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**THE HIGH COURT OF SIKKIM : GANGTOK**

**CRIMINAL APPEAL NO. 11 OF 2003**

In the matter of an appeal against conviction.

Sukhwinder Singh,  
S/o Shri Ramesh Singh,  
R/o Naranwali,  
P.P. Kalanaur,  
Dist. Gurdaspur  
Punjab  
(Now at present Rongyek Jail) .... **Appellant**

**VERSUS**

State of Sikkim .... **Respondent**

For the appellant : Shri N. Rai, Advocate.

For respondent : Shri N. B. Khatiwada, Public  
Prosecutor assisted by Shri J. B.  
Pradhan, Additional Public  
Prosecutor.

**PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE.  
THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.**

**Date of judgment : 3<sup>rd</sup> December, 2003.**

**J U D G M E N T**

**R. K. PATRA, C.J.**

This appeal is directed against the judgment and order dated 23<sup>rd</sup> June, 2003 of the learned Sessions Judge (E & N) Sikkim at Gangtok in Criminal Case No. 15 of 2000 by which the appellant stands convicted under section 302 IPC for committing murder by causing the death of Gautam Banerjee and

Ram

sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- (Rupees five thousand) with defaulting clause of sentence.

**2.** Briefly stated, the prosecution case is as follows :

At the material time, the appellant, a constable belonging to C.I.S.F. was on internal security duty at the Raj Bhawan, Gangtok. He was detailed for duty at Ghumti no.2 of the Raj Bhawan complex on 20<sup>th</sup> March, 2000 between 5 p.m. to 9 p.m. The Inspector Gautam Banerjee (hereinafter referred to as the deceased) at about 5.10 p.m. found the appellant loitering near gate no.2 instead of being on duty at Ghumti no.2. The deceased accordingly sent for the G.D. register from constable D. N. Mishra (PW2) and made an entry in the register about the late reporting of duty by the appellant. Sometime thereafter the appellant left his post and proceeded towards the barracks with his S.L.R. (self-loading revolver) and ammunitions on the plea that he wanted to use the toilet situated there. He however went towards the office of the Asstt. Commandant and after locating the deceased there, fired at him with the S.L.R. which he was carrying with him. The deceased on being shot by the bullet fell on the ground and died instantaneously. After committing the offence, the appellant threw his S.L.R. and ammunitions and ran away. He was apprehended on the next day while trying to cross the Rangpo river on foot.

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3. Although the appellant took a general plea of denial, he stated in his statement recorded under section 313 Cr. P. C. that when he was proceeding towards the toilet the deceased scolded and abused him by slang language and the incident took place due to sudden provocation.

4. In order to bring home the charge against the appellant, the prosecution examined as many as 27 witnesses out of whom PW15 J. B. Panday and PW18 Ganesh Ram are the two eye-witnesses to the occurrence.

5. There is no dispute that the deceased died due to the injury caused by bullets. PW20, the doctor who conducted the post-mortem examination found the following injuries on the dead body of the deceased:-

“i) Firearm bullet entry wound on the inner cantus of the right eye about 1 cm. in diameter with abrasion and contusion collar on the medial side causing laceration and rupture with collapse of the right eye ball. The track moving backward and towards the left side causing irregular commuted fracture irregularly of the medial orbital wall and the spheroid bone passing through the sella, traveling through the mid brain and the left lobe of the cerebellum and causing irregular ..... of the occipital bone on the left side and the exit wound in the scalp in the left occipital region measuring 1.5 x 2 cms. irregular in shape.

ii) There was extravasation of blood in the right lower eye lid.”

He opined that the injury was ante-mortem and sufficient to cause death in the ordinary course of nature. The cause of death was on account of the penetrating injury of the brain produced by a firearm bullet.

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6. PW1 R.C. Barman was a constable who was posted on duty at gate no.2 of the Raj Bhawan on the date of occurrence between 5 p.m. to 9 p.m. He stated in his evidence that the appellant was posted on duty at Ghumti no.2 at the Raj Bhawan compound between the same time, i.e., 5 p.m. to 9 p.m. The appellant was late by about 10 minutes for which the deceased pulled him up for reporting late for duty. Thereafter the appellant resumed his duty at Ghumti no. 2. At about 5.20 p.m., the appellant came down to gate no.2 where he (PW1) was on duty. He was carrying with him his S.L.R. and rounds of ammunicions issued for duty. He questioned the appellant as to why he had come down to which the latter replied that he would go to the toilet situated little below gate No.2 in the barracks. PW1 further stated that since the appellant told him that he had sought the permission of shift in-charge to go to the toilet, he allowed him to proceed towards the toilet. After a short while, he heard sound of firing. When he looked around he found the appellant standing outside the window of the office of the Asstt. Commandant by pointing his S.L.R. towards the window in a firing position. Thereafter he proceeded towards the office and saw the deceased lying on the ground. PW2 D. N. Mishra was a head-constable at the Raj Bhawan and was on duty in the control room between 5 p.m. to 9 p.m. on the date of occurrence. He stated that although the appellant was detailed for duty at Ghumti no.2 between 5 p.m. to 9 p.m. he had not reported for duty at 5 p.m. Instead he saw the appellant at gate no.2 talking to two other Jawans there. At that time he received a walkie-

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talkie message from PW1 R. M. Barman to the effect that the deceased wanted him (PW2) at gate no.2 along with the G.D. register. On receiving the message, PW2 reached gate no.2 with the G.D. register in which the deceased made some entry regarding the appellant. He (PW2) further deposed that while he was proceeding to the control room with the G.D. register he found the appellant leaving his post and approaching him. The appellant told him that he was going to the toilet situated near the barracks. At that moment, he was carrying his S.L.R. along with ammunitions. He advised the appellant to go to the left side toilet of the Raj Bhawan but he insisted that he would use the toilet near the barracks. After about 10 minutes, on hearing the sound of firing he enquired over the walkie-talkie from PW1 R.M. Barman as to what happened. PW1 informed him that he had seen the appellant firing his rifle at the window outside the office of the Asstt. Commandant and the deceased was lying in front of the said office. PW3 Officer In-Charge Rangpo P.S., PW4 Writer Constable of Rangpo P.S., PW5 Constable of Rangpo P.S., PW6 Constable of Rangpo P.S., PW7 Constable of Rangpo P.S., PW8 Constable of Rangpo P.S. stated as to how the appellant was apprehended near the river bank of Rangpo on the following day of the incident.

At this stage, let us consider the ocular evidence of PW15 and PW18. PW15 D. B. Panday was the Sub-Inspector and was posted at the Raj Bhawan on the relevant day. He deposed that at about 5.20 p.m. in response to the blow of whistle for roll-call,

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he along with the deceased proceeded towards the barracks being led by PW18 Sub-Inspector Ganesh Ram. At that time, the appellant came down the stairs from the Asstt. Commandant's office. He was carrying the self-loading rifle issued to him for official duty. On seeing the appellant the deceased asked him in a loud voice as to why did he leave the duty post (Tum duty post chorkay kisliye idhar aa ra hao? Isko G.D. karo). On hearing this, the appellant fired at the deceased with his S.L.R. The shot hit the deceased as a result of which he fell on the ground. Thereafter the appellant pointed his weapon towards him (PW15) and he to save himself entered into the office of the Asstt. Commandant. After about 10 minutes he (PW15) came out and found the deceased dead. PW18 Ganesh Ram was another C.I.S.F. personnel who was on duty in the Raj Bhawan complex at the relevant time. He corroborated PW15 by saying that when the appellant came down carrying his S.L.R. the deceased asked him as to why he had come leaving his duty post and asked "Isko G.D. karo". On hearing this the appellant picked up his rifle, took aim and fired at the deceased. On receiving the bullet shot, the deceased fell down. Both PW15 and PW18 were cross-examined at length but nothing was brought out in their evidence to discredit their testimony. There is no reason as to why they would falsely implicate the appellant in the commission of the offence. Their evidence is consistent, cogent and reliable and does not suffer from any infirmity. Their clear and categorical evidence is that it was the appellant who shot with his S.L.R. at the deceased who on receiving the bullet shot died. In view of the above

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clinching evidence, we have no hesitation to hold that it was the appellant who shot the deceased with his S.L.R. causing his death. Shri Rai, learned counsel for the appellant rightly did not assail the finding recorded by the learned Sessions Judge that it was the appellant who fired at the deceased from his S.L.R. causing his death.

7. Shri Rai however submitted that the present case comes within exception 1 to section 300 IPC and as such, the appellant can at the worst be convicted under section 304 part I IPC. According to the learned counsel, the appellant was deprived of the power of self-control due to the grave and sudden provocation given by the deceased. Learned counsel submitted that the deceased was in the habit of scolding his subordinates using un-parliamentary and filthy language in the name of their sisters and mothers and on account of this the appellant lost his self-control and fired at the deceased. In this connection, he referred to the evidence of D. N. Mishra (PW2), R. K. Mondal (PW12) and Gurmit Singh (PW13). D. N. Mishra PW2 stated that the deceased used to often scold his junior staff using un-parliamentary and filthy language and it was unbecoming of an Inspector to use such abusive language while pulling up his subordinates. R. K. Mondal PW12 in his cross-examination stated that the deceased often used to give "gandha gali" to his subordinates. Gurmit Singh PW13 in his cross-examination stated that the deceased used to scold the Jawans using filthy expressions in the name of their mothers and sisters, which no

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Jawan could tolerate. It may be noted here that out of these three witnesses, PW2 and PW13 were placed under suspension on account of the concerned incident and were under suspension by the time they deposed in Court (see the first sentence of the last paragraph of deposition of PW2).

8. Exception 1 to section 300 IPC lays down that 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. In K. M. Nanavati Vs. State of Maharashtra AIR 1962 SC 605 the Supreme Court summarised the meaning of the expression "grave and sudden provocation" as follows :-

"The Indian law, relevant to the present enquiry, may be stated thus; (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first exception to Section 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or to otherwise giving room and scope for premeditation and calculation."

Law is now fairly settled that the accused need not specifically plead that his case comes under any of the exceptions to section 300 IPC. Even if he had not taken any such plea in his defence if

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there is material available on record to bring the offence under any of the exceptions to section 300 IPC the Court can record an appropriate finding on that score.

**9.** The question as to whether the provocation given to the accused is grave and sudden or not is one of fact and has to be decided on the circumstances of each case. Keeping the aforesaid legal position in view, we have carefully examined the entire evidence on record to find out if the appellant's case would come within the exception 1 to section 300 IPC. On close scrutiny we have not been able to find an iota of evidence to indicate that the deceased abused the appellant in filthy language when he found the latter absent on his duty post at the relevant time. There is also no evidence that any time before the incident the deceased hurled abusive language to the deceased. The general testimony of PWs 2, 12 and 13 that the deceased used to scold his subordinates in un-parliamentary and filthy language is of no help to the appellant. What is necessary is the relevant evidence that because of slang language uttered by the deceased which gave rise to grave and sudden provocation on account of which the appellant was deprived of the power of self-control and fired the fatal shot. We may at the cost of repetition state that the evidence on that count is miserably wanting. On the contrary PWs 1 and 2 simply stated that the deceased pulled up the appellant as to why he did not reach his post for duty at the appointed hour and made entry in the G.D. register. The evidence of PWs 15 and 18, as already noted, is to the effect that

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when the deceased found the appellant near the office of the Asstt. Commandant he shouted at him as to why he left the post and came over there for which he should be proceeded against. None of the above witnesses (PWs 1, 2, 15 and 18) stated that the deceased uttered any humiliating or slang words to the deceased which could have constituted grave and sudden provocation. As the evidence shows, the deceased made some entry in the G.D. register regarding the appellant when he was not at his duty post at the appointed hour. The appellant had obviously scope for pre-meditation and planning and after 20 minutes came to the office of the Asstt. Commandant with his S.L.R. and ammunitions on the plea that he would go to the toilet situated in the barracks and after locating the deceased shot at him with his S.L.R. causing his instantaneous death. In the circumstances, we are of the considered opinion that the appellant is not entitled to the benefit of exception 1 to section 300 IPC. Unless the case falls within any of the exceptions to section 300 IPC, it shall be murder and the Court cannot convert the offence of murder into that of culpable homicide not amounting to murder.

**10.** Learned counsel for the appellant further submitted that the appellant had no intention to cause the death and, therefore, the conviction under section 302 IPC is not proper. We do not find any merit in the above submission. As noticed above, the appellant with a calculated mind left the place of his duty and came over to the office of the Asstt. Commandant with a view to take revenge on the deceased because he made entry against him

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in the G.D. register. After locating the deceased the appellant fired shot from a close range which could not have had other than the fatal effect and it is indicative of the intention of the appellant to commit murder. We may also state that even if there is no intention to kill it can also be murder if the accused knew that the injury inflicted would be likely to cause death or that it would be sufficient in the ordinary course of nature to cause death or that the accused knew that the act must in all probability cause death. When the appellant fired from his S.L.R. on the deceased, it cannot be said that he had no intention to cause such bodily injury, as it would be likely to cause the death. The doctor who conducted the post-mortem examination also opined that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause death. Therefore, in the circumstances, it is a clear case of an offence of commission of murder.

**11.** The following cases were cited by the learned counsel for the appellant in support of his contention that the offence committed by the appellant would not be a case of murder :-

**(i)** State of Gujarat vs. Bhand Jasub Mamad, 1982 CRI. L. J. 1691. It was a case in which the trial Judge convicted the accused for the offence punishable under section 304 part I IPC against which the State filed appeal. The Gujarat High Court held that abuses hurled at the mother and sister might constitute grave and sudden provocation considering the class of society to which the accused belonged and accordingly the Court held that the case comes under exception 1 to section 300 IPC and did not

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find fault with the conviction recorded against the accused under section 304 part I IPC. The facts of this case are quite different from the facts of the present case.

**(ii)** Babrubahan Jal vs. State of Assam, 1991 CRI. L. J. 278. It was a case in which the accused entered the kitchen of one Sumitra and threatened her to outrage her modesty and dragged her out from the kitchen. When Kusha, the younger brother-in-law of Sumitra resisted, the accused inflicted knife injury on his abdomen and fled away. Kusha succumbed to his injury after two days. Considering the facts and circumstances, the Gauhati High Court held that the accused entered the kitchen to take revenge on the son and younger brother-in-law of Sumitra and he had no intention to kill Kusha. The incident took place at the spur of the moment. The Court accordingly held the accused guilty of an offence punishable under section 304 part II IPC. The fact-situation of that case is quite different from the facts and circumstances of the present case.

**(iii)** Nalleti Eswara Rao vs. State of Andhra Pradesh, 2002 CRI. L. J. 1649. It was a case in which the accused gave one single blow on the head of the deceased without any intention to cause the death. A learned Single Judge of Andhra Pradesh High Court held that it was a case of sudden provocation. In the circumstances, the conviction of the accused under section 304 part II IPC was held to be proper. The facts of this case are also quite different from the facts of the case at hand.

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**iv)** Desa Singh vs. State of Punjab, 2003 CRI. L. J. 2986.

It was also a case where the convict was found to have no intention to commit murder of the deceased and the occurrence took place at the spur of the moment. In the circumstances, the conviction under section 304 part I IPC was held to be appropriate. The facts and circumstances of that case are quite distinguishable and the ratio of that case is not available to be extended to the present case.

**12.** In view of what has been stated above, there is no merit in this appeal which is accordingly dismissed.

  
( **N. Surjamani Singh** )  
**Judge**  
03.12.2003

  
( **R. K. Patra** )  
**Chief Justice**  
03.12.2003