

**THE HIGH COURT OF SIKKIM: GANGTOK
(Criminal Appeal Jurisdiction)**

D.B.: HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CHIEF JUSTICE
HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No. 17 of 2016

State of Sikkim

.... Appellant (s)

versus

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

.... Respondent (s)

**An Appeal under Section 378 Criminal Procedure Code,
1973.**

Appearance:

Mr. Karma Thinlay, Addl. Public Prosecutor with Ms. Pollin Rai, Asstt. Public Prosecutor for the Appellant.

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

Mr. A. Moulik, Senior Advocate, with Ms. K. D. Bhutia, Mr. Ranjit Prasad, Advocates as Amicus Curiae.

ORDER

(11.04.2018)

Bhaskar Raj Pradhan, J.

1. Mr. Karma Thinlay, Additional Public Prosecutor submits that a bare perusal of the confession recorded under Section 164 Code of Criminal Procedure, 1973 (Cr.P.C.) at page 34 of the paper-book 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 for*

recording deposition” and as such in view of paragraph 126 of the judgment rendered by the Full Bench of this Court in re: **State of Sikkim v. Suren Rai**¹ it would be important to remit the matter back 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.

2. Mr. B. Sharma, Learned Senior Advocate for the Respondent submits that the confession under Section 164 Cr.P.C. was evidently recorded under oath and duly signed by the Judicial Officer and further the Respondent in his statement under Section 313 Cr.P.C. had stated that he had made the statement on being pressurised by the Investigating Officer. He therefore, submits that remitting the matter would serve no useful purpose.

3. In re: **Suren Rai (supra)** this Court held that:-

“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.”

4. In a Criminal case and that too when the allegation is of commission of a heinous crime punishable under section 302 Indian Penal Code, 1860 (IPC) certainty of facts is vital. The appreciation of those facts in view of settled law and surrounding circumstances is a subsequent requirement. The

¹ 2018 SCC OnLine Sikk 12

feeling of factual uncertainty is trouble to the judicial mind. We are of the considered view that it is crucial to ascertain the fact whether oath was actually administered or not on the Respondent when the statement under section 164 Cr.P.C. was recorded before we examine the relevance and the implications of the confession to the facts of the present case. On the face of the original document of confession recorded under Section 164 Cr.P.C. it is evident that the said confession was recorded in a pre-typed form for recording of deposition. In such circumstances the evidence whether oath was actually administered or not upon the Respondent may have a vital bearing in the present appeal. The additional evidence would be necessary to effectively decide the present appeal.

5. Section 391 Cr.P.C. provides:

“391. Appellate Court may take further evidence or direct it to be taken.-

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.”

6. We, therefore, direct that the case papers be remitted back to the Court of the Learned Sessions Judge, West Sikkim at Gyalzing for examining whether oath was actually administered upon the Respondent by the Learned Magistrate while recording his confession under section 164 Cr.P.C. in terms of Section 463 Cr.P.C. The Learned Sessions Judge is

directed to complete the said proceeding within a period of 15 days.

7. We are also of the view that a warrant in terms of Section 390 Cr.P.C., in the facts and circumstances of the present case, must be issued. Accordingly, let a warrant be issued forthwith and the Respondent be arrested and brought before the Court of Learned Sessions Judge, West Sikkim at Gyalzing for compliance of the provision of Section 390 Cr.P.C.

Judge
11.04.2018

Chief Justice
11.04.2018

Approved for reporting: yes.
Internet: yes.