

**THE HIGH COURT OF SIKKIM : GANGTOK**

**CRIMINAL APPEAL NO. 2 OF 2003**

In the matter of an appeal under section 374 (2) of Code of Criminal Procedure, 1973.

Ben Kumar Rai alias Johny Rai,  
S/o Late Suman Singh Rai,  
R/o Santi Colony,  
P.O. & P.S. Singtam,  
East Sikkim **.... Appellant**

**VERSUS**

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

For the appellant : Mr. S. R. Sarkar assisted with  
Mr. B. K. Rai, Advocates.

For respondent : Mr. N. B. Khatiwada, Public  
Prosecutor assisted by Mr. J. B.  
Pradhan, Addl. Public  
Prosecutor.

**AND**

**CRIMINAL APPEAL NO. 3 OF 2003**

1. Lhakpa Sherpa,  
S/o Dawa Sherpa,  
R/o Singtam Bazar,  
P.O. & P.S. Singtam,  
East Sikkim  
A/P Rongyek Jail.
2. Karma Sonam Sherpa alias Jaggu,  
S/o Lhakpa Sherpa,  
R/o Manpari Busty,  
South Sikkim  
A/P Rongyek Jail. **.... Appellants**

**VERSUS**

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

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For the appellant : Mr. A. K. Upadhyaya, Advocate.

For respondent : Mr. N. B. Khatiwada, Public  
Prosecutor assisted by Mr. J. B.  
Pradhan, Addl. Public  
Prosecutor.

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

**DATE OF JUDGMENT : 23<sup>RD</sup> SEPTEMBER, 2003.**

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

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

The aforesaid twin appeals are directed against the judgment and order dated 17<sup>th</sup> January, 2003 passed by the learned Sessions Judge (E & N), Sikkim at Gangtok in Criminal Case No. 19 of 2000 by which the three appellants stand convicted under section 302 read with 34 IPC and sentenced each to undergo rigorous imprisonment for life and to pay a fine of Rs.5,000/- (Rupees five thousand) each with defaulting clause of sentence.

2. Criminal Appeal No. 2 of 2003 has been filed by the appellant Ben Kumar Rai alias Jhony Rai whereas Criminal Appeal No. 3 of 2003 by Lhakpa Sherpa and Karma Sonam Sherpa alias Jaggu.

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3. Briefly stated, the prosecution case is that Ashok Kumar Bansal (hereinafter referred to as the deceased) was residing at Singtam Bazar with his wife PW 19 Sushma and two minor children. In his residential building, he was running a hardware shop. In the evening of 15<sup>th</sup> October, 1999 (prior to the date of occurrence, i.e., 16<sup>th</sup> October, 1999) appellant Ben Kumar Rai demanded money from the deceased over telephone. This was preceded by a number of telephonic calls which were responded by PW 19 Sushma. The deceased, on such demand of money being made over the telephone, asked the appellant Ben Kumar Rai to come to his shop on the following day. 16<sup>th</sup> October, 1999 was a festive occasion observed by the Nepalese of Hindu faith as 'Phulpati'. In between 10.30 a.m. to 11 a.m., all the appellants entered into the shop premises of the deceased and had altercations with him which drew the attention of PW 19 Sushma who was then inside the kitchen and PW 5 Surendra Chettri (a munim of the deceased) who was unloading some goods in the godown. PW 5 Surendra Chettri tried to intervene in the matter and had a fight with the appellants. As the deceased refused to give them any money, appellants Lhakpa Sherpa and Karma Sonam Sherpa held the deceased and appellant Ben Kumar Rai stabbed in his abdomen and chest with a 'khukuri'. After he was severely injured, all the appellants fled from the

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place of occurrence. The victim was immediately taken to the District Hospital, Singtam. The doctor who attended him found his condition deteriorating. Therefore, he referred the patient to STNM Hospital, Gangtok who however succumbed to the injuries on the way.

**4.** The plea of the appellants was one of clean denial.

**5.** The prosecution in order to prove its case examined 22 witnesses. Out of them, PW1 Satnarayan (elder brother of the deceased), PW5 Surendra Chettri (munim of the deceased) and PW19 Sushma (widow of the deceased) were the eye witnesses. The learned Sessions Judge held the appellants guilty of the charge under section 302 read with 34 IPC on the basis of the evidence of eye witnesses, dying declaration made by the deceased before police personnel and the doctor and interception of the appellant Ben Kumar Rai while he was fleeing.

**6.** Learned counsel for the appellants did not dispute the fact that the deceased had a homicidal death. PW15 Dr. K. B. Gurung who conducted post-mortem examination over the dead body of the deceased found the following external injuries :-

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1. A gaping stabbed wound 7 cms left side of chest from midline measuring 3 x 2 cms.

The inner end of the wound was sharp and clean cut while outer end was splitting type.

2. A gaping stabbed wound 9 cms left side of the chest from midline measuring 3 x 2 cms in between 5<sup>th</sup> and 6<sup>th</sup> inter-costal space. The inner end of the wound was sharp and clean cut while the outer end was splitting type.
3. A stabbed wound 2 x 1 cms in the right atrium of heart.

The cause of death, according to the doctor, was shock as a result of haemorrhage due to multiple ante-mortem injuries inflicted by sharp cutting weapon.

7. Learned counsel appearing for the appellant Ben Kumar Rai submitted that the evidence adduced by the prosecution suffers from serious infirmities and, therefore, the conviction is not sustainable. Alternatively, he submitted that the appellant Ben Kumar Rai had no intention to cause death of the deceased. According to the learned counsel, there was tussle between the appellant and the deceased over demand of money and in course of such sudden quarrel the appellant in a heat of passion inflicted the injuries and, therefore, the offence committed by him would come under section 304 part II IPC. Learned counsel appearing for the appellants Lhakpa Sherpa and Karma Sonam Sherpa contended that the prosecution has not been able to show that they had shared the common intention with the other appellant to assault the deceased to death.

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His submission is that at the worst the two appellants could be said to have accompanied the appellant Ben Kumar Rai for the purpose of demanding money from the deceased. Learned Public Prosecutor on the other hand while refuting the above contentions raised on behalf of the appellants submitted that the prosecution has proved its case against the appellants beyond reasonable doubt.

**8.** In view of the aforesaid rival contentions, let us proceed to first examine the evidence of the eye witnesses, i.e., PWs 1, 5 and 19. PW1 Satnarayan is the elder brother of the deceased who lodged the FIR Exhibit P-1. He stated in his evidence that on the date of occurrence he received a telephonic message that a quarrel was going on in the shop of the deceased. On hearing this, he rushed towards it and found appellant Ben Kumar Rai coming out of the shop of the deceased with a 'khukuri' in his hand being accompanied by appellant Karma Sonam Sherpa alias Jaggu and another person whose name he did not know. In the Court, he identified that person (appellant Lhakpa Sherpa). On reaching the shop he found the deceased lying injured on the 'gaddi', who was immediately removed to the hospital. It was brought out in his cross-examination that in the FIR (Exhibit P-1) there is no mention of receiving any telephonic message to the effect that quarrel was going on in the shop of the deceased, nor that when he reached he saw the

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appellant Ben Kumar Rai coming out of the shop carrying 'khukuri' being accompanied by other appellants. It may be noted that the FIR was scribed by one Kishan Agarwal and PW1 Satnarayan simply put his signature there. Since the FIR was scribed by another person the discrepancies indicated above may not be much of significance. The fact however remains that the name of appellant Ben Kumar Rai finds place therein as the assailant of the deceased. PW5 Surendra Chettri was the munim under the deceased. He stated that about 11 a.m. of the day of occurrence when he was unloading articles in the godown behind the shop, he heard the deceased shouting "why are you 3 (three) persons attacking me". On hearing this, he rushed to the shop and saw two persons pressing over the deceased and one person was near his side. When he tried to separate them he had a fight with one of those persons. After sometime, the deceased came and separated him from others. When he got up those three persons had already fled and the deceased was lying unconscious on the 'gaddi'. In his cross-examination, he candidly admitted that he did not see who inflicted the wound on the deceased. On close scrutiny of his evidence, it would appear that his version that he saw two persons pressing over the deceased has to be accepted with a pinch of salt. He has made contradictory statements by saying that he had a fight with one of those persons who

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was trying to press his master. In the same breath, he has stated that it was the deceased who came and separated him from the other person and when he got up those three persons had already fled and the deceased was lying unconscious on the 'gaddi'. As indicated above, his clear and categorical admission in his cross-examination was that he did not see who inflicted the wound on the deceased. This being the position he can hardly be considered as a reliable witness. The next eye witness is PW 19 Sushma, widow of the deceased. She deposed that on the day of occurrence around 10 a.m. to 11 a.m. while she was preparing food in the kitchen she heard some quarrel taking place in the shop. Then she came rushing and saw the appellant Ben Kumar Rai alias Jhony and his two friends (identified appellants Lakhpa Sherpa and Karma Sonam Sherpa) catching hold of her husband who was standing on the corner of the 'gaddi'. The deceased was trying to free himself from their clutches and their munim PW5 was trying to help the deceased. Appellant Ben Kumar Rai then pushed the deceased and caused him to fall on the ground. Then, he took out a knife from his coat pocket and stabbed the deceased twice on the stomach and chest. Thereafter, all of them fled from the shop. She rushed to the police station and reported to the police personnel who were present there that her husband had been stabbed. Hearing this, those

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police personnel came to the shop. She proceeded to the District Hospital, Singtam where her husband was admitted. From the above version, it is clear that the appellant Ben Kumar Rai pushed the deceased and after he fell down the said appellant stabbed him.

At this stage, we may consider the involvement of appellants Lhakpa Sherpa and Karma Sonam Sherpa who were charged with commission of murder by causing the death of the deceased in pursuance of their common intention with the other appellant. Except the evidence mentioned above, there is no acceptable evidence connecting these two appellants with the crime. Shri A. K. Upadhyaya, learned counsel appearing for the appellant seriously submitted that the prosecution has failed to make out a case that these two appellants shared the common intention to commit the murder with the appellant Ben Kumar Rai. There seems to be much force in the above submission. There is no material on record to suggest that these two appellants had shared the common intention with the other appellant to cause the death of the deceased. Common intention pre-supposes prior meeting of minds. Of course it may also develop during the course of the occurrence. There is absolutely no evidence on record to indicate that these two appellants were aware of the fact that the appellant Ben Kumar Rai was armed with a 'khukuri'. It

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might be they accompanied appellant Ben Kumar Rai and went to the deceased to extort money from him. Therefore, in absence of any positive evidence on record, it is not safe to draw adverse inference and fasten them with the principle of joint liability. In this connection, we may refer to a judgment of the Supreme Court in *Kashmira Singh vs. State of Punjab* 1995 Supp (4) SCC 558. In that case two accused caught hold of the deceased and the third accused took out a knife and gave fatal blow leading to the death of the deceased but the two accused had no knowledge that the third accused was armed with knife. In the circumstances, their Lordships held that it cannot be said to be a conjoint act so as to attract the element of common intention on the part of the other two accused persons. For the reasons aforesaid, we are inclined to hold that the prosecution has failed to bring home the charge against the appellants under section 302 read with 34 IPC beyond reasonable doubt. They are, therefore, entitled to be acquitted of the charge on the benefit of doubt.

**9.** What is the consequence of acquittal of the aforesaid two appellants on the conviction of the appellant Ben Kumar Rai who was charged as follows :-

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“That you, on or about the 16<sup>th</sup> day of October, 1999 at Singtam Bazar, East Sikkim alongwith Karma Sonam Sherpa @ Jaggu and Lhakpa Sherpa in pursuance of the common

intention of you all have committed murder by causing the death of Ashok Kumar Bansal @ Pappu and thereby committed an offence punishable under section 302/34 IPC.”

It is now well-settled that even where other accused are acquitted of the charge under section 302/34 IPC, if the evidence discloses that a particular accused inflicted a particular injury which was proved fatal, the Court can hold him guilty for the commission of substantive offence of murder. It is, therefore, necessary for us to examine as to whether the prosecution has been able to prove that it was appellant Ben Kumar Rai who gave the fatal injuries on the deceased.

From the above analysis of evidence made by PW1 Satnarayan and PW19 Sushma, it is clear that it was the appellant Ben Kumar Rai who stabbed on the belly and chest of the deceased. Besides, the evidence of eye witnesses there are two other items of evidence on which the prosecution relied upon. They are (i) dying declaration (ii) conduct of the appellant.

The deceased made dying declaration at two different stages. The first stage was when he was being taken from his residence to District Hospital, Singtam. PW12, a Constable attached to the Singtam Police Station deposed that on the day of occurrence at about 11 a.m. they were on

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duty near the Old Traffic Point where they heard that the deceased was assaulted by a knife. On hearing this, when they were proceeding to the shop of the deceased they saw he was being taken to the hospital by his relatives. On enquiry, the victim told them that he was assaulted by a knife by the appellant Ben Kumar Rai in his shop. Learned counsel for the appellant did not bring to our notice any serious contraction in his evidence to reject the above testimony of PW12. The deceased made statement about the cause of his death at Singtam hospital. This was the second stage of making dying declaration. PW16, a Writer Constable deposed that after being informed that some fight was going on in the shop of the deceased he along with ASI PW11 rushed to the spot and found that the deceased had already been taken to the hospital. They immediately reached the hospital and enquired from the deceased as to what had been happened. He told them that he was assaulted by the appellant Ben Kumar Rai with a knife like object. The Doctor PW 17 recorded the dying declaration vide Exhibit P8. He stated that on being asked in Nepali, as to who assaulted him, the patient replied that it was appellant Ben Kumar Rai alias Jhony entered into his shop and assaulted him with a knife. There is no reason as to why the doctor PW17 would fabricate a document and speak falsehood in Court. The Supreme Court in Adbul Majid vs.

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State of Gujarat AIR 1976 SC 1782 has observed that when the doctor finds that life is ebbing fast in the patient and there is no time to call the police or a magistrate, in such a situation, he is justified - indeed, he is duty bound - to record the dying declaration of the deceased.

**10.** Now coming to the conduct of the appellant, the evidence of PWs 7, 8, 9 and 10 is very relevant. PW7 was the Writer Constable at Ranipool Police Station. He deposed that on the day of occurrence he was on duty and they were informed that the assailant of the deceased was going in a public service bus 'Glory' from Singtam towards Gangtok. PW7 found the said bus at the petrol pump at Ranipool. He enquired from the conductor if any person boarded the bus at Singtam Bazar. The conductor told him that the person sitting at the back seat boarded the bus from Singtam. He noticed that the appellant had injury on his leg. On being questioned, he stated that he was attacked by the deceased. PW7 on holding the coat of the appellant felt a hard-like object and when he took out the same, he found it to be a small 'khukuri'. The above evidence of PW7 is corroborated by the evidence of another Constable PW8 of Ranipool Police Station. He also deposed that on checking the bus they found the appellant from whose pocket the 'khukuri' was recovered. PW9 the Sub-Inspector of Ranipool Police Station stated that on checking the bus 'Glory' which was

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parked for fuelling at the petrol pump, the appellant was found sitting on the last seat at the back of the bus and from his coat the 'khukuri' was recovered.

On careful perusal of the entire evidence as indicated above, we have no hesitation to hold that it was the appellant Ben Kumar Rai who stabbed the deceased on his belly and chest.

**11.** There is no merit in the submission made on his behalf that the offence even if proved would not amount to murder. It was suggested that the appellant being a Nepali it is customary on his part to carry with him a 'khukuri' and in course of the struggle, he might have assaulted the deceased in a heat of passion. From the evidence of Dr. PW16 it appears that the deceased had sustained three stabbed injuries. On examination of those injuries, it cannot be said that the appellant had no intention of causing such bodily injury as he knew that by such bodily injury he would likely to cause the death. Admittedly, the deceased was unarmed. The appellant had taken undue advantage of the situation and inflicted fatal injuries leading to his death. Therefore, this cannot be a case coming under section 304 part I or II IPC as suggested by the learned counsel.

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**12.** For the reasons mentioned above, we do not find any merit in Criminal Appeal No. 2 of 2003 filed by appellant Ben Kumar Rai and the same is accordingly dismissed.

**13.** In view of what has been stated in the last sub-para of paragraph 8 of this judgment, the conviction and sentence imposed on appellants Lhakpa Sherpa and Karma Sonam Sherpa under section 302/34 are set aside. They are acquitted of the charge. Criminal Appeal No. 3 of 2003 filed on their behalf is hereby allowed. They may be set at liberty forthwith if their detention is not required in any other case.

  
( **N. Surjamani Singh** )  
**Judge**  
23.09.2003

  
( **R. K. Patra** )  
**Chief Justice**  
23.09.2003