

THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No. 9 of 2018

Nanda Lall Sharma @ Poudyal Bajey,
Son of late Govind Sharma,
Resident of Gayabari,
Martam,
West Sikkim.

*Presently at Central Prison,
Rongyek, East Sikkim.*

.....Appellant

Versus

State of Sikkim

..... Respondent

Appeal under Section 374 of the Code of Criminal Procedure, 1973.

Appearance:

Mr. N. Rai, Senior Advocate (Legal Aid Counsel) with
Mr. Sushant Subba, Advocate (Legal Aid Counsel) for the
Appellant.

Ms Mukun Dolma Tamang, Assistant Public Prosecutor for
the Respondent.

Date of hearing : 26.02.2020

Date of judgment : 14.03.2020

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. Heard Mr. N. Rai, learned Senior Advocate for the
appellant and Ms Mukun Dolma Tamang, learned Assistant

Public Prosecutor for the State. It is Mr. N. Rai's contention that the learned Sessions Judge had erred in convicting the appellant under section 302 of the Indian Penal Code, 1860 (for short 'the IPC') as the evidence of Raman Rai (PW-16) and Suman Rai (PW-19), who were eye witnesses to the assault, has established that this was a case which fell under section 304 Part II and not under section 302 IPC. Mr. N. Rai adverted to two judgments of the Supreme Court, one judgment of Gauhati High Court and one judgment of this Court. We have read those judgments. The two judgments of the Supreme Court found relevant is discussed below. Ms Mukun Dolma Tamang, however, submits that the reasoned judgment and order on sentence, both dated 31.08.2017, brooks no interference.

2. The First Information Report (for short 'the FIR')(Exhibit-19) was lodged on 05.04.2015 by Suman Rai (PW-19). He reported that on their way to collect wood, he and his brother reached the appellant's house and saw him quarrel with the deceased and assault him repeatedly with a piece of beam. On the submission of the charge-sheet, the learned Sessions Judge framed a charge of murder against the appellant. The appellant pleaded not guilty and the trial ensued. The prosecution examined 24 witnesses.

3. Ajay Rai (PW-23) was the first Investigating Officer of the case and Sonam Doma Bhutia (PW-24) was the second Investigating Officer.

4. During the trial, the following story unfolded. Birbal Subba (PW-11) had accompanied the deceased to Bermiok Bazar on the relevant day. He had bought four plain GCI sheets and the deceased some other articles. The deceased told Birbal Subba (PW-11) that he would carry the GCI sheets. The deceased carried the GCI sheets and was paid Rs.500/- as carriage charge by Birbal Subba (PW-11). When the deceased was returning through the footpath which passed through the appellant's house, Birbal Subba (PW-11) took another route. Raman Rai (PW-16) and Suman Rai (PW-19) who were passing by the appellant's house witnessed an altercation between the appellant and the deceased and the assault on the deceased by the appellant. Thereafter, Suman Rai (PW-19) lodged the FIR (Exhibit-19). Nar Maya Nirola (PW-3), the ward panchayat member of the concerned area, received a call from the son of the appellant who told her that the deceased was lying on the footpath in front of the appellant's house. Chandrakala Kami (PW-4), wife of the deceased, also received a phone call from the son of the appellant saying that her husband was lying unconscious near the house of the appellant. Thereafter, she proceeded to the place of occurrence and found the deceased in

an unconscious state, bleeding from his head and ears. The father of the deceased Palman Kami (PW-14) also saw the deceased with injuries on his head and other parts of his body. They along with other villagers including Basant Kumar Kami (PW-7), the younger brother of the deceased and Bal Krishna Kami (PW-15) took the deceased to the Rinchenpong hospital. Doctor Amber Singh Subba (PW-18) examined the appellant at the Rinchenpong Primary Health Centre on 05.04.2015 and found no external injuries on his body. He also examined the deceased and declared him dead.

5. The appellant was arrested on 05.04.2015 by Ajay Rai (PW-23). Aitaman Limboo (PW-20) accompanied Dipen Chettri (PW-21) the panchayat member, to the Kaluk Police Station on 05.04.2015 where the appellant made a statement in their presence confessing the guilt of the crime. Both of them identified the disclosure statement (Exhibit-21) dated 05.04.2015 by which the appellant disclosed that he had concealed the wooden beam (MOX). Pursuant thereto, the wooden beam (MOX) was recovered with blood stains concealed with dry leaves of banana below the house of the appellant and the seizure memo (Exhibit-22) was prepared by Ajay Rai (PW-23).

6. During the investigation, Mon Bahadur Kami (PW-1) and Buddhiman Limboo (PW-13) witnessed the seizure of blood stained check shirt from the dead body of the deceased by Ajay Rai (PW-23) on 05.04.2015. Accordingly, seizure memo (Exhibit-1) dated 05.04.2015 was prepared. Tashi Namgyal Lepcha (PW-2) and Binod Gurung (PW-6) witnessed the seizure of a blood stained white kurta and half pants worn by the appellant at the Rinchenpong Primary Health Centre on 05.04.2015 by Ajay Rai (PW-23) who also prepared the seizure memo (Exhibit-2). Chabilall Sharma (PW-12) witnessed the seizure of blood stained soil and control sample of soil lifted from the place of occurrence on 05.04.2015 by Ajay Rai (PW-23) through seizure memo (Exhibit-7). When Birbal Subba (PW-11) came to know about the incident, he reached there and saw the GCI sheets on the footpath. The deceased and the appellant had already been taken away by the police. Birbal Subba (PW-11) and Shekhar Sewa (PW-5) are the witnesses to the seizure of GCI sheets on 07.04.2015 by Ajay Rai (PW-23). The relevant seizure memo (Exhibit-3) is dated 07.04.2015. Krishna Bir Kami (PW-8) and Tika Ram Nirola (PW-9) witnessed the seizure of the Scheduled Caste Certificate of the father of the deceased by Sonam Doma Bhutia (PW-24) through seizure memo dated 28.05.2015 (Exhibit-4).

7. Subarna Rai (PW-17), the learned Chief Judicial Magistrate, recorded the statement of Raman Rai (PW-16) and Suman Rai (PW-19) under section 164 Cr.P.C on 07.04.2015.

8. Pooja Lohar (PW-22), the Scientific Officer at the Regional Forensic Laboratory (RFSL), Saramsa, examined the soil collected from the place of occurrence; sample blood of the appellant; a dirty cream colour kurta with blood stains said to belong to the appellant and one multi coloured striped full shirt having suspected blood stains belonging to the deceased. Pooja Lohar (PW-22) found that the sample blood of the appellant gave positive test for blood group “AB”. According to her, human blood could be detected in the soil samples collected from the place of occurrence as well as the dirty cream colour kurta belonging to the appellant. Sonam Doma Bhutia (PW-24) exhibited the CFSL Report (Exhibit-34) as well as the forwarding letter vide which the CFSL report (Exhibit-34) was forwarded to the police by CFSL, Kolkata.

9. The appellant was examined under section 313 of the Code of Criminal Procedure, 1973 (for short ‘the Cr.P.C.’). After hearing the parties, the learned Sessions Judge rendered the judgment of conviction and order on sentence both dated 31.08.2015 sentencing him to life which are assailed in the present appeal.

10. The learned Sessions Judge found that the deposition of Raman Rai (PW-16) and Suman Rai (PW-19), the two eye witnesses, corroborated each other and proved that it was the appellant who hit the deceased with a wooden beam (MOX); the wooden beam (MOX) had been positively identified by both of them; their statements recorded under section 164 Cr.P.C. were consistent with the depositions. The learned Sessions Judge relied upon the deposition of Dr. O.T. Lepcha (PW-10) and the autopsy report (Exhibit-6) to hold that the cause of death was intra-cranial haemorrhage along with fracture of the middle cranial fossa by blunt force trauma. It was found that the appellant had assaulted the deceased several times on his head with the wooden beam (MOX) which was also heard by Raman Rai (PW-16) and Suman Rai (PW-19). The learned Sessions Judge noted that the deceased was unarmed and there was no injury on the body of the appellant. The learned Sessions Judge did not agree with the contention of the defence that the injuries were caused by the appellant in his right of private defence. The disclosure statement (Exhibit-21) was held to have been adequately proved pursuant to which the wooden beam (MOX) had been discovered. The evidence that human blood could be traced in the wooden beam (MOX) was held to have supported the deposition of Raman Rai (PW-16) and Suman Rai (PW-19). The learned Sessions Judge held that the evidence gathered had also sufficiently proved that the appellant had assaulted the

deceased repeatedly with the wooden beam (MOX) on his head with the knowledge that he would die.

11. In *Bishnupada Sarkar vs. State of West Bengal*¹, the Supreme Court found that there was no evidence to suggest any premeditation to assault the deceased, leave alone evidence to show that the assailants intended to kill the deceased. The Supreme Court also found that there was no previous enmity between the parties who were residents of the same locality except that there was a minor incident in which some hot words were exchanged. It was found that only when the deceased noticed the incident and intervened to save the complainant, the appellant no.2 had started assaulting the deceased and inflicted injuries on his body that resulted in his death. In such circumstances, the Supreme Court upheld the conviction by the courts below under section 304 Part I IPC.

12. In *Bhagirath vs. State of Madhya Pradesh*², the Supreme Court found that the High Court had acquitted all the other accused, since fatal blow was attributed to the appellant. The nature of the offence was examined. It was noticed that there was wordy quarrel between the accused party and the deceased. In the quarrel, the appellant inflicted injuries on the right side of

¹ (2012) 11 SCC 597

² AIR 2019 SC 264

the head of the deceased measuring 15 x 2½ x 3 cm. It was found that the injuries inflicted on the deceased were during the sudden fight between the deceased and the accused party and there was no premeditation. The Supreme Court held that the fourth exception to section 300 IPC deals with death committed in sudden fight without premeditation. The Supreme Court found that one injury was caused by '*farsi*' blow on the head which indicated that the appellant therein had not taken undue advantage of the deceased. Thus it was held that the manner, the occurrence and the injury inflicted on the deceased attracted Exception 4 to section 300 IPC and consequently, the conviction of the appellant under 302 IPC was modified to section 304 Part I IPC.

13. In the present case, Raman Rai (PW-16), a 14 year old minor, deposed that when he and Suman Rai (PW-19) were going to collect firewood, they saw the deceased having some arguments with the appellant in front of the appellant's house. He further deposed that the deceased started pushing the appellant suddenly and after a few moments, the appellant lifted a wooden beam (MOX) and hit the deceased on the left side of the head. He further stated that the deceased fell down on the ground as a result of the assault but the appellant kept on hitting the deceased with the wooden beam (MOX). During his cross-examination, Raman Rai (PW-16) admitted that the

incident took place in front of the house of the appellant; during the argument the deceased went towards the house of the appellant; the deceased started pushing the appellant; the deceased was also hitting/physically assaulting the appellant; the argument was initiated by the deceased; it was during the scuffle between the deceased and the appellant that the appellant suddenly lifted the wooden beam (MOX) and struck the deceased with it and after the first strike he did not see the appellant repeatedly striking the deceased with the wooden beam (MOX).

14. Suman Rai (PW-19) the first informant deposed that he and Raman Rai (PW-16) were going to the forest for collection of firewood. When they reached the house of the appellant they saw the appellant and the deceased quarrelling from the CC footpath near the house of the appellant. They saw the appellant going towards his house and return with a wooden beam (MOX). Thereafter, the appellant struck the deceased on the left side of his head above his ear when the deceased was looking down towards the ground. They also saw the deceased falling down on the ground. Thereafter, the appellant kept on striking him with the said wooden beam (MOX) four-five times on his head. Out of fear they did not separate them and instead he rushed to the Thana and lodged the FIR (Exhibit-19). During his cross-examination, Suman Rai (PW-19) admitted that they saw the

deceased and the appellant having verbal arguments in the courtyard of the house of the appellant; a person using the footpath did not have to go to the courtyard of the house of the appellant while passing by the house; he and Raman Rai (PW-16) saw the same incident of assault; they saw the deceased pushing the appellant; the appellant and the deceased were involved in verbal altercation, pushing and pulling and the appellant suddenly picked up the wooden beam (MOX) during the altercation.

15. Dr. O.T. Lepcha (PW-10) the Medico Legal Consultant conducted the autopsy over the dead body of the deceased. He found the following ante mortem injuries:- 1. Lacerated injury 3 x 2 cms x bone over the left side of the occipital bone; 2. Scalp haematoma 6 x 4 cms over the left side scalp; 3. Fracture of underlying occipital bone (+). 4. Comminuted fracture of the middle cranial fossa. In his opinion, the main cause of death was intracranial haemorrhage along with fracture of the middle cranial fossa caused as a result of blunt force trauma.

16. The death was caused by intracranial haemorrhage along with fracture of the middle cranial fossa caused as a result of blunt force trauma by the wooden beam (MOX). The deposition of Raman Rai (PW-16) and Suman Rai (PW-19) clearly establishes that the appellant had hit the deceased on the left side of his

head first and after he fell, several blows on his head again with the wooden beam (MOX). There is adequate corroboration of the depositions of Raman Rai (PW-16) and Suman Rai (PW-19) from the autopsy report (Exhibit-6) and the deposition of Dr. O.T. Lepcha (PW-10).

17. Mr. N. Rai has sought to invoke Exception 1 as well as Exception 4 to section 300 IPC.

18. Culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury.

19. Exception 1 provides 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 or causes the death of any other person by mistake or accident. The explanation to Exception 1 provides whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

20. Exception 4 provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

21. Section 105 of the Indian Evidence Act, 1872 provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the IPC, or within any special exception or proviso contained in any other part of the IPC, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances. This burden upon the accused would stand discharged by showing preponderance of probabilities in favour of that plea on the basis of material on record.

22. The deposition of Raman Rai (PW-16) and Suman Rai (PW-19) establishes that there was an argument between the

deceased and the appellant which was also accompanied by pushing and pulling. There was some provocation is quite evident from the depositions. However, there is no evidence to establish the gravity and suddenness of the provocation. The injuries sustained by the deceased as reflected in the autopsy report (Exhibit-6) read with the deposition of Raman Rai (PW-16) and Suman Rai (PW-19) establishes that the appellant had taken undue advantage and acted in a cruel manner by inflicting several blows on the head of the deceased even after he had fallen with the first blow of the wooden beam (MOX) itself. According to Palman Kami (PW-14), the appellant had earlier passed some derogatory comments with reference to his caste due to which the appellant had gone to jail. The deceased was Palman Kami's (PW-14) son. The evidence reflects that the appellant may have harboured a grudge against the father of the deceased. Although, the evidence suggests that there was sudden quarrel between the appellant and the deceased and that there may have been provocation on the part of the deceased, the appellant has failed to establish even by way of preponderance of probabilities that the provocation was grave and sudden enough to prevent the offence from amounting to murder or that he had not taken undue advantage or acted in a cruel or unusual manner.

23. Resultantly, the appeal must fail and is accordingly dismissed.

24. The judgment of conviction and order on sentence under section 302 IPC passed by the learned Sessions Judge, South Sikkim at Namchi, are upheld.

25. The records of the learned Trial Court may be sent back. Certified copy of this Judgment be sent to the learned Trial Court and a copy also be furnished free of charge to the appellant.

(Bhaskar Raj Pradhan)
Judge

(Arup Kumar Goswami)
Chief Justice

Approved for reporting : **Yes/No**
Internet : **Yes/No**

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