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**THE HIGH COURT OF SIKKIM : GANGTOK**

**CRIMINAL APPEAL NO. 4 OF 2003**

In the matter of an appeal against conviction and sentence under section 302 IPC.

Pawan Kumar Rai,  
S/o Nandalall Rai,  
R/o Megyong Busty,  
P.S. Kaluk,  
West Sikkim  
**A/P Rongyek Jail. .... Appellant**

**VERSUS**

State of Sikkim,  
Through the Chief Secretary,  
Government of Sikkim,  
Gangtok,  
East Sikkim. .... **Respondent**

For the appellant : Mr. N. Rai, 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 : 11<sup>th</sup> SEPTEMBER, 2003.**

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

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

This appeal is directed against the judgment and order dated 14<sup>th</sup> December, 2001 passed by the learned

R.K.P.

Sessions Judge (South & West Districts), Sikkim at Namchi in Criminal Case No. 9 of 2001 convicting the appellant under Section 302 Indian Penal Code and sentencing him to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- (Rupees ten thousand) only with defaulting clause of sentence.

**2.** The prosecution case unfolded from the FIR and the evidence on record may be stated briefly as under:-

The appellant and Prem Kumar Rai (hereinafter referred to as the deceased) were co-villagers being the residents of Megyong under Kaluk P.S. in the West District of Sikkim. On the previous night of the date of occurrence (the occurrence took place on 10<sup>th</sup> February, 2001) when PW 14 Dhurbalal Rai, elder brother of the deceased had gone to attend a marriage ceremony in the village, the appellant called him and assaulted him without any rhyme or reason. On the date of the occurrence at about 7 p.m., the appellant along with his younger brother PW 18 Binod Rai and a co-villager PW 1 Sukbir Subba while returning home from Yangsung, met the deceased and PW17 Prakash Rai in the village. PW 17 Prakash Rai asked the appellant as to why he assaulted PW 14 Dhurbalal Rai on the previous night. The appellant replied that because PW 14 Dhurbalal Rai assaulted him, he had also assault him. In the meantime,

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they all reached the house of PW1 Sukbir Subba. PW 17 Prakash Rai went inside the village to call one Ashok Subba an elderly villager to settle the dispute. PW1 Sukbir Subba also went inside his house to take his food. The deceased, however, remained outside in the courtyard of PW1 Sukbir Subba. At this juncture PW 18 Binod Rai shouted that his brother, i.e., the appellant, assaulted the deceased to death. On hearing the shout PW1 Sukbir Subba rushed to the spot and found that the deceased had already succumbed to the injuries sustained by him and the appellant was absent from the spot.

**3.** On the basis of the FIR lodged by PW 8, Man Bahadur Subba before the Officer-in-Charge, Kuluk P.S. investigation was taken up and after its completion, the appellant was placed on trial leading to his conviction as aforesaid.

**4.** The plea of the appellant was one of denial.

**5.** The prosecution examined as many as 21 witnesses to bring home the charge against the appellant. The learned Sessions Judge on the basis of "chain of circumstances" held the appellant guilty of the offence of murder of the deceased. Although he has written a lengthy judgment, he has failed to indicate specific circumstances

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which formed the chain of events of incriminating nature establishing the guilt of the appellant. He has also failed to record a preliminary finding as to whether the death of deceased was homicidal or not. The learned Sessions Judge seems to have forgotten that he was dealing with a case in which there was a charge under section 302 against the appellant. It was, therefore, incumbent on his part to first examine whether the death of the deceased was homicidal or not.

**6.** From the evidence on record including the evidence of PW 20 Dr. S. D. Sharma who conducted the autopsy on the dead body of the deceased, we have no hesitation to hold that the deceased had a homicidal death. The doctor found the following injuries on the person of the deceased:-

“1. Incised wound 15 x 1 x 2 Cms over the left frontal region running in front and along the Coronal plane resecting the scalp, whole thickness of the skull and resecting the Meninges and Cerebrum to a depth of 1 CM

2. Incised wound 12 x 1 x 1 Cm over the left occipital region behind the left ear, resecting the scalp, whole thickness of the skull and resecting the cerebrum and meninges;

3. Incised wound 12 x 1 x 3 Cms. over the left shoulder splitting the shoulder muscles and causing cut fracture of the head of the left humerous;

4. Incised wound 2 x 1 x .5 cms. over the dorsum of right hand at the base of the index finger;

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5. Incised wound 10 x 4 x 4 cms. over the lower third of left leg horizontally placed resecting the underlying muscles, tenders and vessels;
6. Incised wound 12 x 3 x 4 cms. over the lower third of the right leg horizontally placed resecting the under lying muscles, tenders and vessels;
7. Laceration 3 x 1 x .5 cms. over the left forearm distal third;"

According to him all the above injuries were ante-mortem in nature and the cause of death was shock as a result of multiple incised injuries which were sufficient to cause death in the ordinary course of nature. Exhibit P-10 is the post-mortem report.

**7.** Coming to the evidence proper, it may be seen that PW18 Binod Rai younger brother of the appellant was the ocular witness to the occurrence. For obvious reason, he did not support the prosecution. His evidence was sought to be corroborated by the evidence of PW 1 Sukbir Subba, PW 5 Pema (wife of PW1), PW8 Man Bahadur Subba (elder brother of PW1) and PW 4 Sushila (wife of PW8) but as they all resiled from their previous statements, the prosecution after declaring them hostile, cross-examined them with the permission of the learned trial Judge.

**8.** By referring to the judgment of the Supreme Court in Karuppana Thevar vs. State of Tamil Nadu AIR 1976 SC 980, Mr. Rai contended that since all the material

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witnesses examined by the prosecution turned hostile, the entire evidence is worthless and, therefore, no conviction can be based on such evidence. Learned Public Prosecutor on the other hand by referring to the judgments of the Supreme Court in Sat Paul Vs. Delhi Administration AIR 1976 SC 294 and Gura Singh vs. State of Punjab AIR 2001 SC 330 submitted that merely because witnesses were declared hostile their evidence is not wiped out and the Court can accept that part of their evidence which supports the prosecution.

It may be stated that a three-Judge Bench of the Supreme Court in Bhagwan Singh vs. State of Haryana AIR 1976 SC 202 while considering the value of the evidence of a hostile witness held as follows :-

“ ..... But the fact that the court gave permission to the Prosecutor to cross-examine his own witness, thus characterising him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.”

A two-Judge Bench of the Supreme Court in Sat Paul vs. Delhi Administration AIR 1976 SC 294 had the occasion to consider the questions whether the evidence of the hostile witness must be rejected in whole or in part, whether it must be rejected so far as it is in favour of the party calling

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the witness, whether it must be rejected so far as it is in favour of the opposite party. After approving the opinion of Rankin C. J. of the Calcutta High Court rendered in the Full Bench judgment in Prafulla Kumar Sarkar vs. Emperor 1931 AIR Calcutta 401 and on consideration of judgments of other High Courts, the Supreme Court in paragraph 51 held as follows :-

“From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is of the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto.” [emphasis supplied]

The above principle has been recently followed by the Supreme Court in Gura Singh vs. State of Punjab AIR 2001 SC 330.

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On this point, another three-Bench Judge of the Supreme Court in Karuppana Thevar vs. State of Tamil Nadu AIR 1976 SC 980 held as follows :-

“A hostile witness may not be rejected outright but the court has at least to be aware that prima facie, a witness who makes different statements at different times has no regard for truth. The Court should therefore be slow to act on the testimony of such a witness and, normally, it should look for corroboration to his evidence.”

From the aforesaid, the principle that clearly emerges is that where the Court gives permission to the prosecution to cross-examine its own witness declaring him as a hostile witness, that fact does not completely efface his evidence. His evidence has to be read and considered as a whole. His evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

9. Keeping the above principle in view, let us proceed to examine the evidence of the star witness PW 18 Binod Rai. As already noticed, he is the younger brother of the appellant. Naturally he would try to shield his brother. He deposed that on the day of occurrence at the relevant time he was returning home with the appellant and PW 1 Sukbir Subba. On the way in the village they met PW 17 Prakash Rai and the deceased. PW 17 Prakash Rai asked

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the appellant as to why he had assaulted PW 14 Dhurbalal Rai, brother of the deceased. The appellant replied that since PW 14 Dhurbalal Rai assaulted him he in turn assaulted him. PW 17 Prakash Rai insisted that the appellant and others should go to see PW 14 who was lying in his house. The deceased also asked the appellant as to why he had assaulted his brother PW 14 Dhurbalal Rai and asked him to fight with him (deceased). Saying so the deceased boxed the appellant twice. In the meantime, they all arrived near the house of PW 1 Sukbir Subba. He (PW18) as well as his brother appellant went inside the house of PW1 Sukbir Subba. PW 17 Prakash Rai who was accompanying them went to call one Ashok Subba, an elderly person of the village to settle the dispute. PW 1 Sukbir Subba went inside his kitchen to take his food leaving the deceased alone outside in his courtyard. Within two to three minutes PW 18 heard a sound like thrashing of belt from outside. Hearing this he came out and having found the deceased lying profusely bleeding, shouted at PW 17 Praksh Rai who had gone to call Ashok Subba. The appellant was not found there.

At this stage, we may refer to the FIR Exhibit P1 lodged by PW 8 Man Bahadur Subba wherein he stated that PW 18 Binod Rai told him that his brother (the appellant) had 'cut'

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the deceased. After hearing this, he (PW8) reached his house and found the deceased had already died in his courtyard. The FIR was in the Nepalese language. Its English rendering was supplied to us which reads as follows:-

To,

The Police Incharge,  
Kaluk Police Station  
West Sikkim

Date: 10<sup>th</sup>. Feb. 2001

Subject: Complaint

Sir,

I Nar Bahadur Subba of Meyong Busty is giving this written complaint that in the evening of 10/02/2001 while coming home I met Binod Rai near the water tank by the side of my house. At that moment the time was about 7.00 p.m. Binod told me that brother Pawan had done something and cut Prem Babu, hearing this I reached hurriedly to see the same. I came and saw that Prem Babu had already died in my court yard. The blood was flowing in the earth. But the father of the deceased was holding the dead body. There were mother of the Pawan, Prakash Rai, my wife Sushila and my younger brother Sukbir were present near the dead body. Therefore necessary legal action may be taken by thana.

ended.

Yours faithfully,

Man Bahadur Subba

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Although PW 8 Man Bahadur Subba lodged the FIR, in his examination he denied to have made any such complaint. He admitted his signature in the said FIR on being cross-examined by the prosecution. He stated that PW 18 Binod Rai informed him about the death of the deceased who was lying in his courtyard in front of his house. He admitted that his brother PW 1 Sukbir Subba and his wife PW 4 were present. He frankly admitted that he proceeded to Kaluk P.S. to report verbally about the incident. PW 8 Man Bahadur Subba's evidence is fully corroborated by the evidence of PW 1 Sukbir Subba who happens to be his (PW8) younger brother. This witness PW 1 was also cross-examined by the prosecution and the learned Sessions Judge recorded his evidence in question and answer form. Although he resiled from his previous statement recorded by the Police he frankly admitted that police took his statement in connection with the case. We may, for sake of convenience, quote the relevant questions and answers put to this witness by the prosecution :

"Qn. No. 2 : Is it true that on the relevant date and time you along with accused and one Binod Rai were coming from Yangsung?

Ans. : Yes.

Qn. No. 3 : Is it true that when you all arrived at your house it was 6.00 P.M.?

Ans. : Yes.

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Qn. No. 4 : Is it true that you all met one Prem Rai, the deceased and there was a physical fight in between the accused and the deceased?

Ans. : Yes.

Qn. No. 9 : Is it true that at the relevant date time Pawn had gone to the room of Man Bahadur to keep the camera while the deceased Prem Rai was outside alone?

Ans. : Yes.

Qn. No. 10 : Is it true that at that time there was a sound of chopping like the sound of cutting banana plants outside your house?

Ans. : Yes.

Qn. No. 11 : Is it true that hearing that sound Binod came out side the house who was with you?

Ans. : Yes.

Qn. No. 12 : Is it true that the said Binod called you that the accused struck (cut) the deceased and ran away?

Ans. : Yes.

Qn. No. 13 : Is it true that on hearing this you immediately came out of your house and saw the accused running away?

Ans. : Yes.

Qn. No. 14 : Is it also true that you also saw the victim Prem Rai falling down instantaneously?

Ans. : Yes."

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From the above answers given by this witness PW 1, it is plain that PW 18 Binod Rai called him saying that the appellant assaulted the deceased and ran away. Hearing this he (PW1) came out from his house and noticed the appellant running away from the spot. He has also found the deceased falling down after being assaulted. PW 5 Pema is the wife of PW 1 Sukbir Subba. This witness like her husband turned hostile. As a result the prosecution had to cross-examine her. Her reply to different questions put by the prosecution are as follows :-

“Qn. No. 2 : Is it true that the incident took place by which the accused cut the deceased in the courtyard of your house?

Ans. : Yes.

Qn. No. 4 : Is it true that you family and the family of Man Bahadur Subba live in the same house having common courtyard?

Ans. : Yes.”

PW 4 Sushila is the wife of PW 8 Man Bahadur Subba. She also denied to have made any previous statement in connection with the case. Her answer to question No. 9 is as follows :-

“Qn. No. 9 : Is it true that when you came out of your kitchen you saw the deceased lying on the ground in a pool of blood?

Ans. : Yes.”

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From a conjoint reading of the evidence of the afore-noted hostile witnesses, there can be no doubt that PW 18 Binod Rai had seen his brother, the appellant assaulting the deceased to death. To this, we get also corroboration from the evidence of PW 17 Prakash Rai. His evidence has not been shaken in any way. He deposed that he along with the deceased went to the house of the appellant to know the reason as to why his brother PW 14 Dhurbalal was assaulted by the appellant on the previous night. The appellant was not found in the house. While returning they met the appellant, his brother PW 18 Binod Rai and PW 1 Sukbir Subba on the way. The deceased and the appellant had hot discussion in the house of PW 1 Sukbir Subba. He (PW 17) entered the house of PW 1 to light a cigarette and in the courtyard the deceased, the appellant and his brother PW 18 Binod Rai were present. On being asked by the deceased he went to call Ashok Subba, an elderly member in the village. When he was in the house of Ashok Subba, PW 18 Binod Rai called him. He immediately rushed apprehending that some incident must have taken place. When he reached the place of occurrence PW 18 told him that the appellant assaulted the deceased and he found the deceased lying on the ground.

**10.** The prosecution also pressed into service the disclosure statement made by the appellant under section

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27 of the Evidence Act. Investigating Officer PW 21 recorded the statement marked as Exhibit P3. On the basis of the said statement, the weapon of offence, i.e., patang (sharp-cutting weapon) (Exhibit P-1) was seized from the field of PW 8 Man Bahadur Subba on being pointed out by the appellant. Exhibit P-3(d) is the signature of the I.O. who identified the same. PW 8 Man Bahadur and PW 9 Bhawani Gurung who were witnesses to the seizure identified their signatures respectively as Exhibit P-3(a) and Exhibit P-3(b). The weapon of offence was sent for chemical examination and the Chemical Examiner found it to have contained blood but its origin could not be traced as it was found degraded.

**11.** From above analysis of evidence we are inclined to hold that PW 18 Binod Rai had seen the appellant assaulting the deceased with patang (Exhibit P-1) causing multiple incised injuries on him on account of which he died at the spot instantaneously. The appellant's conviction, therefore, under section 302 IPC is well-founded which cannot be disturbed.

**12.** In the result, there is no merit in this appeal which is accordingly dismissed.

  
**( N. Surjamani Singh )**  
**Judge**  
 11.09.2003

  
**( R. K. Patra )**  
**Chief Justice**  
 11.09.2003