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THE HIGH COURT OF SIKKIM : GANGTOK

CRIMINAL APPEAL NO. 13 OF 2003

In the matter of an appeal against conviction and sentence passed by B. C. Sharma, Sessions Judge (S&W) at Namchi vide judgment and order dated 8.11.2001 in Criminal Case no. 4 of 1996.

Mitra Prasad Rai,
S/o Dhan Kumar Rai
@ Sardar or Rai Maila,
R/o Neyabram, Police Station,
Ravangla, South Sikkim
(at present in Rongyek Jail,
Gangtok) **Appellant**

VERSUS

State of Sikkim **Respondent**

For the appellant : B. Sharma, Advocate.

For the respondent: 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: 17th May, 2004.

J U D G M E N T

R. K. PATRA, C.J.

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The appellant stands convicted under section 302 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- with a defaulting clause of imprisonment by the learned Sessions Judge (S&W) at Namchi vide judgment and order dated 8.11.2001 in Criminal Case no. 4 of 1996. The appellant has been further convicted under section 201 IPC and sentenced to undergo

imprisonment for 5 years and to pay a fine of Rs.5,000/- with a defaulting clause of imprisonment. The substantive sentences of imprisonment are to run concurrently.

Originally the appellant along with his brother-in-law (sister's husband) Manbir Rai was placed on trial in the Court of the Sessions Judge (S & W) at Namchi. The learned Trial Judge by his judgment dated 30.9.2000 while acquitting the co-accused Manbir Rai of the charges, convicted and sentenced the appellant under sections 302 and 201 IPC. The appellant challenged the said conviction and sentence in this Court in Criminal Appeal no. 1 of 2001. By judgment dated 11.6.2001 this Court set aside the aforesaid decision dated 30.9.2000 of the Sessions Judge and remitted the matter for re-trial because the appellant was not given opportunity to cross-examine eight number of PWs. On remand the concerned PWs were cross-examined and the matter has been disposed of by the impugned judgment giving rise to the present appeal.

2. The thumb-nail sketch of the prosecution story runs as follows:-

Ramkumar Subba alias Pandit Maila (hereinafter referred to as the deceased) had married the appellant's sister Sumitra (PW14) of village Neyabram. The deceased was said to be a violent and quarrelsome person and he used to assault his wife Sumitra (PW14) often. The conduct

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of the deceased in assaulting his wife was very much resented by the appellant who wanted to teach a lesson to the former. In the intervening night of 1.5.1996 and 2.5.1996 the appellant was in drunken state and stabbed the deceased with a knife. When he found that the deceased had already died, he got nervous and with the connivance of Manbir Rai (since acquitted) and the approvers Jangabir Rai (PW15) and Phur Thendup Tamang (PW16) put the deadbody of the deceased in a gunny bag and threw the same in the river Teesta.

On the basis of the FIR (exhibit 1) lodged by PW1 Mahendra Subba (brother of the deceased) investigation was taken up. In course of the investigation, the appellant made a judicial confession and Jangabir Rai (PW15) and Phur Thendup Tamang (PW16) turned as approvers. On completion of investigation, charge sheet was filed and the appellant was placed on trial leading to his conviction as mentioned above.

3. The prosecution examined 25 witnesses to bring home the charges against the appellant.

4. The appellant's plea was one of denial.

5. The learned Sessions Judge convicted the appellant under sections 302 and 201 IPC basing on the following items of evidence:-

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- (i) statement of PW7 Dhan Kumar Rai (father of the appellant) before the villagers saying that the appellant had 'cut' the deceased;
- (ii) judicial confession of the appellant;
- (iii) discovery of weapon of offence under section 27 of the Evidence Act;
- (iv) evidence of the approvers Jangabir Rai (PW15) and Phur Thendup Tamang (PW16).

6. Learned counsel for the appellant strenuously argued that the appellant stabbed the deceased in exercise of the right of private defence of body and as such his conviction under section 302 IPC is vulnerable.

7. In the present case the *corpus delicti* was not found. The Investigating Officer (PW24) stated that despite search for about a fortnight the deadbody could not be recovered.

8. Let us now proceed to consider the evidence on record and examine if the appellant has been able to bring out any evidence in support of the right of private defence of body as suggested by his counsel. It is well-settled that even if an accused does not plead self-defence, the Court can consider such plea on the basis of materials available on record. No doubt, the burden is on the accused to establish such plea and he can discharge the burden by showing that his version is probable one.

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Mahendra Subba (PW1) is the brother of the deceased. He stated that on 2.5.1996 evening when he was returning home, his co-villager Ram Prasad (PW9) on the way told him that he was being required by the Panchayat president Prem Kumar Subba (PW23). PW1 accordingly went to the Panchayat president who stated that his brother (deceased) was murdered and the deadbody was thrown into the river Teesta by the appellant, co-accused Manbir Rai (since acquitted) and the approvers PWs 15 and 16. The Panchayat president prepared the FIR and handed it over to him to be lodged at the police station. PW1 then went to Ravangla police station and lodged the FIR. PW2 is a resident of village Neyabram who deposed that at about 1 to 1.30 a.m. of the night of occurrence his wife woke him up saying that there was some noise coming from outside their house. He then got up and went out. On enquiry, Dhan Kumar Rai (PW7) informed him that his son (referring thereby to the appellant) had 'cut' the deceased. The witness (PW2) further deposed that in the morning when he went to cast his vote in a polling station, he met Dhan Kumar Rai (PW7) who requested him to go to the house of Panchayat president (PW23). He accordingly went to the Panchayat president along with PW7 who told the Panchayat president that his son had 'cut' the deceased and requested him to take action in the matter. Shree Prasad

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Subba (PW3) stated that the appellant is his brother-in-law as he had married his sister and the co-accused Manbir Rai (since acquitted) has married his (PW3's) wife's elder sister. The deceased was also related to him. He further deposed that in the night of occurrence the deceased knocked at his door and told him that he was 'cut' by the appellant. The deceased was carrying a khukri and had also injury on his head. He asked him to bandage the injury. He (PW3) accordingly with the help of a cloth bandaged his injury. Thereafter the deceased went out of his house carrying the khukri. Out of fear he (PW3) and his wife left their house and went to the house of co-accused Manbir Rai and after staying there for sometime came back to his own house. PW4 is the wife of PW3. She was merely tendered by the prosecution. PW5 is the wife of the approver PW15. PW6 Neera is the sister of Sumitra (PW14) and denied her knowledge as to cause of the death of the deceased. PW7 is the father of the appellant who turned hostile to the prosecution. PW8 is one Manbir Rai who has not deposed anything about the main incident. PW9 is one Ram Prasad who stated that the Panchayat president informed Mahendra Subba (PW1) that his brother was no more as he had been killed by the appellant. PW10 is one Singh Bahadur Thapa. He stated that while going to get fodder he found a number of people had gathered in the house of the deceased. He

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accordingly went there and found the appellant was present. He deposed that on being questioned by the Police Inspector the appellant replied that he first delivered two 'cut' injuries on the deceased. This evidence is inadmissible being hit by section 25 of the Evidence Act. The evidence of PW11 is in the same line as that of PW10 and is therefore of little value. [The learned Sessions Judge should not have recorded this statement being inadmissible.) PW12 is a witness to the seizure of knife produced by the appellant. PW13 is a witness to the seizure of 'pyjama' of the appellant. PW14 is the wife of the deceased and was merely tendered by the prosecution. PWs 15 and 16 are the two approvers who helped the appellant in throwing the deadbody into the river. PW17 is a Writer Constable. PW18 was the in-charge of the out-post Yengyong. PW19 is one Phur Deeki Sherpa. She did not depose anything about the incident and as such her evidence is of little help to the prosecution. PW20 is the Judicial Magistrate who recorded the confessional statement (exhibit P12) of the appellant. PW21 is the doctor who examined the appellant on police requisition. He deposed that during his examination he found the appellant had simple lacerated injury on his left foot. PW22 is a Police Constable. PW23 deposed that in the afternoon of the day of occurrence he was informed by PW7 (father of the appellant) that his son had killed the deceased in the previous night

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and threw the deadbody into the river Teesta. PW24 is the Investigating Officer. PW25 is another Police Officer who stated about the recording of statements of approvers PWs 15 and 16.

9. From the above brief analysis of evidence the following items of evidence emerge for consideration:-

- (i) judicial confession made by the appellant before the Judicial Magistrate (PW20);
- (ii) the evidence of PW7 Dhan Kumar Rai (father of the appellant) together with the evidence of PWs 2 and 23 and dying declaration of the deceased before PW3;
- (iii) the evidence of the approvers Jangabir Rai (PW15) and Phur Thendup Tamang (PW16);

10. Let us now consider and scrutinise the above evidence.

Before going into the details of confession, we are distressed to observe that the learned Sessions Judge did not put any question to the appellant while examining him under section 313 Cr.P.C. with regard to the judicial confession. We are therefore not in a position to say whether it could be taken as unretracted or retracted confession. This Court in the order dated 19.3.2004 pronounced in Criminal Appeal no. 10 of 2003 (Tolman

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Subba vs. State of Sikkim) has emphasised the importance and significance of proper examination of the accused under section 313 Cr.P.C. The confession is definitely an incriminating material against the appellant. Therefore, the learned Sessions Judge should have brought it to his notice so as to enable him to explain the same. In the circumstances, we have no other option than to take it to be a retracted one. Law is well-settled that retracted judicial confession can solely form the basis of conviction if it is found to be true and voluntary. On perusal of the evidence of Judicial Magistrate (PW20), we are satisfied that confessional statement of the appellant was recorded after duly complying with all the legal requirements. There is nothing on record to suggest that the confession was the result of any threat, inducement or coercion. Accordingly we have no hesitation to hold that it was voluntary.

The appellant in his confession (exhibit P12) stated that at about 9 to 9.30 p.m. in the night of occurrence he was sitting in his house in the company of his father PW7, his wife PW14, sister-in-law PW6 and the co-accused Manbir Rai (since acquitted). The deceased came shouting that he would kill all of them and threw challenge at them to fight with him. The appellant came out with a khukri for self-defence. The deceased after asking him as to what he was doing in his house, went inside his house and came out

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carrying a knife in his hand. While coming out, he tripped over a pile of gravel and stones lying outside his house and fell down. The appellant who was standing outside the house apprehended that the deceased was going to kill him with the knife. He accordingly pulled up the khukri which was with him and struck the deceased with it. The deceased however got up and went inside his house again. The appellant followed him to find out as to what he would do. Within a short time the deceased came out from his house being wrapped with a blanket and started chasing the appellant. The deceased jumped over the appellant with the knife in his hand. The appellant had a stone in his hand and struck the deceased with it. When the deceased fell down, the appellant took out the knife from his hand and struck with it. As a result, he died at the spot. The appellant got nervous following the incident. At that time PWs 15 and 16, the two approvers came. The co-accused Manbir Rai (since acquitted) also arrived at the spot. The appellant sought their advice as to what should be done in the matter. All of them told him that he should not have assaulted the deceased to death. The appellant asked them to assist him in getting rid of the deadbody. Thereafter all of them took the deadbody and threw it into the river. The appellant further stated that at that time he was

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under the influence of liquor and had no intention to kill the deceased.

The confession, as may be seen, consists of inculpatory as well as ex-culpatory statements. The ex-culpatory part suggests that apprehending assault from the deceased the appellant stabbed him although he had no intention to do so. The version in the confession that the appellant stabbed the deceased to death finds corroboration from the evidence of his father Dhan Kumar Rai PW7. It appears that he was witness to the occurrence but he turned hostile to the prosecution. The evidence of a hostile witness cannot be washed off the record altogether. It is for the Court to consider whether as a result of cross-examination and contradiction he stands thoroughly dis-credited or can still be believed with regard to the portion of his testimony. Although he denied to have seen the incident, it is relevant to take note of the answer given by him to question no.3 put by the prosecution.

“Qn. No.3 Is it true that when Mitra Prasad had raised his Khukri to kill the said Pandit Maila you had warned him not to do so?”

Ans. Yes. I had said so but not after seeing the incident, as I was about 7/8 minutes walking distance from the place where the quarrel was emanating from.”

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The above answer suggests that he had seen the occurrence. It is in the evidence of Krishna Bahadur Chettri PW2 that on being questioned by him, PW7 stated that his son had 'cut' the deceased. There is no reason as to why PW2 would falsely state as above in the Court.

Prem Kumar Subba (PW23) was the Panchayat president. He deposed that in the afternoon of the date of occurrence PW7 told him that his son (appellant) killed his son-in-law in the previous night and threw the deadbody into the river Teesta. PW7 stated so in the presence of Krishna Bahadur Chettri (PW2). As noted above PW2 has fully corroborated PW23 in this regard. There is also no reason as to why PW23 would speak falsely implicating the appellant in the commission of the crime.

Besides this, there is also dying declaration of the deceased before PW3 who is closely related to both the appellant and the deceased (the wife of the deceased is the elder sister of PW3's wife). He stated that while he was sleeping in his house, at about 11 p.m. in the night of the occurrence the deceased knocked at his door. When he opened the door, the deceased told him that the appellant had 'cut' him. He was carrying a khukri with him and also had injury on his head. On his request he bandaged the injury. Thereafter the deceased went out. In view of the aforesaid evidence it can be unhesitatingly held that it was

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the appellant who assaulted the deceased to death and his confession is true.

The next piece of evidence is that of the two approvers Jangabir Rai PW15 and Phur Thendup Tamang PW16. Both of them are accomplices. An accomplice by becoming an approver becomes as a prosecution witness and therefore his evidence must pass the double test viz. (i) his evidence must be reliable and (ii) it should be sufficiently corroborated [See Shanker vs. State of Tamil Nadu (1994) 4 SCC 478]. A question may arise as to whether PWs 15 and 16 being accomplices can corroborate one another. The Supreme Court in Mohd. Hussain Umar Kochra vs. K. S. Dalipsinghji AIR 1970 SC 45 in paragraph 21 of the judgment held that one accomplice cannot corroborate another. In paragraph 33 of the judgment Their Lordships further held as follows:-

“33. Section 114 of the Evidence Act says thus as to Illustration (b): “A crime is committed by several persons, A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable.” If several accomplices simultaneously and without previous concert give a consistent account of the crime implicating the accused the Court may accept the several statements as corroborating each other, see Haroon Haji Abdulla v. State of Maharashtra, 70 Bom LR 540 at p.545=(AIR 1968 SC 832 at p.837). But it must be established that the

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several statements of accomplices were given independently and without any previous concert, see *Bhuboni Sahu v. The King*, 76 Ind App 147 at pp. 156-157= (AIR 1949 PC 257 at pp.260-261).”

It appears from the records that PW16 was granted pardon under section 306 Cr.P.C. on 9.5.1996 by the Chief Judicial Magistrate. On the petition filed by the prosecution the other approver PW15 was granted pardon on 8.6.1996. There is nothing on record to indicate that the prosecution moved the petitions to grant them pardon with any previous concert. Two separate petitions under section 306 Cr.P.C. were filed which were allowed by the Chief Judicial Magistrate on two different dates. There is no material to show that the prosecution was over-zealous in making them approvers.

It is the evidence of PW15 that in the night of occurrence at about 3.30 a.m. PW14 wife of the deceased came to his residence and informed him that a fight was going on between her husband and the appellant and he should go and intervene. He accordingly proceeded to the place of occurrence and found the deceased was lying dead on the ground and the appellant was standing with a knife in his hand. After sometime the appellant brought one gunny bag and jute twin and requested him to help to put the deadbody into the gunny bag. On his refusal he threatened him with direct consequences. Out of fear he

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assisted the appellant in putting the deadbody into the gunny bag. In the meantime, PW16 reached there and on the insistence of the appellant they all helped him in carrying the deadbody which was thrown into the river. PW16 was aged about 18 years and a resident of village Rabong. He stated that appellant is his cousin brother. His evidence is that in the month of August about 5 years ago the appellant came to his village and asked him to accompany him to Neyabram. Accordingly, they came to Neyabram. The wife of the deceased also joined them. After sometime of their arrival he saw the appellant striking someone with a khukri. Thereafter the appellant came back and the person who was assaulted ran shouting "maryo, maryo". The person who was assaulted was the deceased. The appellant who was present there asked him to pick up a gunny bag lying there which was found to be torn. Thereafter the appellant brought out another gunny bag and asked him to hold it so that he could put the deadbody inside it. In the meantime, PW15 arrived there and all of them put the deadbody into the gunny bag and took the deadbody to the river Teesta and threw the same into the river. In the circumstances, we are inclined to accept the evidence of PWs 15 and 16 as corroboration to each other and their evidence coupled with the confession clearly establishes a case under section 201 IPC.

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11. The stage has now come to consider the plea of self-defence. From the confession, it may be seen that after being assaulted by the appellant the deceased went to his house and after coming out started chasing the appellant with a knife in his hand. The deceased jumped over the appellant. The latter had a stone in his hand and struck the deceased with it. When he fell down the appellant took out the knife from his hand and struck with it. A person facing with imminent threat of being assaulted is not expected weigh in 'golden scales' the exact force required to repel the danger. In the circumstances, the apprehension in the mind of the appellant that he would be assaulted by the deceased could not be reasonably excluded and therefore in exercise of self-defence he was justified in stabbing the deceased which was found to be fatal. In the circumstances, the case clearly falls within exception 2 of section 300 IPC. We accordingly hold him guilty under section 304 part I IPC.

In view of the overwhelming evidence, we do not find any valid and cogent reason to disturb the finding of guilt recorded by the learned Sessions Judge under section 201 IPC. The conviction and sentence thereunder are hereby confirmed.

12. For the foregoing reasons while setting aside the conviction of the appellant under section 302 IPC, we convict him under section 304 part I IPC. So far as sentence is

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concerned, it appears that the appellant was arrested on 3.5.1996 and since then he has been in custody which is for about 8 years. Ends of justice would be met if he is sentenced to the period of imprisonment already undergone by him. We order accordingly. The sentence of imprisonment passed under section 201 IPC is to run concurrently. He may therefore be released forthwith if his detention is not required in any other case.


(R. K. Patra)
Chief Justice
17.05.2004

I agree.


(N. Surjamani Singh)
Judge
17.05.2004

Dictation taken
&
typed by me
Dipak Saha