhrona Sharma and the police would be directed to leave the premises. Having satisfied herself that there was no policeman in the Court or in any place where the proceedings could be seen or heard except the peon, not concerned in the investigation of the crime, as necessary to guard the witness, the Learned Judicial Magistrate would put 16 questions to Suren Rai to ensure the voluntariness of the confession to be recorded. It would be explained to Suren Rai that she was a Magistrate and had no concern with the police. Suren Rai would be asked whether he had any complaint of ill treatment against the police or other person responsible for bringing him to the Court. Suren Rai would reply with a *"no"*. Suren Rai would be asked whether he consented to be examined by the Learned Judicial Magistrate. He would reply in the affirmative. Suren Rai would be asked if he wished to make any statement. He would again reply in the affirmative. Suren Rai would be specifically asked whether he wanted to consult an advocate of his choice before proceeding any further. He would reply with a *"no"*. Suren Rai would be informed that he was not bound to make a statement or there is no compulsion that he should make a statement. He would say he understood the information. Suren Rai would also be informed that if he made a statement it would be taken down and may be used against him as evidence. He would say he understood the information. Suren Rai would be asked

whether the police or any other person threatened him to make a statement. He would say *"no"*. Suren Rai would be asked whether the police or anyone else promised him that lesser punishment would be awarded if he made a statement or that he would be acquitted. Suren Rai would state *"no they have not told me anything like that"*. Suren Rai would be asked whether the police or any other person had given him any allurement to make a statement and the reply would be a *"no"*. Suren Rai would be specifically asked if he was under pressure of the police to make statement under Section 164 Cr.P.C. and the reply would again be a *"no"*. Suren Rai would be asked if he still desired to make a statement and the reply would be a *"yes"*. When asked when it first occurred to him that he should make the statement and why did it occur to him to do so, Suren Rai would reply: *"immediately after I was arrested and realized that I had made a mistake"*. When asked why he was making a statement, Suren Rai would state: *"because I had committed the offence"*. Suren Rai would be specifically asked whether he was making the statement voluntarily, Suren Rai would reply with a *"yes"*. Finally, Suren Rai would be informed that he was given four days time for reflection. He would also be told not to keep in touch with the police. On being asked whether he understood the same he would reply with a *"yes"*. Accordingly, Suren Rai would be given four days time for reflection and sent to jail with

personnel with a direction to appear before the Learned Judicial Magistrate on 10.06.2013 at 10 a.m.

36. The aforesaid details culled out from the record of the questionnaires put to Suren Rai amply and substantially fulfil the requirements of Section 164 (2) of Cr.P.C. Complete and adequate examination seems to have been undertaken by the Learned Judicial Magistrate to satisfy herself regarding the voluntariness of the statement of Suren Rai to be recorded.

37. On 10.06.2013 Suren Rai would be produced by a Head Constable from the District Jail. He would be placed in custody of the Learned Judicial Magistrate's staff and the Head Constable from the District Jail would be directed to leave the Court premises. The Learned Judicial Magistrate would satisfy herself that there was no policeman in the Court and chamber from where the Court could be seen or heard. Thereafter, the Learned Judicial Magistrate would inform Suren Rai that she was a Magistrate and had no connection with the police. Suren Rai would be asked whether he understood the said fact to which he would reply with a *"yes"*. Suren Rai would once again be asked whether he had any complain of ill treatment by the police and the answer would be a *"no"*. Suren Rai would be asked whether he was induced, coerced, promised or advised by the police to make a statement and the answer would be a *"no"*. Suren Rai would

be asked whether the statement he offered to make was induced by any harsh treatment and if so by whom and the answer would be a *"no"*. Suren Rai would be informed that he was a free agent and not bound to make any statement. He would also be informed that it is open to him to make statement before her or not. Suren Rai would answer that he had understood the information. Suren Rai would be asked whether he still desired to make a statement after having been given four days of reflection time to think about it and the reply would be: *"yes, since I have committed the offence, I desire to make my statement.*" The Learned Judicial Magistrate, thereafter, would explain to the accused that he is not bound to make any statement before her. The Learned Judicial Magistrate would believe that the statement was made voluntarily. Having satisfied herself regarding the voluntariness of the statement, the Learned Judicial Magistrate would record the confessional statement after which the mandate of Section 164 (4) and 281 of Cr.P.C. would be complied with. Memorandum of the statement of the accused recorded under Section 164 of Cr.P.C. would be prepared and signed by both the Learned Judicial Magistrate as well as the accused as required. However, the statement of Suren Rai would be recorded in the *"form for recording deposition"* and the details of Suren Rai, the Magistrate recording the deposition, the date of the deposition, the name

of the person deposing, his father's name, age, village would be duly filled which would read thus:-

> ***"FORM FOR RECORDING DEPOSITION***
>
> *The deposition of accused Suren Rai for the Court taken on Oath solemn affirmation before me Subarna Rai, Judicial Magistrate, West Sikkim at Gyalshing on this the 10th day of June, 2013*
>
> *My name is Suren Rai*
>
> *My father's name is Dhan Bahadur Rai,*
>
> *I am aged about 27 yrs.*
>
> *My home is at village Karmatar, Darjeeling, West Bengal*
>
> *I reside at present at village Karmatar, Darjeeling, West Bengal where I am a labourer."*

38. The Learned Judicial Magistrate would be examined and she would depose that she had been satisfied that Suren Rai had understood the nature of the proceeding and he was willing to give his statement voluntarily despite knowing that it would be used against him. The Learned Judicial Magistrate would also depose that the contents of the confession so recorded was read over and explained to Suren Rai in Nepali and admitted by him to be his true statement. The Learned Judicial Magistrate would also be cross-examined by the defence when she would state that she had not informed the accused about free legal aid before recording his confession under Section 164 Cr.P.C. The defence would take a denial that the statement under Section 164 Cr.P.C. was voluntarily. No question would be asked, as sought to be raised in the present appeal, on the issue of purported administration of

oath on Suren Rai, in the manner detailed above, before recording his confession.

39. As we would find that the issue of administration of oath on an accused before recording a confession raised important question to be judicially answered, a reference would be made vide Order dated 03.07.2017 to the Full Court. The Full Court would render its judgment dated 10.03.2018 answering all the three questions referred.

40. From the perusal of the records it is quite clear that the mandate of Section 164 and 281 of Cr.P.C. had been substantially complied with by the Learned Judicial Magistrate before recording the confession. The Learned Sessions Judge would, however, hold that Suren Rai would explain in a statement under Section 313 Cr.P.C. that he had expressed his desire to make the statement on being pressurised by the Investigating Officer. The Learned Sessions Judge would also hold that the statement recorded under Section 164 of Cr.P.C. is not a substantive piece of evidence and could be used only to corroborate the statement of the witnesses or to contradict them. On the said two grounds, the Learned Sessions Judge would not rely upon the confession.

41. The Full Bench of this Court vide its judgment dated 10.03.2018 in re: ***State of Sikkim v. Suren Rai*** would hold:-

""Confessions" are one species of the genus "admission" consisting of a direct acknowledgement of guilt by an accused in a criminal case. "Confessions" are thus "admissions" but all admissions are not confessions. A confession can be acted upon if the Court is satisfied that it is voluntary and true. Judgment of conviction can also be based on confession if it is found to be truthful, deliberate and voluntary and if clearly proved. An unambiguous confession, as held by the Supreme Court, if admissible in evidence, and free from suspicion suggesting its falsity, is a valuable piece of evidence which possess a high probative force because it emanates directly from the person committing the offence. To act on such confessions the Court must be extremely vigilant and scrutinize every relevant factor to ensure that the confession is truthful and voluntary. Although the word confession has not been defined in the Evidence Act, 1872 the Privy Council in re: Pakala Narayanaswami v. King Emperor has clearly laid down that a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. As abundant caution the Courts have sought for corroboration of the confession though. As per Taylor's Treaties on the law of Evidence, Vol. I a confession is considered highly reliable because no rational person would make admission against his own interest prompted by his conscience to tell the truth. If the Court finds that the confession was voluntary, truthful and not caused by any inducement, threat or promise it gains a high degree of probability. To insulate such confession from any extraneous pressure affecting the voluntariness and truthfulness the laws have provided various safeguards and protections. A confession is made acceptable against the accused fundamental right of silence. A confession by hope or promise of gain or advantage is equally unacceptable as a confession by reward or immunity, by force or fear or by violence or threat. As held by the Supreme Court in re: Navjot Sandhu (supra) the authority recording the confession at the pre-trial stage must address himself to the issue whether the accused has come forward to make the confession in an atmosphere

free from fear, duress or hope of some advantage or reward induced by the person in authority. It is therefore, the solemn duty of the authorities both investigating agencies as well as Courts to ensure, before acting on such confession, that the same is safe to be acted upon and that there is no element of doubt that the confession is voluntary and truthful and not actuated by any inducement, threat or promise from any quarter. To do so the Magistrate must create an atmosphere and an environment which would allow voluntary confession induced by nothing else but his conscience to speak the truth and confess the crime. In deciding whether a particular confession attracts the frown of Section 24 of the Evidence Act, the question has to be considered from the point of view of the confessing accused as to how the inducement, threat or promise proceeding from a person in authority would operate in his mind."

42. The Supreme Court in re: ***Subramania Goundan v. State of Madras***[2] would hold:-

> ***"14****. The next question is whether there is corroboration of the confession since it has been retracted. A confession of a crime by a person, who has perpetrated it, is usually the outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially."*

43. In re: ***Aloke Nath Dutta v. State of W.B.***[3] the Supreme Court would hold:

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[2] **AIR 1958 SC 66**

"113. *The value of a retracted confession is now well known. The court must be satisfied that the confession at the first instance is true and voluntary. (See Subramania Goundan v. State of Madras [AIR 1958 SC 66 : 1958 Cri LJ 238] and Pyare Lal Bhargava v. State of Rajasthan [AIR 1963 SC 1094 : (1963) 2 Cri LJ 178] .)*

114. *Caution and prudence in accepting a retracted confession is an ordinary rule. (See Puran v. State of Punjab (I) [AIR 1953 SC 459 : 1953 Cri LJ 1925] .) Although if a retracted confession is found to be corroborative in material particulars, it may be the basis of conviction. (Balbir Singh v. State of Punjab [AIR 1957 SC 216 : 1957 Cri LJ 481])*

115. *We may notice that in 1950s and 1960s corroborative evidence in "material particulars" was the rule. (See Puran [AIR 1953 SC 459 : 1953 Cri LJ 1925] , Balbir Singh [AIR 1957 SC 216 : 1957 Cri LJ 481] and Nand Kumar v. State of Rajasthan [(1963) 2 Cri LJ 702 (SC)] .) A distinctiveness was made in later years in favour of "general corroboration" or "broad corroboration". (See for "General Corroboration" — State of Maharashtra v. Bharat Chaganlal Raghani [(2001) 9 SCC 1 : 2002 SCC (Cri) 377] ; "General trend of Corroboration" — Jameel Ahmed v. State of Rajasthan [(2003) 9 SCC 673 : 2003 SCC (Cri) 1853] and "Broad Corroboration" — Parmananda Pegu v. State of Assam [(2004) 7 SCC 779 : 2004 SCC (Cri) 2081 : AIR 2004 SC 4197] .)*

116. *Whatever be the terminology used, one rule is almost certain that no judgment of conviction shall be passed on an uncorroborated retracted confession. The court shall consider the materials on record objectively in regard to the reasons for retraction. It must arrive at a finding that the confession was truthful and voluntary. Merit of the confession being the voluntariness and truthfulness, the same, in no circumstances, should be compromised. We are not oblivious of some of the decisions of this Court which proceeded on the basis that conviction of an accused on the basis of a retracted confession is permissible but only if it is*

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[3] **(2007) 12 SCC 230**

found that retraction made by the accused was wholly on a false premise. (See Balbir Singh [AIR 1957 SC 216 : 1957 Cri LJ 481] .)

117. *There cannot, however, be any doubt or dispute that although retracted confession is admissible, the same should be looked at with some amount of suspicion — a stronger suspicion than that which is attached to the confession of an approver who leads evidence in the court.***"**

44. It would be apposite to point out that Suren Rai had voluntarily given his confession before the Learned Magistrate before whom he candidly stated that he wanted to make the confession because he had committed the offence. Various opportunities would be provided by the Learned Judicial Magistrate in the form of questions inquiring about any direct or indirect pressure, influence, hope or lure from the police or anyone else to Suren Rai and on each such occasion he would candidly reply with an emphatic *"no"*. The confession was recorded by the Learned Judicial Magistrate on 10.06.2013. The charges were framed on 23.05.2014. 11 witnesses were examined including the Investigating Officer during the trial. On the closure of evidence, the examination of Suren Rai, as an accused, would be conducted on 30.07.2015 and 16.02.2016 more than a year after the framing of charges against him. Suren Rai sought to retract his confession only at the time of recording his statement under Section 313 Cr.P.C. The reason, Suren Rai would assign, for retracting his confession is that he made his confession being pressurised by

the Investigating Officer. There are no specific details of how the Investigating Officer exerted pressure on Suren Rai in his explanation. The Investigating Officer was cross-examined by the defence. There is not even a denial of having confessed before the Learned Judicial Magistrate in the cross-examination of the Investigating Officer. If there was any kind of pressure exerted by the Investigating Officer due to which Suren Rai would volunteer to give his confession to the Learned Judicial Magistrate it was incumbent upon the defence to cross-examine the Investigating Officer regarding the specific details of the alleged pressure exerted by him to elicit the truth of the allegation, which was not done. In his subsequent examination under Section 313 Cr.P.C. the Respondent would also be asked: *"3. As per P.W.3, after recording the statement same was read over and explained to you which was admitted by you to be true and correct. Exhibit 10 is your statement recorded by her under Section 164 Cr.P.C. What have you to say?"* The Respondent would answer: *"It is true".* In view of the same it is unequivocally clear that the allegation of the confession not being voluntarily and made only after pressure was exerted by the Investigating Officer was an afterthought of the defence far too late in the day to invoke any further and deeper consideration. However, as adverted before, since an issue of substantial importance that oath having been administered the confession must be

discarded had been raised by Mr. B. Sharma this Court would refer the issue before the Full Bench. A Full Bench of this Court in re: ***State of Sikkim v. Suren Rai (supra)*** would *inter-alia* hold:-

> ***"126****. It is also evident that on examination of Section 164(5) Cr.P.C. administering of oath to an accused while recording confession without anything more may lead to an inference that the confession was not voluntary. However, there could be stray cases in which the confessions had been recorded in full and complete compliance of the mandate of Section 164 and 281 Cr.P.C and that the confession was voluntary and truthful and no oath may have been actually administered but inspite of the same the confession was recorded in the prescribed form for recording deposition or statement of witness giving an impression that oath was administered upon the accused. If the Court before which such document is tendered finds that it was so, Section 463 Cr.P.C would be applicable and the Court shall take evidence of non-compliance of Section 164 and 281 Cr.P.C. to satisfy itself that in fact it was so and if satisfied about the said fact is also satisfied that the failure to record the otherwise voluntary confession was not in the proper form only and did not injure the accused the confession may be admitted in evidence. We answer the second question accordingly."*

45. Admittedly this issue was not raised before the trial Court. Admittedly again no questions were asked to the Learned Judicial Magistrate who recorded the confession about the administration of oath nor any explanation sought. The record of the confession clearly reflects that the confession was recorded in the *"Form for recording deposition"*. The issue not having been raised specifically before the Court it is evident that the Court has not taken evidence under Section 463 Cr.P.C. After the Full Bench of this Court rendered his judgment on the issue of administration of oath to an accused the matter would be listed for hearing to give an opportunity to

the Appellant as well as the Respondent to make submissions on the effect of the said judgment. At the said hearing held on 11.04.2018 Mr. Karma Thinlay would submit that a bare perusal of the confession recorded under Section 164 Cr.P.C. makes it clear that oath was not actually administered upon the Respondent and the words *"taken on oath solemn affirmation"* was part of a pre-typed *"form or recording deposition"* and as such in view of paragraph 126 of the said judgment rendered by the Full Bench of this Court it would be important to remit the matter to the Court of the Learned Sessions Judge for the limited purpose of taking evidence of non-compliance of Section 164 and 281 Cr.P.C. On hearing the parties this Court would direct that the case papers be remitted to the Court of the Learned Sessions Judge for examining whether oath was actually administered upon the Respondent by the Learned Magistrate while recording his confession. The Learned Sessions Judge would re-examine the Learned Magistrate now Learned Chief Judicial Magistrate, giving an opportunity to the Respondent to cross-examine the Learned Chief Judicial Magistrate and thereafter give further opportunity to the Respondent to explain the circumstances under Section 313 Cr.P.C. pursuant to which the records would be placed before this Court. The Appellant as well as the Respondent would be re-heard on 30.05.2018. Mr. Karma Thinley would submit that the evidence of the Learned Chief

Judicial Magistrate would make it evident that oath was in fact not administered upon the Respondent and the confessional statement was voluntary. Mr. B. Sharma to the contrary would submit that in view of the judgement of the Full Bench of this Court the Learned Chief Judicial Magistrate stated that she had not actually administered oath although the records of the examination would reveal that oath was actually administered. He would further submit that in view of the documentary evidence which records that oath was administered there was no question of taking oral evidence and the said oral evidence would thus have little evidentiary value. He would draw the attention of this Court to Sections 91 and 94 of the Evidence Act, 1872. Mr. B. Sharma's submission on exclusion of oral evidence is in ignorance of Section 463 Cr.P.C. A perusal of the cross-examination of the Learned Chief Judicial Magistrate would disclose that the defence had not cross-examined her on the allegation made before us that her evidence was the result of the judgment of the Full Bench which is impermissible. Ambiguities, peculiarities in expression and the inconsistencies between the written words and the existing facts can also be explained by intrinsic evidence. The deposition of the Learned Magistrate dated 26.04.2018 makes it abundantly clear that oath had in fact not been administered upon the Respondent while recording the

confession. It is thus quite evident that this Court must examine the confession statement.

Disclosure statement (Exhibit 14)

46. The disclosure statement dated 24.05.2013 is recorded in Nepali. It is signed by Suren Rai, the Investigating Officer and two witnesses, Bhadrey Biswakarma and Dhiraj Rai. The Investigating Officer has proved his signature thereon. So have the two witnesses.

47. The disclosure statement of Suren Rai states that on the night of 23.05.2013 he and the deceased had a fight after which he took out the *"khukuri"* he had and hit him from behind after which Suren Rai hid the "*khukuri"* close to the house of Padma *"kopa"* (grandfather in the Rai language). Suren Rai also stated that he could show the *"khukuri"* to the police in the presence of witnesses.

48. Both Bhadrey Bishwakarma and Dhiraj Rai have deposed that on 24.05.2013 one Police Personnel of Naya Bazar Police Station recorded the statement of Suren Rai wherein he stated that he has concealed the weapon of offence i.e., *"khukuri"* near the house of Padam Kumar Rai. The said two witnesses also deposed that the disclosure statement was the statement given by Suren Rai. The said two witnesses also deposed about how Suren Rai took the Police Personnel and

them near the house of Padam Kumar Rai and the subsequent discovery of the *"khukuri"* at his instance. However, during their cross-examination they stated that the disclosure statement was prepared by the Police only after the Suren Rai was asked by the police to make statement regarding the weapon of offence. The Learned Sessions Judge would take exception of the fact that the said two witnesses deposed that the disclosure statement was prepared by the police only after Suren Rai was asked to make a statement. This exception, to our mind is not correct as merely asking an accused to make a statement without anything more cannot lead to any negative inference. However, the said two witnesses would also state that the statement was not voluntary. The said two witnesses were not declared hostile on this aspect and cross-examined by the prosecution. The prosecution is bound by their evidence that the disclosure statement was not voluntary.

49. The submission of the defence found favour with the Learned Sessions Judge who would hold the disclosure statement not proved. On perusal of the depositions of the seizure witnesses it is seen that both of them deposed that the disclosure statement was not the voluntary statement of Suren Rai.

50. The question which therefore falls for consideration is whether a disclosure statement is required to be voluntary?

51. Section 27 of the Indian Evidence Act, 1872 provides:-

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

52. Section 25 and 26 of the Indian Evidence Act, 1872 are also important for the purpose of understanding Section 27 thereof and thus reproduced herein below**:-**

> ***"25. Confession to police officer not to be proved***.- *No confession made to a police officer, shall, be proved as against a person accused of any offence."*
>
> ***"26. Confession by accused while in custody of police not to be proved against him***. *No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.*
>
> *Explanation.- In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)."*

53. Sir John Beaumont, in re***: Pulukuri Kottaya and others v. The King Emperor***[4] would hold that Section 27 of the Indian Evidence Act, 1872 seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence.

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[4] **AIR 1947 PC 67**

54. In re: ***State of Maharashtra v. Damu***[5]**,** the Supreme Court would hold:

> ***"35****. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact envisaged in the section. The decision of the Privy Council in Pulukuri Kottaya v. Emperor is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embrace the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect****."***

55. The only portion of the disclosure statement which is admissible is the statement of Suren Rai that he had hidden the *"khukuri"* near the house of Padma Kumar Rai and he can show the same to the police in the presence of witnesses which is covered by Section 27 of the Evidence Act, 1872. The rest of the disclosure statement is in-admissible, being confessional and prohibited by Section 25 and 26 of the Indian Evidence Act, 1872.

56. In re***: Pulukuri Kottaya (supra)*** the Privy Council would hold**:**

> ***"S. 27,*** *which is not artistically worded, provides an exception to the prohibition imposed by the preceding section and enables certain statements made by a person in police custody to be proved. The condition*

[5] **(2000) 6 SCC 269**

> *necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of S. 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information, relating to an object subsequently produced, it seems reasonable to suppose that the pursuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to S. 26, added by S. 27, should not be held to nullify the substance of the section. .....***"***

57. It is not the case of the defence that Suren Rai did not make the disclosure statement or that he did not sign on it. However, the defence would contend that the disclosure statement was not given by Suren Rai *"voluntarily"*. Bhadrey Bishwakarma and Dhiraj Rai have clearly deposed that the disclosure statement was not given *"voluntarily"*.

58. In re: ***State of Maharashtra* v. *Suresh***[6] the Supreme Court would hold:

> ***"26***. *We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.***"***

59. Relying upon the Judgment of the Supreme Court reported in re: ***Raja (supra)*** (paragraph 15 to 17) and emphasizing on the use of the word *"obtained"* Mr. Karma Thinlay, would argue that the disclosure statement does not necessary have to be voluntary. The relevant paragraphs of the said judgment are extracted herein below:-

> ***"15.*** *Another circumstance that has been proven is about the recovery of knife, bloodstained clothes and the ashes of the burnt blanket. The seizure witnesses Sukha PW 7 and Nanak PW 9 have*

[6] **(2000) 1 SCC 471**

proven the seizure. It is submitted by the learned counsel for the appellant that the police had recorded the confessional statement of the appellant-accused at the police custody and thereafter, as alleged, had recovered certain things which really do not render any assistance to the prosecution, for the confession recorded before the police officer is inadmissible. That apart, the accused had advanced the plea that the articles and the weapon were planted by the investigating agency.

16*. To appreciate the said submission in proper perspective, we may profitably reproduce a passage from State of U.P. v. Deoman Upadhyaya[6] :AIR p. 1129, para 7)*

> *"7.. ... The expression, 'accused of any offence' in Section 27, as in Section 25, is also descriptive of the person concerned i.e. against a person who is accused of an offence. Section 27 renders provable certain statements made by him while he was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable insofar as it distinctly relates to the fact thereby discovered. Even though Section 27 is in the form of a proviso to Section 26, the two sections do not necessarily deal with the evidence of the same character. The ban imposed by Section 26 is against the proof*

> *of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By Section 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered."*
>
> ***"17.** In State of Maharashtra v. Damu [State of Maharashtra v. Damu, (2000) 6 SCC 269 : 2000 SCC (Cri) 1088], while dealing with the fundamental facet of Section 27 of the Evidence Act, the Court observed that the basic idea embedded in the said provision is the doctrine of confession by subsequent events, which is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. It further stated that the information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information and, therefore, the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum....."*
>
> *[Emphasis supplied]*

60. In re: ***State of Maharashtra v. Damu (supra)*** after the arrest of accused no. 3 therein, he would tell the Investigating Officer that the dead body of the deceased was thrown in the canal. The said statement was not found admissible as the dead body was not recovered. On reconsideration the Supreme Court

would find that pursuant to the said statement and the offer made by the said accused that he would point out the spot, he was taken to the spot and there the Investigating Officer found a broken piece of glass lying on the ground which was picked up by him. A motorcycle was also recovered from the house of accused no. 2 and its tail lamp was found broken and one piece missing. The broken piece of glass recovered on the ground from the spot pointed out by accused no. 3 was placed on the broken situs of the tail lamp of the motorcycle it fitted the space and the Investigating Officer had no doubt that the said glass piece was originally part of the tail lamp of that motorcycle. It is in this context that the Supreme Court would hold what was reproduced in re: ***Raja (supra)*** in paragraph 17 of the said judgment. The Supreme Court was not called upon to examine whether a disclosure statement was required to be voluntary.

61. In re: ***Selvi v. State of Karnataka***[7] the Supreme Court would hold:

> *"**133**..... However, Section 27 of the Evidence Act incorporates the "theory of confirmation by subsequent facts" i.e. statements made in custody are admissible to the extent that they can be proved by the subsequent discovery of facts. It is quite possible that the content of the custodial statements could directly lead to the subsequent discovery of relevant facts rather than their discovery through independent means. Hence such statements could also be described as those*

[7] **(2010) 7 SCC 263**

which "furnish a link in the chain of evidence" needed for a successful prosecution. This provision reads as follows:

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

134. *This provision permits the derivative use of custodial statements in the ordinary course of events. In Indian law, there is no automatic presumption that the custodial statements have been extracted through compulsion. In short, there is no requirement of additional diligence akin to the administration of Miranda [16 L Ed 2d 694 : 384 US 436 (1965)] warnings. However, in circumstances where it is shown that a person was indeed compelled to make statements while in custody, relying on such testimony as well as its derivative use will offend Article 20(3).***"**

[Emphasis supplied]

62. The word *"voluntarily"* has not been defined in the Cr. P.C. Section 2 (y) Cr.P.C. however, provides:

> ***"**(y). Words an expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code.**"***

63. Section 39 of the IPC provides:

> ***"39**. "Voluntarily".- A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.**"***

64. The word *"involuntary"* has been defined in the Black's Law Dictionary, 10th Edition to mean:

> ***"****Involuntary, adj.(15c) Not resulting from a free and unrestrained choice; not subject to control by the will.****"***

65. The Supreme Court in re: ***Rammi alias Rameshwar v. State of M.P.***[8] would hold:

> ***"11.*** *Regarding the recovery of weapons, the prosecution could utilise statements attributed to the accused on the basis of which recovery of certain weapons was affected. Section 27 of the Evidence Act permits so much of information which lead to the discovery of a fact to be admitted in evidence. Here the fact discovered by the police was that the accused had hidden the bloodstained weapons. In that sphere what could have been admitted in evidence is only that part of the information which the accused had furnished to the police officer and which led to the recovery of the weapons.*
>
> ***12.*** *True, such information is admissible in evidence under Section 27 of the Evidence Act, but admissibility alone would not render the evidence, pertaining to the above information, reliable. While testing the reliability of such evidence the court has to see whether it was voluntarily stated by the accused.****"***
>
> *[Emphasis supplied]*

66. A Constitutional Bench of the Supreme Court, as far back as in the year 1961, would clearly hold in re*:* ***State of Bombay v. Kathi Kalu Oghat***[9] held:-

> ***"(13)*** *..... It was held by this court that S. 27 of the Evidence Act did not offend Art. 14 of the Constitution and was, therefore, 'intra vires'. But the question whether it was unconstitutional because it contravened the provisions of cl. (3) of Art. 20 was not considered in that case. That question may, therefore, be treated as an open one. The question has been*

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[8] **(1999) 8 SCC 649**
[9] **AIR 1961 SC 1808**

> *raised in one of the cases before us and has, therefore, to be decided. The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of cl. (3) of Art. 20 of the Constitution for the reason that there has been no compulsion. It must, therefore, be held that the provisions of S. 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion had been used in obtaining the information.***"***
>
> *[Emphasis supplied]*

67. A Division Bench of this Court also had occasion to examine whether a disclosure statement under Section 27 of the Indian Evidence Act, 1872 was required to be voluntary and in re: ***Kishore Thapa v. State of Sikkim***[10] would hold:

> ***"14****. As can be seen from the above, Section 27 is an exception made to Section 25 and 26 in as much as the information received from a person accused of an offence, in the custody of a police officer, so much of such information, as relates distinctly to the facts thereby discovered may be which proved. In other words, subject to the provisions contained in Sections 24, 25 and 26, information disclosed by a person, whether it amounts to confession or not, would be relevant only the factum of discovery and nothing more. However, the pre-condition for a statement to be*

[10] **2010 SCC OnLine Sikk 10**

admissible under Section 27 is that it should have been made voluntarily bereft of threat or coercion."

[Emphasis supplied]

68. Section 27 of the Indian Evidence Act, 1872 makes information received from a person accused of any offence even if in the custody of Police Officer and whether it amounts to confession or not admissible to the extent it relates distinctly to the fact thereby discovered in consequence of information received from the said person.

69. The question raised in the present case is not merely whether the recording of a disclosure statement in the custody of police officer is inadmissible but whether the recording of a disclosure statement in the custody of police officer and admittedly made not voluntarily is admissible in evidence. In view of the judgment of the Supreme Court in re: ***State of Bombay v. Kathi Kalu Oghat (supra)***, ***Selvi v. State of Karnataka (supra), Rammi alias Rameshwar v. State of M.P (supra)*** and the Division Bench of this Court in re: ***Kishore Thapa v. State of Sikkim (supra),*** it is unequivocally clear that the disclosure statement is required to be voluntary in order to be admissible. Involuntariness has an element of compulsion which has been held prohibited although the mere recording of the disclosure statement in the custody of police would not

make it inadmissible. The disclosure statement, therefore, is required to be kept out of consideration.

Seizure of Khukuri (vide Exhibit-15).

70. The Learned Sessions Judge would hold: *"As per the evidence of the witnesses the articles were seized by the police from open place, accessible to all."* The Learned Sessions Judge would further hold: *"the evidence of witnesses does not connect the accused with seizure articles i.e. M.O.XIV. There are contradiction in the evidence of PW-9, Exhibit-14 and Exhibit-15."* M.O.XIV was the *"khukuri"*. Bhadrey Bishwakarma and Dhiraj Rai would depose, in cross-examination, that the alleged *"Khukuri"* was lying in an open place and everyone could clearly see the place where alleged *"khukuri"* was lying. Surely, it could not be a logical argument that merely because the *"khukuri"*, was found in an open space it was not admissible in evidence or in all crimes, the criminals would be well advised not to hide the weapon of offence and leave it in open spaces. The Supreme Court in ***Anter Singh v. State of Rajasthan***[11] would hold:-

> ***"10.*** *..... Though recovery from an open space may not always render it vulnerable, it would depend upon the factual situation in a given case and the truthfulness or otherwise of such claim. .....***"**

[11] **(2004) 10 SCC 657**

71. In re: ***Yakub Abdul Razak Memon v. State of Maharashtra***[12] the Supreme Court would hold:

> ***"1706.*** *In State of H.P. v. Jeet Singh [(1999) 4 SCC 370 : 1999 SCC (Cri) 539] this Court dealt with the issue of recovery from the public place and held: (SCC p. 377, para 21)*
>
> > ***"21****. The conduct of the accused has some relevance in the analysis of the whole circumstances against him. PW 3 Santosh Singh, a member of the Panchayat hailing from the same ward, said in his evidence that he reached Jeet Singh's house at 6.15 a.m. on hearing the news of that tragedy and then accused Jeet Singh told him that Sudarshana complained of pain in the liver during the early morning hours. But when the accused was questioned by the trial court under Section 313 of the Code of Criminal Procedure, he denied having said so to PW 3 and further said, for the first time, that he and Sudarshana did not sleep in the same room but they slept in two different rooms. Such a conduct on the part of the accused was taken into account by the Sessions Court in evaluating the incriminating circumstance spoken to by PW 10 that they were in the same room on the fateful night. We too give accord to the aforesaid approach made by the trial court."*
>
> ***1707.*** *Similarly, in State of Maharashtra v. Bharat Fakira Dhiwar [(2002) 1 SCC 622 : 2002 SCC (Cri) 217] , this Court held: (SCC p. 629, para 22)*
>
> > *"22. In the present case the grinding stone was found in tall grass. The pants and underwear were buried. They were out of visibility of others in normal circumstances. Until they were disinterred, at the instance of the respondent, their hidden state had remained unhampered. The respondent alone knew*

[12] **(2013) 13 SCC 1**

where they were until he disclosed it. Thus we see no substance in this submission also."

1708. *In view of the above, it cannot be accepted that a recovery made from an open space or a public place which was accessible to everyone, should not be taken into consideration for any reason. The reasoning behind it, is that, it will be the accused alone who will be having knowledge of the place, where a thing is hidden. The other persons who had access to the place would not be aware of the fact that an accused, after the commission of an offence, had concealed contraband material beneath the earth, or in the garbage.*

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1793. *The submission made by Mr Mushtaq Ahmad, learned counsel appearing on behalf of the appellant that the recovery was made from a public place and, therefore, could not be relied upon and cannot be accepted, as it is the accused alone on whose disclosure statement the recovery was made and it is he alone, who is aware of the place he has hidden the same. It cannot be presumed that the other persons having access to the place would be aware that some accused after the commission of an offence has concealed the contraband material beneath the earth or in the garbage.*

1794. *In State of H.P. v. Jeet Singh [(1999) 4 SCC 370 : 1999 SCC (Cri) 539] , this Court held: (SCC p. 378, para 26)*

*"26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is 'open or accessible to others'. It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others.***"**

72. The said Bhadrey Bishwakarma and Dhiraj Rai were re-examined. They would prove that the *"khukuri"* was the same *"khukuri"* seized in their presence vide the Property Seizure Memo (exhibit-15).

73. The recovery of the *"khukuri"* from near the place of occurrence as well as its seizure vide Property Seizure Memo (exhibit-15) cannot be doubted. It is important that it is not the defence case that the *"khukuri"* recovered from near the place of occurrence was planted by the police. Two questions still remain to be answered. Firstly whether the prosecution has been able to connect the *"khukuri"* to the crime? Secondly whether the Learned Sessions Judges hesitation to rely upon the same due to the fact that the seizure witnesses deposed that the Property Seizure Memo (exhibit-15) was prepared after they were asked to make the statement, is correct? The fact that the *"khukuri"* was seized near the place of occurrence in front of the kitchen of Padam Kumar has been proved. The existence of the blood stained *"khukuri"* cannot also be doubted merely because the two seizure witnesses stated that the said *"khukuri"* was recovered after the involuntary statement of Suren Rai. The Property Seizure Memo (exhibit 15) would clearly reflect that the said *"khukuri"* had blood stains on it. Dr. O.T. Lepcha would opine that the cause of death, to the best of his knowledge and belief, was due to

fracture with resection of the spinal cord as a result of a sharp, moderately heavy weapon homicidal in nature. The Investigating Officer would state that the *"khukuri"* seized from the place of occurrence has been sent to CFSL, Kolkatta for analysis and examination and the said report would be received and placed before the Court through supplementary charge-sheet. Dr. Anil Kumar Sharma, would depose that the said *"khukuri"* with large reddish brown stain on the metallic part with wooden handle contained in a sealed cloth packet was received by him. He would depose that a portion of the *"khukuri"* was examined for the presence of human blood by Tetramethyl Benzidine and anti-human Haemoglobin test and human blood could be detected therein. The aforesaid evidences would cogently and clearly prove that the *"khukuri"* with suspected blood stains had been seized from near the place of occurrence and the said *"khukuri"* was found, in fact, to be stained with human blood. The CFSL, Report (exhibit-26) would also record the examination of *"One metallic knife with wooden handle stated to be khukuri of length 18 inches approx"*. Unfortunately, the genetic profiles from the blood stains on the *"khukuri"* could not be developed after repeated experiments which could be due to minute and/or highly degraded DNA material. In re: ***Raja (supra)*** the Supreme Court would observe:-

> ***"19.*** *Another circumstance which has been taken note of by the High Court is that the bloodstained clothes and the weapon, the knife, were sent to the Forensic Science Laboratory. The report obtained from the laboratory clearly shows that bloodstains were found on the clothes and the knife. True it is, there has been no matching of the blood group. However, that would not make a difference in the facts of the present case. The accused has not offered any explanation as to how the human blood was found on the clothes and the knife. In this regard, a passage from John Pandian v. State [John Pandian v. State, (2010) 14 SCC 129 : (2011) 3 SCC (Cri) 550] is worth reproducing: (SCC p. 153, para 57)*
>
> > *"57. … The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This is apart from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case."*
>
> *In view of the aforesaid, there is no substantial reason not to accept the recovery of the weapon used in the crime. It is also apt to note here that Dr N.K. Mittal PW 1, has clearly opined that the injuries on the person of the deceased could be caused by the knife and the said opinion has gone unrebutted.***"**

74. Padam Kumar Rai would tell the Court that the police also recovered the weapon of offence *"khukuri"* which was given by him to Suren Rai and the deceased for cutting logs. This fact is vital. The defence would not deny this statement but only assert that the said *"khukuri"* was not shown to him in Court. Although the defence would deny the recovery of *"khukuri"* at the instance of Suren Rai it would assert that the said *"khukuri"* was lying at an open place through the cross-examination of Bhadrey Bishwakarma and Dhiraj Rai. Both the aforesaid witnesses would identify the *"khukuri"* as the one seized under Property Seizure Memo (exhibit-15). The Property

Seizure Memo (exhibit-15) would be prepared at the place of occurrence.

75. In re: ***Prithipal Singh v. State of Punjab***[13] the Supreme Court would hold:

> ***"Burden of proof under Section 106***
>
> ***53.*** *In State of W.B. v. Mir Mohammad Omar [(2000) 8 SCC 382 : 2000 SCC (Cri) 1516 : AIR 2000 SC 2988] this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. (See also Shambhu Nath Mehra v. State of Ajmer [AIR 1956 SC 404 : 1956 Cri LJ 794] , Sucha Singh v. State of Punjab [(2001) 4 SCC 375 : 2001 SCC (Cri) 717 : AIR 2001 SC 1436] and Sahadevan v. State [(2003) 1 SCC 534 : 2003 SCC (Cri) 382 : AIR 2003 SC 215] .)"*

76. Under Section 106 of the Indian Evidence Act, 1872 when any fact is especially within the knowledge of any person, the burden of proving the fact is upon him. The only person who could throw light on how the *"khukuri"* which was admittedly given to Suren Rai and the deceased by Padam

[13] **(2012) 1 SCC 10**

Kumar Rai was found blood stained with human blood in the open space near the place of occurrence, is Suren Rai, since the other was hacked to death. No such explanation is forthcoming.

77. The Learned Sessions Judge would hesitate to rely upon the seizure of the *"khukuri"* vide Property Seizure Memo (exhibit-15) due to discrepancy in the time in the said memo, the disclosure statement and the evidence of Dhiraj Rai who stated that the alleged *"khukuri"* was seized about 10 a.m. The disclosure statement would be recorded at Naya Bazar Police Station. Disclosure statement would record the date of recording the disclosure as 24.05.2013 and the time 1255 hrs. The Property Seizure Memo (exhibit-15) would record the place of seizure as *"in front of the kitchen of Shri Padam Kumar Rai's residence"* at *"Okherbotey, Zoom, West Sikkim"*, the date of seizure as 24.05.2013 and the time as 1325. The disclosure statement being recorded at Naya Bazar and the seizure of the *"khukuri"* having taken place at Okherbotey there was bound to be difference in the time. Dhiraj Rai in his cross-examination, however, would state: *"Alleged khukuri and other material exhibits were seized at about 10 a.m. on the relevant day".* The evidence of Dhiraj Rai would be recorded on 19.05.2015.

78. In re: ***State of U.P. v. Santosh Kumar***[14] the Supreme Court would hold:

> ***"24.*** *In any criminal case where statements are recorded after a considerable lapse of time, some inconsistencies are bound to occur. But it is the duty of the court to ensure that the truth prevails. If on material particulars, the statements of prosecution witnesses are consistent, then they cannot be discarded only because of minor inconsistencies.****"***

79. The Supreme Court in re: ***Om Prakash v. State of Haryana***[15] would hold:

> ***"****Every small discrepancy or minor contradictions which may erupt in the statements of a witness because of lapse of time, keeping in view the educational and other background of the witness, cannot be treated as fatal to the case of the prosecution. The court must examine the statement in its entirety, correct prospective and in light of the attendant circumstances brought on record by the prosecution.****"***

80. We are of the view that the minor discrepancy of the exact time of recovery of the *"khukuri"* is explainable and can be overlooked. The time of seizure as provided by Dhiraj Rai was an approximate time and not an exact time that too after a gap of two years. Thus, although we are hesitant to rely upon the disclosure statement because it has been said to be involuntary, the recovery of the blood stained *"khukuri"* from the front of the kitchen of Padam Kumar Rai's residence and close to the place of occurrence which was within the holding

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[14] **(2009) 9 SCC 626**
[15] **(2011) 14 SCC 309**

of Padam Kumar Rai cannot be doubted. Further, the failure of Suren Rai to explain how the *"khukuri"* given to him and the deceased would be found blood stained in an open place close to the place of occurrence admittedly occupied by him and the deceased till the night before provides a vital link to the chain of circumstances. More so when Suren Rai failed to deny the fact that the said *"khukuri"* had been given to him and the deceased for cutting logs by Padam Kumar Rai when specifically put to him by the Learned Sessions Judge at the time of his examination under Section 313 Cr.P.C.

Evidence of Padam Kumar Rai, Bhadrey Bishwakarma and Dhiraj Rai.

81. The Learned Sessions Judge would hold that: *"On deep consideration of the evidence of P.W.5, P.W.8 and P.W.9, their presence become totally doubtful. If they were present together at the P.O. then why P.W.5 did not know about the statement made by the accused."* The solitary reason on which the Learned Sessions Judge would brush aside the evidence of the three witnesses was on the above ground. Padam Kumar Rai would be the sole witness present in the vicinity where the crime was committed and therefore not only a natural witness but also a vital witness. Bhadrey Bishwakarma and Dhiraj Rai would be witnesses to the purported disclosure statement, seizures, as well as the inquest. Padam Kumar Rai in cross-

examination would state: *"It is true that accused person did not confess anything before me. It is true that I cannot say what statement was given by the accused before the police. It is true that Dhiraj Rai and Bhadrey Bishwakarma Panchayat Member were accompanying me throughout the investigation process on 24.05.2013." (Emphasis supplied).* It was not the case of the prosecution that Suren Rai confessed before Padam Kumar Rai. Padam Kumar Rai was not a witness to the disclosure statement or any confessional statement. Padam Kumar Rai would clearly depose that he cannot say what statement was given before the police by Suren Rai. The disclosure statement would be purportedly recorded in the presence of Bhadrey Bishwakarma and Dhiraj Rai at the Naya Bazar Police Station and not at the place of occurrence i.e. Okherbotey, Zoom, West Sikkim. Both the witnesses would clearly state that the disclosure statement was made by Suren Rai in their presence. It is a completely different matter that we hesitate to rely upon the disclosure statement because of the fact that both the said witnesses would state that it was not voluntary. Bhadrey Bishwakarma in cross-examination would state that: *"one Padam Kr. Rai was with us on the relevant day."* Bhadrey Bishwakarma would not be asked whether Padam Kr. Rai was near him when Suren Rai confessed. Dhiraj Rai would not even be asked about the presence of Padam Kumar Rai. In such circumstances, it is quite evident the defence was trying

to steal a march by the afore-quoted general statement of Padam Kumar Rai obviously made on the suggestion of the defence. On examination of the depositions of the said three witnesses in its entirety, correct prospective and in light of the attendant circumstances brought on record by the prosecution we are of the view that the same are consistent and brooks no hesitation to receive them in evidence.

Last seen theory

82. In re: ***Mohibur Rehman v. State of Assam***[16] the Supreme Court would hold that there must be a close proximity between the events of accused last seen together with deceased and the factum of death. This was a case in which the dead body was recovered 14 days after the date on which the deceased was last seen in the company of the accused.

83. In re*:* ***Sahadevan v. State***[17] the Supreme Court would hold:

> ***"19.*** *The last circumstance relied on by the courts below pertains to the stand taken by the appellants in the trial as to parting company with Vadivelu. Here we must notice that as discussed hereinabove, the prosecution has established the fact that Vadivelu was seen in the company of the appellants from the morning of 5-3-1985 till at least 5 p.m. on the same day, when he was brought to his house and thereafter his dead body was found in the morning of 6-3-1985. Therefore, it has become obligatory on the appellants to satisfy the court as to how, where and in what manner*

[16] **(2002) 6 SCC 715**
[17] **(2003) 1 SCC 534**

Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found has to explain the circumstances in which they parted company. In the instant case the appellants have failed to discharge this onus. In their statement under Section 313 CrPC they have not taken any specific stand whatsoever. In the evidence of PW 25, it is elicited that on 5-3-1985 in the afternoon when Vadivelu was produced before the said witness, he after interrogation allowed Vadivelu to go, but then it is found from his evidence that he instructed A-1 to keep a watch over Vadivelu. In such circumstances, it was incumbent upon A-1 to have explained to the court in what circumstances they parted company. He has not given any explanation in this regard. On the contrary, the prosecution has established the fact that on the very day at about 5 p.m., Vadivelu was brought to the house of PW 1 by the appellants which was seen by PW 5. This part of the evidence of PW 5 has gone unchallenged in the cross-examination and, therefore, we will have to proceed on the basis that, what is stated by PW 5 in this regard is true. If that be so, the prosecution has established the fact that on 5-3-1985 at 5 p.m. Vadivelu was still in the company of these appellants and, therefore, in the absence of any specific explanation from the appellants in this regard, and in view of the other incriminating circumstances against the appellants having been proved by the prosecution, an adverse inference will have to be drawn against these appellants as to their part in the missing of Vadivelu. At this point, it may be relevant to note that though no specific stand has been taken by the appellants as to their parting company with Vadivelu, in their statement under Section 313 CrPC, it is seen from the evidence of PWs 1 and 5 that A-1 told the said witnesses on the night intervening between 5-3-1985 and 6-3-1985 that Vadivelu had escaped from the police station when he was allowed to sleep in the verandah of the police station. This explanation given by A-1 to PW 1 which was also heard by PWs 5 and 14, clearly shows that the same is totally false

*and obviously was an excuse made by the appellants to conceal the true facts and, therefore, this circumstance of A-1 making a false statement to PW 1 can also be taken as a circumstance against the appellants, in establishing the appellants' guilt. This Court in more than one case has held, that if the prosecution, based on reliable evidence, establishes that the missing person was last seen in the company of the accused and was never seen thereafter, it is obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. (See Joseph v. State of Kerala [(2000) 5 SCC 197 : 2000 SCC (Cri) 926] .) Therefore, we are in agreement with the finding of the courts below that Circumstance 7 also stands established against the appellants.***"***

[Emphasis supplied]

84. The Supreme Court in re: ***Shyamal Ghosh v. State of W.B.***[18] would hold:

"73. *Application of the "last seen theory" requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case. This Court in para 21 of Yusuf case [(2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620] while referring to Mohd. Azad v. State of W.B. [(2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082] and State v. Mahender Singh Dahiya [(2011) 3 SCC 109 : (2011) 1 SCC (Cri) 821] , held as under: (Yusuf case [(2011) 11 SCC 754 : (2011) 3 SCC (Cri) 620] , SCC pp. 760-61)*

"21. The last seen theory comes into play where the time gap between the point of time when the

[18] **(2012) 7 SCC 646**

accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. (Vide Mohd. Azad v. State of W.B. [(2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082] and State v. Mahender Singh Dahiya [(2011) 3 SCC 109 : (2011) 1 SCC (Cri) 821] .)"

74. *The reasonableness of the time gap is, therefore, of some significance. If the time gap is very large, then it is not only difficult but may even not be proper for the court to infer that the accused had been last seen alive with the deceased and the former, thus, was responsible for commission of the offence. The purpose of applying these principles, while keeping the time factor in mind, is to enable the court to examine that where the time of last seen together and the time when the deceased was found dead is short, it inevitably leads to the inference that the accused person was responsible for commission of the crime and the onus was on him to explain how the death occurred.***"**

[Emphasis supplied]

85. In re: ***Dharam Deo Yadav v. State of U.P.***[19] the Supreme Court would hold:

"19. *It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. The conduct of the accused and the fact of last seen together plus other circumstances have to be looked into. Normally, last seen theory comes into play when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the perpetrator of the crime becomes*

[19] **(2014) 5 SCC 509**

> *impossible. It will be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. However, if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain the circumstances in which the missing person and the accused parted company. Reference may be made to the judgment of this Court in Sahadevan v. State [(2003) 1 SCC 534 : 2003 SCC (Cri) 382] . In such a situation, the proximity of time between the event of last seen together and the recovery of the dead body or the skeleton, as the case may be, may not be of much consequence. PWs 1, 2, 3, 5, 9 and 10 have all deposed that the accused was last seen with Diana. But, as already indicated, to record a conviction, that itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.***"***
>
> *[Emphasis supplied]*

86. In the present case the evidence of Padam Kumar Rai would clearly prove that Suren Rai was last seen with the deceased in the temporary shed a little latter after 8.00 p.m. on 23.05.2013. The dead body of the deceased was then discovered by Padam Kumar Rai the very next day on 24.05.2013 at 6.00 a.m. barely ten hours later in the temporary shed in which, admittedly, both the deceased and Suren Rai were last residing together. In fact it is even the defence case that Suren Rai was with the deceased till 8.30 p.m. on 23.05.2013. Suren Rai would admit in his statement under Section 313 Cr.P.C. that he was with the deceased at

the place of occurrence till 8.30 pm on 23.05.2013. Padam Kumar Rai would clearly depose that after Suren Rai left his house he went off to sleep as it was raining. This is an important fact. The defence would not even attempt to deny this fact. The defence would not be able to tarnish Padam Kumar Rai's deposition. In fact through Padam Kumar Rai's cross-examination the defence would assert that Suren Rai had appeared before Padam Kumar Rai at around 8.30 p.m. The only person who was present in the vicinity of the place of occurrence was Padam Kumar Rai. However, from the evidence adduced it is certain that Padam Kumar Rai was asleep when the crime was perpetrated. The defence would not even try to point a needle of suspicion towards Padam Kumar Rai and suggest instead, in his cross-examination, that there was *"some other person"* in the temporary shed of Suren Rai and the deceased. The only person who could have named the said *"some other person"* is Suren Rai as the other is dead. It is quite obvious that this is a false defence. The fact that when Suren Rai left the house of Padam Kumar Rai it would be raining and Padam Kumar Rai would go to sleep was specifically put to Suren Rai by the Learned Sessions Judge and in reply thereof Suren Rai in his statement under Section 313 Cr.P.C. would admit it to be true. It is evident that there is proximity of both time and place in the present case. The time gap between the point of time when Suren Rai and the

deceased was seen together and deceased alive then and when the deceased was found dead within a period of just about 10 hours, all of it in the middle of the rainy night at a remote village-Okherbotey, Zoom, West Sikkim, is so small that the possibility of any other person other than Suren Rai being the perpetrator of the crime would become impossible. It is also admitted that immediately prior to the death of the deceased there was a quarrel between the deceased and Suren Rai.

87. It is trite that the circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. However, where the other links would be satisfactorily made out and the circumstances would point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which would complete the chain.

88. The Learned Sessions Judge would rely upon the statement of Padam Kumar Rai in cross-examination to hold that his statement does not lend full support to the prosecution case. The said statement is:-

> ***"****.....It is true that when the accused appeared before me at around 8.30 pm at my house and thereafter, I cannot say whether he left towards his temporary shed or somewhere else.****"***

89. The evidence of Padam Kumar Rai would establish that on the fateful night of 23.05.2013 Suren Rai and the deceased

were together after 08.00 pm at the temporary shed in which both Suren Rai and the deceased, admittedly, were residing till the fateful day. Padam Kumar Rai would also state that after he met the deceased and Suren Rai in the temporary shed, he returned home and *"Suren Rai came following me".* In cross-examination, Padam Kumar Rai would thus concede that he could not say whether Suren Rai went towards his temporary shed or somewhere else. It would be because of this statement of Padam Kumar Rai that the Learned Sessions Judge would find it unsafe to rely on the last seen theory. What Padam Kumar Rai said was absolutely truthful; how could he have known where Suren Rai went after they parted? The Learned Sessions Judge was required to examine what happened after they parted instead of dismissing the last seen theory, which in fact, was even admitted by Suren Rai in his statement under Section 313 Cr.P.C. Being last seen with the deceased, Suren Rai had sought to explain under what circumstances he had parted ways with the deceased who had been residing with him till that fateful night in his statement under Section 313 Cr.P.C. The relevant questions and answers are reproduced herein:-

> *"Q.No.14. It is in the evidence of PW-5 Shri Padam Kr. Rai that he knows you. He is a resident of Zoom. At the relevant time, you were hired by him to work as a lumberjack at his house. Along with you, deceased Monit Rai also worked with you. About 100 meters away from his house, you and the deceased had build a temporary shed*

with plastic and GIS sheets and the same could be seen from the Veranda of his house.

What have you to say?

Ans. It is true.

Q.No.15. PW-5 deposed that on 23.05.2013, around 8 pm, you came to his house and requested him to pacify the deceased Monit Rai as he was provoking you into a fight regarding his mobile phone. He told you that he will be coming later and after some time, he went to your temporary shed and saw that you were having your meal and deceased Monit Rai was sitting inside the temporary shed. He asked both of you about the matter and he was told that deceased Monit Rai had misplaced his mobile phone and was blaming for it.

What have you to say?

Ans. It is true.

Q.No.16. PW-5 deposed that he told both of you, not to fight over such things and look for the mobile phone as it could be misplaced somewhere and could be found later. Accordingly, he went to his house and you came following him and he again asked you whether you found the mobile phone. Thereafter, you left his house and it started raining heavily he went to sleep.

What have you to say?

Ans. It is true.

xxxxxxxxxxxxxxxx

Q.No.58. Do you have any statements to make in your defense?

Ans:- I am innocent and I did not commit any offence. I humbly submitted that on the relevant night when I requested the complainant twice for settlement of dispute between me and the deceased (Monit Rai) but the complainant did not take positive steps and I was continuously harassed and threatened by the deceased Monit Rai to kill and due to the fear I left for Karmatand around 8.30 pm on 23.05.2013 and as such, I have no knowledge about the murder of the deceased Monit Rai."

90. Section 313 Cr.P.C is an important section of the Code of Criminal Procedure. Section 313 Cr.P.C requires the Court to put questions to the accused for the purpose of enabling the accused *"personally"* to explain any circumstances appearing

in the evidence against him. The section enables a direct interaction between the Court and the accused for the sole purpose of allowing the accused to provide his explanation to each and every incriminating circumstance appearing in the evidence. The statement is not to be taken on oath which is prohibited under sub-section (3) thereof. The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them. The answers, however, given by the accused may be taken into consideration in such enquiry or trial, and put in evidence for or against him in any other enquiry into, or trial for, any other offence which such answers may tend to show that he had committed. Under Section 313 Cr.P.C the accused has a duty to furnish explanation in his statement regarding any incriminating material that has been produced against him. It is not sufficient compliance with the section to generally ask the accused what he has to say after having heard the prosecution evidence. Every material circumstance must be questioned separately. Providing fair, proper and sufficient opportunity to the accused to explain the circumstances appearing against him should be the whole object of the Court in compliance with Section 313 Cr.P.C. The Court must be particularly sensitive when the accused is ignorant or illiterate and may not understand the language of Court. The questions must be simple and understandable even to an illiterate and

ignorant of the law. Preferably the Court should avoid using legal language and keep the questions simple especially while dealing with people who are uneducated, illiterate, ignorant or simple. The question should be short and each new incriminating fact must be separately put to the accused. If the accused is unable to understand the language of the Court, the Court must translate the question in the language understood by the accused. It is obligatory on the accused while being examined to furnish explanation with respect to incriminating circumstances against him and the Court is duty bound to note such explanation even in a case of circumstantial evidence. Section 313 Cr.P.C. was enacted for the benefit of the accused.

91. It is trite that in a case like the present one where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, his failure to offer any explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain.

92. The failure of the accused to offer any explanation in his Section 313 Cr.P.C. statement alone would not be sufficient to establish the charge against the accused. The Court can, however, rely on a portion of the statement of the accused and find him guilty in consideration of other evidence against him. The accused has a right to maintain silence during examination or completely deny the incriminating circumstance but in such an event adverse inference could be drawn against him.

93. Suren Rai has accepted as true substantially all the deposition of Padam Kumar Rai till Suren Rai left the house of Padam Kumar Rai on the fateful night. In fact in his explanation to what transpired after Suren Rai left the house of Padam Kumar Rai, Suren Rai would state that since Padam Kumar Rai did not take positive steps to settle the dispute between him and the deceased and as he was continuously harassed and threatened by the deceased to kill, due to fear, he left for Karmatar around 08.30 pm on 23.05.2013. Suren Rai's explanation, however, does not inspire confidence. Admittedly, Suren Rai was there at the scene of crime till 08.30 pm on 23.05.2013. Suren Rai also admits his arrest the very next day. Suren Rai's arrest at Karmatar is cogently proved by the evidence of two Police Officers, Constable Topden Lepcha and Home guard Yamnath Sharma on

24.05.2015 as well as the arrest Memo (exhibit-24) proved by the Investigating Officer. At the time of the arrest on 24.05.2013 at 1245 hours it would be proved that three wearing apparels had been seized from Suren Rai in the presence of Dhiraj Rai and Bhadrey Biswakarma when he was brought from Karmatar to Naya Bazar Police Station.

94. The aforesaid three items were seized vide Property Seizure Memo (exhibit-19) duly signed by the Investigating Officer as well as the aforesaid two witnesses. The defence, quite clearly, would not be able to demolish the aforesaid seizure. The Investigating Officer, Dhiraj Rai and Bhadrey Biswakarma would cogently prove it.

95. Suren Rai, however, would provide no explanation to this circumstance appearing against him, although, he would be the only person who would have been able to explain the same when the question is put to him. Suren Rai would simply deny it by saying: *"it is not true"* when the specific circumstance is put to him by the Learned Sessions Judge under Section 313 Cr.P.C. The said three wearing apparels seized vide property seizure memo (exhibit-19) were sent for forensic examination to CFSL, Kolkata for its examination. The Investigating Officer also collected blood sample of Suren Rai vide requisition letter (exhibit-11). The result of the forensic examination would be placed before the Court through Dr. Anil Kumar Sharma who

would prove the Forensic Examination Report dated 29.06.2015 (exhibit-25).

96. The Forensic Examination Report (exhibit-26) would opine about the said three wearing apparels seized from the possession of Suren Rai at the Naya Bazar Police Station vide Property Seizure Memo (exhibit-19). The result of the examination would reflect that the soil particles found in the blue faded jeans of Suren Rai seized after his arrest were found to be similar to the sample soil particles collected from the place of occurrence seized vide (exhibit-18). The Forensic Examination Report dated 29.06.2015 (exhibit-25) would opine that human blood could be detected in the said wearing apparels seized from Suren Rai. It would also be opined that the blood stains in the black T-shirt and the blue jeans pant were of Suren Rai. Suren Rai would be examined by Dr. S. N. Adhikari at PHC Jorethang, South Sikkim on 24.05.2013 at 12.40 p.m. His examination would reveal that Suren Rai had no injuries. The Learned Sessions Judge would observe that: *"If there was such fight between the accused and the deceased one day prior to the incident, the accused would have sustained some injury"*. It is not necessary that in every fight there must be injury sustained by both the parties. However, what is vital is that it would be proved that at the time of his arrest Suren Rai was in possession of his blood stained wearing apparels

which would also be seized. It was incumbent upon Suren Rai to explain how he was in possession of his blood stained wearing apparels on 24.05.2013, the day of his arrest, when he clearly denied any physical brawl between him and the deceased in the intervening night of 23.05.2013 and 24.05.2013 when admittedly they had quarrelled over a mobile phone. In re: ***Gajanan Dashrath Kharate v. State of Maharashtra***[20] the Supreme Court would hold:

> ***"13.*** *As seen from the evidence, appellant Gajanan and his father Dashrath and mother Mankarnabai were living together. On 7-4-2002, mother of the appellant-accused had gone to another Village Dahigaon. The prosecution has proved presence of the appellant at his home on the night of 7-4-2002. Therefore, the appellant is duty-bound to explain as to how the death of his father was caused. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of the occurrence, when the accused and his father Dashrath were in the house and when the father of the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime.*

[20] **(2016) 4 SCC 604**

14. *In Trimukh Maroti Kirkan v. State of Maharashtra [Trimukh Maroti Kirkan v. State of Maharashtra, (2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] , it was held as under: (SCC pp. 694-95, para 22)*

> *"22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In Nika Ram v. State of H.P. [Nika Ram v. State of H.P., (1972) 2 SCC 80 : 1972 SCC (Cri) 635] it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra [Ganeshlal v. State of Maharashtra, (1992) 3 SCC 106 : 1993 SCC (Cri) 435] the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 CrPC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife. In State of U.P. v. Ravindra Prakash Mittal [State of U.P. v. Ravindra Prakash Mittal, (1992) 3 SCC 300 : 1992 SCC (Cri) 642] the medical evidence disclosed that the wife died of*

strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that the wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In State of T.N. v. Rajendran [State of T.N. v. Rajendran, (1999) 8 SCC 679 : 2000 SCC (Cri) 40] the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime."

*Same view was reiterated by this Court in State of Rajasthan v. Parthu [State of Rajasthan v. Parthu, (2007) 12 SCC 754: (2009) 3 SCC (Cri) 507].***"**

97. Under Section 106 of the Indian Evidence Act, 1872 Suren Rai was required to discharge the burden of proving the said fact especially within his knowledge. Suren Rai has offered no such explanations. The presence of blood stains in

Suren Rai's wearing apparels seized at the time of his arrest shortly after the crime is surely a circumstance against him which remained unexplained. The cumulative effect of the admitted fact of the quarrel between Suren Rai and the deceased, the fact that Suren Rai failed to explain the incriminating circumstance of human blood in his wearing apparels seized at the time of his arrest on 24.05.2013 itself, the fact that Suren Rai made a false defence of an unknown: *"some other person"*, the impossibility of: *"some other person"* or even Padam Kumar Rai being even a suspect along with the fact that Suren Rai was admittedly last seen with the deceased at 8.30 p.m. in the temporary shed i.e. the place of occurrence on 23.05.2013 and in spite of all these Suren Rai would offer no reasonable explanation would itself be the additional vital link in the chain of circumstances against Suren Rai all of which, as stated above, had been cogently established.

98. The evidence produced by the prosecution and tested by a detailed and intrusive cross-examination by the defence has cogently established the following circumstances against Suren Rai:-

(i) Suren Rai and the deceased had been hired by Padam Kumar Rai to work as "lumberjacks" at his premises at Zoom.

(ii) Suren Rai and the deceased had built a temporary shed with plastic and GIS sheets close to Padam Kumar Rai's house.

(iii) On 23.05.2013 around 8 p.m. Suren Rai went to Padam Kumar Rai's house and requested him to pacify the deceased as he was provoking him into a fight regarding his mobile phone. This circumstance provides the animus nocendi or the intention to harm for Suren Rai to commit the offence.

(iv) Padam Kumar Rai visited the temporary shed after sometime and found Suren Rai and the deceased together inside the temporary shed. The deceased was alive then.

(v) A little while later, Suren Rai came to the house of Padam Kumar Rai who asked him about the mobile. It was raining heavily that night. Suren Rai left Padam Kumar Rai's house after which Padam Kumar Rai went off to sleep. This was the time when Suren Rai was last seen.

(vi) Next morning at 6 a.m. when Padam Kumar Rai discovered the dead body of the deceased and the GIS sheet used to make the temporary shed splattered with blood, Suren Rai was not there without informing his hirer, Padam Kumar Rai.

(vii) The FIR was lodged by Padam Kumar Rai on 24.05.2013 at 8.45 a.m. to 9 a.m.

(viii) Suren Rai was arrested from Karmatar School ground, Darjeeling and brought to the Naya Bazar Police Station on 24.05.2013 and formally arrested at the Naya Bazar Police Station at 1250 hrs.

(ix) At the time of his arrest three wearing apparels of Suren Rai, all of them blood stained, were seized by the Investigating Officer. The blood stains on the said wearing apparel were found to be that of Suren Rai on forensic examination. Save a bald denial, Suren Rai failed to provide a convincing explanation to his blood in his wearing apparels including his underwear. If there was no physical brawl Suren Rai had got into there was no reason for the blood to be found.

(x) The soil particles found in the blue jean pant seized from Suren Rai after his arrest matched the soil particles from the place of occurrence.

(xi) After the arrest of Suren Rai a blood stained "khukuri" which was give to Suren Rai and the deceased was recovered from outside the kitchen of Padam Kumar Rai close to the temporary shed where the deceased suffered:- (1) multiple gaping chop wounds over the back of the neck situated below the skull involving the neck and the back; (2) chop wound 12 x 2 cm x bone situated over the posterior aspect of neck, 1.8 cms behind the right ear involving the scalp, bone and direct downward and outward; (3) chop wound 11 x 2 cms, 1.8 cms below the first injury directed downwards involving skin muscle and second and third cervical vertebrae; (4) chop wound, 21 x 2.8 cms situated at 2.5 cms below injury No. 2 and extended up to the lower angle of mandible. The wound involved the skin, muscle, vessels and the spinal cord, which clean cut with fracture of second cervical vertebrae; (5) Spindal shaped injury 15 x 4.5 cms x bone covering the right shoulder with underline fracture of shoulder joint and; (6) Spindal shaped injury 2 x 1.5 cms involving skin, muscle and bone over the right upper back situated 4.5 cms below and middle to injury No.5. The medical opinion opined that the cause of death was due to fracture and resection of the spinal cord as a result of a sharp, moderately heavy weapon homicidal in nature.

(xii) The failure of Suren Rai to convincingly explain the circumstances appearing in evidence against him including the fact that admittedly he was last seen with the deceased at around 8:30 p.m. on 23.05.2013 barely 10 hours before the dead body of the deceased was discovered and the blood being noticed and proved on his wearing apparels seized at the time of the arrest after 6 hours 45 minutes of the discovery of the dead body of the deceased brutally hacked to death.

99. This is a case of circumstantial evidence as said before. We have re-examined the entire case and marshalled the evidence and documents on record. We are constrained to hold

that the Learned Sessions Judges conclusion and the consequential judgment of acquittal is not at all a possible or plausible view. Each of the other circumstances, as held above, having been conclusively proved by the prosecution, we are of the view that the only gap in the chain of circumstances has been conclusively filled by the aforesaid evidence and circumstances. The factum of Suren Rai being last seen together with the deceased, the blood on his wearing apparels, soil particles in his blue jeans pant matching the soil at the place of occurrence, the recovery of human blood stained *"khukuri",* definitely a sharp, moderately heavy weapon (which has been cogently proved to have caused the death of the deceased) given by Padam Kumar Rai to Suren Rai and the deceased for cutting wood on 24.05.2013 from near the place of occurrence itself are strong circumstances against Suren Rai directly connecting him to the crime. Suren Rai's failure to convincingly explain the incriminating circumstances as above including the factum of his being last seen together, together with the fact that there was a short gap would eventually lead to the inference that Suren Rai was responsible for the crime against the deceased and it was incumbent upon Suren Rai to explain how the death occurred. His failure to do so fortifies our conclusion of guilt of Suren Rai. There is no one else in the same circumstance with even a remote possibility of the same motive. All the proved facts are consistent only with the

hypothesis of the guilt of Suren Rai and no other. The circumstances are of conclusive nature and exclude every possible hypothesis except that it is Suren Rai and Suren Rai alone who is guilty of the crime. The chain of evidence is complete. We, thus, hold that the view adopted by the Learned Sessions Judge is not a reasonable one in the conclusion reached by it and does not have its ground well set out on the materials on record. The judgment passed by the Learned Sessions Judge acquitting Suren Rai is not only unreasonable but palpably wrong, manifestly erroneous and demonstrably unsustainable.

100. The confessional statement of Suren Rai would disclose that Suren Rai and the deceased would consume alcohol in their temporary shed at around 2100 hours. They would get a little intoxicated. The deceased would go out for a while and return after having consumed more alcohol and start provoking Suren Rai into a fight. The deceased would then hurl a *"khukuri"* at him. Suren Rai would believe that this assault was to kill him. Suren Rai would dodge himself, take the *"khukuri"* from the deceased and use it to give three fatal blows on the neck of the deceased. Suren Rai would stay in the temporary shed for half an hour more till which time the decease would be still alive and thereafter he would run off towards Naya Bazar.

101. Section 96 IPC, 1860 provides:-

> ***"96. Things done in private defence****. – Nothing is an offence which is done in the exercise of the right of private defence."*

102. Section 97 IPC, 1860 provides:-

> ***"97. Right of private defence of the body and of property****.- Every person has a right, subject to the restrictions contained in section 99, to defend-*
>
> ***First****.- His own body, and the body of any other person, against any offence affecting the human body;*
>
> ***Secondly****.-The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass."*

103. Section 99 IPC, 1860 provides:-

> ***"99. Acts against which there is no right of private defence****.-There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.*
>
> *There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.*

There is not right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised.- The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.- A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, so such, unless he knows or has reason to believe, that the person doing the act is such public servant.

*Explanation 2.- A person is not deprived of the right or private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.***"**

104. Section 100 IPC, 1860 provides:-

"100. When the right of private defence of the body extends to causing death*.-The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--*

First.--Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly.--Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly.--An assault with the intention of committing rape;

Fourthly.--An assault with the intention of gratifying unnatural lust;

Fifthly.--An assault with the intention of kidnapping or abducting;

Sixthly.-- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

*[Seventhly.--An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.]***"**

105. Section 102 IPC, 1860 provides:-

"102. Commencement and continuance of the right of private defence of the body*.- The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.***"**

106. In re: ***Laxman Singh v. Poonam Singh***[21] the Supreme Court would hold:-

"6. *The only question which needs to be considered is the alleged exercise of the right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression "right of private defence". It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person acted in the exercise of the right of private defence is a question of fact to be determined on the*

[21]**(2004) 10 SCC 94**

facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), the burden of proof is on the accused, who sets off the plea of self-defence, and, in absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. [AIR 1968 SC 702 : 1968 Cri LJ 806] , State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478] , State of U.P. v. Mohd. Musheer Khan [(1977) 3 SCC 562 : 1977 SCC (Cri) 565 : AIR 1977 SC 2226] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri)

635 : AIR 1979 SC 577] .) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391] runs as follows: (SCC p. 654, para 9)

"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence."

*The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.***"**

107. In view of the categorical confession of Suren Rai that it was he who had assaulted the deceased thrice with a *"khukuri"* after he was provoked to a fight and hurled the *"khukuri"* at him by the deceased, although Mr. B. Sharma has raised the plea of private defence during the hearing of the present appeal as an alternative argument, it is considered necessary to examine the same.

108. In re: ***Darshan Singh v. State of Punjab***[22] the Supreme Court would hold:

> ***"58.*** *The following principles emerge on scrutiny of the following judgments:*
>
> *(i) Self-preservation is the basic human instinct and is duly recognised by the criminal jurisprudence of all civilised countries. All free, democratic and civilised countries recognise the right of private defence within certain reasonable limits.*
>
> *(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.*
>
> *(iii) A mere reasonable apprehension is enough to put the right of self-defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.*
>
> *(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is coterminous with the duration of such apprehension.*
>
> *(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.*
>
> *(vi) In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.*
>
> *(vii) It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.*

[22] **(2010) 2 SCC 333**

(viii) The accused need not prove the existence of the right of private defence beyond reasonable doubt.

(ix) The Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.

*(x) A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self-defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.***"**

109. Padam Kumar Rai would clearly depose that Suren Rai, at around 8.00 p.m. on 23.05.2013, would request him to pacify the deceased as he was provoking him into a fight regarding his mobile phone. Padam Kumar Rai would also depose that Suren Rai had come following him to his house after he had gone to the temporary shed and told them not to fight and look for the mobile instead, when he would ask Suren Rai whether the mobile had been found. The fact that the deceased had lost his mobile and was blaming Suren Rai for it is evident from the deposition of Padam Kumar Rai. The fact there was an altercation between the deceased and Suren Rai is also evident. We have found that the confession to be true and voluntary. We have also found that the retraction was an afterthought and had no basis. The judicial confession of Suren Rai discloses that the deceased had provoked him to a fight. This confessional statement corroborates the evidence of Padam Kumar Rai that Suren Rai had complained to him

about the deceased provoking him to a fight. Although we are aware that a retracted confession if found to be corroborative in material particulars it may be the basis of conviction we are also alive to the rule that no judgment of conviction shall be passed on an uncorroborated retracted confession. We are also alive to the rule that although retracted confession is admissible, the same should be looked at with some amount of suspicion-a stronger suspicion then that which is attached to the confession of an approver who leads evidence in the Court. In the circumstances, we examine the confession for the limited purpose of examining the alternative plea of Mr. B. Sharma of the right of private defence. Suren Rai in his confession would state that the deceased, after provoking him to a fight, had hurled the *"khukuri"* at him with the intention to kill him. Suren Rai would also state in his confession that he took the *"khukuri"* from the deceased. It is evident that, therefore, the *"khukuri"* was no longer with the deceased.

110. The Supreme Court in re: ***Buta Singh v. State of Punjab***[23] would hold:

> ***"****A person who is apprehending death or bodily injury cannot weigh in golden scales on the spur of the moment and in the heat of circumstances, the number of injuries required to disarm the assailant who are armed with weapons. In moments of excitement and disturbed mental equilibrium it is often difficult to expect the parties to preserve composure and use only so much force in retaliation commensurate with the danger apprehended to him.*

[23] **(1991) 12 SCC 612**

*Where assault is imminent by use of force, it would be lawful to repel the force in self-defence and the right of private defence commences, as soon as the threat becomes so imminent. Such situations have to be pragmatically viewed and not with high-powered spectacles or microscopes to detect slight or even marginal overstepping. Due weightage has to be given to, and hypertechnical approach has to be avoided in considering what happens on the spur of the moment on the spot and keeping in view normal human reaction and conduct, where self-preservation is the paramount consideration. But, if the fact situation shows that in the guise of self-preservation, what really has been done is to assault the original aggressor, even after the cause of reasonable apprehension has disappeared, the plea of right of private defence can legitimately be negative. The court dealing with the plea has to weigh the material to conclude whether the plea is acceptable. It is essentially a finding of fact.***"***

111. Dr. O. T. Lepcha who conducted the post-mortem would find six anti-mortem injuries on the deceased as stated above. Each of the said injuries are severe and in the neck region. Section 102 of IPC provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues. The moment Suren Rai had taken the *"khukuri"* from the deceased the threat was over. It may be true that in the spur of the moment, and in view of the provocation, the attempted assault by the deceased with a *"khukuri"* and his apprehension of the imminent danger on his

life, Suren Rai may have taken the *"khukuri"* and assaulted the deceased. It is true that it is unrealistic to expect a person under assault to modulate his defence step by step with an arithmetical exactitude. However, the multiple and severe anti-mortem injuries on the deceased coupled with the fact that Suren Rai after commission of the act ran away from the scene of the crime even while the deceased would be still alive makes it unequivocally clear that Suren Rai had exceeded his right of self defence.

112. Section 299 IPC, 1860 provides:-

> ***"299. Culpable homicide.*** *- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."*

113. Section 300 IPC, 1860 provides:-

> ***"300. Murder.*** *—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*
>
> ***(Secondly)*** *—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—*
>
> ***(Thirdly)*** *—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—*
>
> ***(Fourthly)*** *—If the person committing the act knows that it is so imminently dangerous that it must, in all*

*probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.***"**

Exception 1.—***When culpable homicide is not murder***.—*Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*

The above exception is subject to the following provisos:—

(First) *—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.*

(Secondly) *—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.*

(Thirdly) *—That the provocation is not given by anything done in the lawful exercise of the right of private defence.*

Explanation.—*Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact*

Exception 2.—*Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. Illustration Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent*

himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

***Exception 3**.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.*

***Exception 4**.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.*

Exception 5**.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.**"

114. In re: ***Suresh Singhal v. State (Delhi Administration)***[24] the Supreme Court would examine the case in which the accused had exceeded the right of private defence. In the said case the accused, Suresh Singhal was sought to be strangulated by the deceased. Suresh Singhal would reach for his revolver, upon which the deceased would release him and turn around to run away. At this point the accused would shoot him, either still lying down or having got up. The Supreme Court would hold that the accused had reasonably apprehended danger to his

[24] **(2017) 2 SCC 737**

life on being strangulated which would be reasonable apprehension to put the right of self defence into operation. In such situation on the face of imminent and reasonable danger of losing life or limb the accused may in exercise of self defence inflict any harm even extending to death on his assailant. The Supreme Court would find that the accused had been put in such a position. The Supreme Court would, however, hold that the accused had exceeded the power given to him by law in order to defend himself although the exercise of the right was in good faith, in his own defence and without premeditation. The Supreme Court would, thus, hold that the homicide does not amount to murder in view of exception 2 of Section 300 IPC, 1860 and that the homicide falls within exception 4 of Section 300 IPC, 1860 and does not amount to murder. In such circumstances the Supreme Court would hold:-

> ***"32.*** *In these circumstances, we are of the view that Suresh Singhal is undoubtedly guilty of causing death to Shyam Sunder with the intention of causing death or of causing such bodily injury as is likely to cause death and therefore guilty of the offence under Section 304 IPC. We are informed that the appellant has already undergone a sentence of 13½ years as on date. We thus sentence him to the period already undergone.***"**

115. In re: ***Naveen Chandra v. State of Uttaranchal***[25] the Supreme Court would examine a situation where the accused would while exercising his right of private defence, exceeded by

[25] **(2009) 16 SCC 449**

continuing attacks after threat to life had seized. The Supreme Court would draw the distinction between the first and the fourth exception of Section 300 IPC thus:

> ***"12. "17****. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution (sic provocation) not covered by the First Exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1.*
>
> ***18****. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4, all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to*

enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

***19**. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In Kikar Singh v. State ofRajasthan [(1993) 4 SCC 238 : 1993 SCC (Cri) 1156 : AIR 1993 SC 2426] it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that by using the blows with the knowledge that they were likely to cause death he had taken undue advantage. In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons were ripped open and internal organs had come out. In view of the aforesaid factual position, Exception 4 to Section 300 IPC has been rightly held to be inapplicable."*

The above position was highlighted in Babulal Bhagwan Khandare v. State of Maharashtra [(2005) 10 SCC 404 : 2005 SCC (Cri) 1553] , at SCC pp. 410-11, paras 17-19.

***13**. Considering the background facts in the backdrop of the legal principles as set out above, the inevitable conclusion is that Fourth Exception to Section 300 IPC does not apply"*

116. In re: ***Naveen Chandra (supra)*** was a case in which the Trial Court had convicted the accused under Section 302 IPC and awarded the death sentence which led to a reference

before the High Court for confirmation in terms of Section 366 Cr.P.C. The High Court converted the death sentence to life imprisonment partly allowing the appeal. The case would relate to an altercation between two sets of family members. It was alleged that the appellant before the Supreme Court, Naveen Chandra rushed and injured the deceased on his head with a *"khukuri"*. When the Appellant would be asked to spare the deceased the Appellant would attack the said persons too and injured them. The deceased would succumb to his injuries on the spot.

117. We find that the deceased had blamed Suren Rai for the loss of his mobile. We also find that the deceased had more than once provoked Suren Rai. Considering the confession of Suren Rai it seems that the deceased had provoked Suren Rai into a fight and hurled a *"khukuri"* at him on which Suren Rai had grabbed the *"khukuri"* from him and assaulted the deceased multiple times and severely which caused the death of the deceased. There was reasonable apprehension of danger to Suren Rai's life which would put the right of self defence into operation giving him the right to inflict any harm even extending to death. The multiple and gaping chop wounds on the back of the neck, below the skull causing the six severe anti-mortem injuries with the *"khukuri"*, a sharp moderately heavy weapon and his running away whilst the deceased was

still alive makes us firmly believe that Suren Rai exceeded the power given to him by law in order to defend himself although the exercise of the right, quite clearly, was done whilst deprived of the power of self control by grave and sudden provocation in his own defence and without premeditation. The homicide therefore does not amount to murder in view of exception 1 of Section 300 IPC, 1860. We are of the view that Suren Rai is guilty of causing death of the deceased with the intention of causing death or of causing such bodily injury as is likely to cause death and therefore guilty of the offence under Section 304 IPC, 1860. Resultantly, Suren Rai is convicted for the offence of culpable homicide not amounting to murder under paragraph 1 of Section 304 IPC, 1860. The appeal against conviction is allowed. The acquittal of the Respondent vide impugned judgment dated 29.02.2016 passed by the Learned Sessions Judge, West Sikkim at Gyalshing is set aside.

118. As this Court is reversing a judgment of acquittal in favour of the Respondent and convicting him we deem it appropriate to grant a hearing to the Respondent on the quantum of sentence. Accordingly the Respondent shall be produced before this Court on 11.06.2018 and heard on the quantum of sentence.

119. Certified copies of this judgment shall be furnished free of cost to the Respondent and also forwarded to the Court of the Learned Sessions Judge, West Sikkim at Gyalshing forthwith.

Sd/-
(Bhaskar Raj Pradhan)
Judge
04.06.2018

Sd/-
(Meenakshi Madan Rai)
Judge
04.06.2018

Approved for reporting: yes.
to Internet: yes.