THE HIGH COURT OF SIKKIM : GANGTOK

CRIMINAL APPEAL NO. 8 OF 2003

In the matter of an appeal against conviction and sentence under section 323 of the Indian Penal Code.

Guman Singh Pradhan,
S/o Late Purna Bahadur Pradhan,
Resident of Upper Sadam,
P.O. & P.S. Melli,
South District, Sikkim. ..... **Appellant**

VERSUS

State of Sikkim
Through Secretary,
Home Department,
Government of Sikkim,
Gangtok. ..... **Respondent**

For the appellant : Mr. K.T. Bhutia, Advocate.

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

PRESENT: THE HON'BLE MR. JUSTICE R.K. PATRA, CHIEF JUSTICE.

DATE OF JUDGMENT : 3rd November, 2003.

J U D G M E N T

R.K. PATRA, C.J.

This appeal is directed against the judgment and order dated 27.5.2003 passed by the learned Sessions Judge, (South & West) Namchi, in criminal case No. 12 of 2002, convicting the appellant under section 323 of the Indian Penal Code and releasing him on his entering into a bond for a sum of Rs. 10,000/- only with one surety of like amount. The appellant has also been directed to pay a sum of Rs. 15,000/- only as compensation to the widow of the deceased Gopi Chettri.

2. The appellant was placed on trial for an offence punishable under section 304 Part II of the Indian Penal Code for having

committed culpable homicide not amounting to murder by causing the death of Gopi Chettri (hereinafter referred to as the deceased). In view of the medical evidence to the effect that the cause of death could not be ascertained due to negative report from CFSL and negative findings of the post mortem examination, the learned Sessions Judge held that the appellant cannot be held guilty for the offence of culpable homicide but having regard to the evidence of eye witnesses that he assaulted the deceased, he convicted him for the offence punishable under section 323 IPC.

3. The prosecution story as revealed from the FIR and the evidence on record briefly is as follows:

> On 26.10.2001 at about 8.00 to 8.30 pm, Sambu Gurung PW-22 and his family members were about to go to sleep after celebrating Durga Puja in village Melli. Bhakta Bahadur Gurung PW-2, a co-villager came to his house and knocked at the door and asked PW-22 Sambu Gurung to call and bring the deceased to his house. Accordingly, Sambu Gurung PW-22 brought the deceased to his house. Bhakta Bahadur Gurung PW-2 suggested that they all should go to the house of Ratna Gurung PW-10, sister of Sambu Gurung PW-22, as there was rumour in the village that the appellant had illicit relationship with her. At his suggestion, Sambu Gurung PW-22 along with the deceased proceeded to the house of Ratna Gurung PW-10. On arrival the deceased called Poonam Gurung PW-9 (a), daughter of Ratna Gurung and questioned her as to whether any outsider was present in their house. The appellant himself opened the door and suddenly hit the deceased on his head with a wooden danda, exhibit P-1. As a result of the blow, the deceased fell down on the ground. Sambu Gurung PW-22 took the deceased to his house and after laying him on his bed, came back. Nar Bahadur Chettri PW-4, younger brother of the deceased took and admitted him in Namchi Hospital on the next day. It was suspected to be a case of alcoholic poisoning. The deceased however expired in the hospital on 28.10.2001 at

about 11.10 a.m.

Initially the case was registered at Melli Police Station as UD case but following the death of Gopi Chettri, it was converted to one under section 302 IPC. After completing investigation, charge sheet was filed under section 302 IPC against the appellant. The learned Sessions Judge however, framed charge against the appellant under section 304 Part II IPC.

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

5. The prosecution in order to bring home the charge against the appellant examined 28 witnesses out of whom PW-9(a) Poonam Gurung, PW-10 Ratna Gurung, PW-11 Rajesh Gurung, PW-22 Sambu Gurung and PW-24 Yogesh Gurung were eye witnesses.

6. Relying on the judgment of the Supreme Court in Chhittar v. State of Rajasthan 1994 Crl.L.J. 245 and judgments of Allahabad High Court in Ram Karan Mal v. State 1990 Crl. L.J. 846 and Gulab v. State 1996 Crl.L.J. 2247 the learned counsel for the appellant submitted that the conviction under section 323 IPC is not sustainable in view of the admitted fact that no injury was found on the body of the deceased which is inconsistent with the evidence of eye witnesses who deposed that the deceased was hit on the head by the appellant. The learned Public Prosecutor on the other hand submitted that although no injury was found on the body of the deceased there is no reason as to why the evidence of the eye witnesses should be discarded.

7. In view of such rival contentions it is necessary to go through the entire evidence on record.

Dr. T. Paljor PW-20 is the Medical Officer of District Hospital, Namchi. He deposed that on 27.10.2001, the patient (i.e. the deceased) was brought to the hospital in a state of coma. His relatives did not furnish any history. On examination he found the

patient was unconscious and was not responding to verbal commands. His blood pressure was 100/80 and his breath was smelling of alcohol. He did not detect any abnormality in his chest. He was duly treated. The patient however expired on 28.10.2001 at about 11.10 am. The doctor further stated that on examination he did not find any external injury on the person of the deceased. According to him, if a person is hit by a blunt substance abrasion or bruises would be caused which would remain for about a week. He opined that as the deceased had consumed alcohol he suspected the case to be one of alcoholic poisoning.

Dr. K.B. Gurung PW-17 is the doctor who conducted post mortem examination on the dead body of the deceased. Exhibit P-16 is his report. His findings are as follows :

> "A: General
> Rigor mortis fully developed all over the body.
> P.M. lividity fixed on the back no putrefaction mark.
> B: HEAD & NECK
> Intact and healthy.
> C: Chest
> Intact and healthy.
> D: Abdomen
> Intact and healthy."

He reserved his opinion with regard to the cause of death pending report of FSL(chemical analysis report).

After receiving the chemical analysis report from CFSL, Calcutta, the doctor finally opined that the cause of death could not be given due to negative report from CFSL and negative finding on post mortem examination. The doctor also stated that he did not find any internal or external injury on examination of the dead body of the deceased. He clarified that if blow was given on the head of the deceased with a danda, like exhibit P-1 there was bound to be injury. From the aforesaid medical evidence, I have no hesitation to hold that the deceased had no internal or external injuries on his person.

8. At this stage it would be appropriate to examine and assess the evidence of the eye witnesses. It is the specific case of the prosecution that it was the appellant who assaulted the deceased with the danda, exhibit P-1. Ratna Gurung PW-10 deposed that the

appellant is a co-villager with whom she had love affairs. She stated that on the day of the occurrence i.e. 26.10.2001, the appellant came to her house at about 7.30 p.m. At that time there was some commotion in the house of her brother Sambu Gurung PW-22 from where the deceased was found shouting. After about 10 to 15 minutes the deceased came to her house uttering vulgar language and wanted to know who were the persons who were kept inside her house. He kicked at her door. The appellant who was inside her house opened the door. He came out with a danda, exhibit P-1 and with it hit the deceased. On receiving the blow, the deceased fell down in the court-yard near the steps. He was lying unconscious. The appellant threw two tins of water at him. Her brother Sambu Gurung PW-22 came and took the deceased to his house. In her cross-examination she admitted that the deceased was under the influence of alcohol. She further deposed that the appellant assaulted the deceased with force and she found blood stains on the stair case and in her court yard. Poonam Gurung PW-9(a) is the daughter of Ratna Gurung PW-10 who stated that on the day of the occurrence while she was sleeping, the deceased came to their house and knocked at the door asking her to open the same. She did not open in spite of the repeated knocks. After about 5 minutes the appellant who was present inside their house opened the door and started hitting the deceased with a firewood. In her cross-examination she gave inconsistent version by saying that the appellant assaulted the deceased 3 to 4 times on his head with force and in the same breath she stated that she did not see the appellant hitting the deceased. Rajesh Gurung, PW-11 is the son of Ratna Gurung PW-10. He stated that on the night of the occurrence he was sleeping in the room which was to the extreme corner of the house and his sister Poonam Gurung PW-9(a) was sleeping in the middle room where her cousin Yogesh Gurung PW-24 was also sleeping. At that time the deceased came shouting towards their house and knocked at the door. The appellant who was inside their house wanted to go out but his mother Ratna Gurung PW-10 prevented him. The appellant however managed to open the door and hit the deceased with the danda, exhibit P-1. As a result of assault, the

deceased fell down on the ground. He further stated that the appellant also hit the deceased with his fist. It was brought out in his cross-examination that from the bed in which he was sleeping the court-yard could not be seen. He claimed to have seen the incident from the bed. If he was on his bed from which the courtyard was not visible (where the deceased was assaulted), his assertion that he saw the appellant assaulting the deceased on his head 2 to 3 times has to be accepted with a pinch of salt. Yogesh Gurung PW-24 is the son of Sambu Gurung PW-22. He was aged about 12 years. He deposed that he was sleeping in one room while Poonam Gurung PW-9(a) was sleeping in another room and Ratna Gurung PW-10 and her son Rajesh Gurung PW-11 were sleeping in another room. After sometime the appellant came to the room where his mother was sleeping. At that moment the deceased came and shouted asking his sister to open the door. He (PW-24) deposed that he did not see as to who opened the door from the inside but saw the appellant assaulting the deceased with the danda exhibit P-1. On being hit, the deceased fell down. According to him, they all saw the incident from the window. It was brought out in his cross-examination that if windows of the room where he was sleeping stood closed one could not see the staircase of the house. In order to cover up this lacuna he stated that he peeped through the window without opening it. In his cross examination he gave a different version by stating that the appellant assaulted the deceased when the latter was standing on the top of the staircase. It may be noted that it is nobody's case that the deceased was assaulted on the stair case rather the other eye witnesses deposed that the incident took place in the courtyard. Sambu Gurung PW-22 stated that the appellant assaulted the deceased on his head with a wooden danda, exhibit P-1. He struck on the head of the deceased thrice. Poonam Gurung PW-9(a), Ratna Gurung PW-10, Rajesh Gurung PW-11 and Yogesh Gurung PW-24 have not stated that Sambu Gurung PW-22 was a witness to the occurrence. Their consistent version is that Sambu Gurung PW-22 came when the deceased was lying unconscious and he took him to his house. Sambu Gurung PW-22 stated that while taking the deceased to his house he

met Nar Bahadur Chettri PW-4, brother of the deceased. If appellant assaulted the deceased, as a natural course Sambu Gurung PW-22 should have told Nar Bahadur Chettri PW-4 about it because he carried him to his house. But strangely he did not say anything. He admitted in his cross-examination that he did not tell Nar Bahadur Chettri PW-4 that the appellant assaulted the deceased. He also admitted that he did not even tell about the incident to the wife of the deceased. PW-3 who is the widow of the deceased stated that when her husband was taken by Sambu Gurung PW-22 he was physically alright but when he returned he was not in a position to speak and no injury could be seen on his person. She asked Sambu Gurung PW-22 as to what had happened to him. He replied that he did not know anything and laid him on the bed and went away. The Investigation Officer PW-28 seized the weapon of offence, exhibit P-1 on 8.11.2001 vide seizure memo exhibit P-14 from the court-yard of the house of Ratna Gurung PW-10 in the presence of two seizure witnesses Rup Narayan Rai PW-14 and Purna Bahadur Rai PW-15. The danda, exhibit P-1 measured 3ft 7.5 inches with a girth of 7 inches. From the above it would appear that the weapon of offence was a heavy one and normally if one was assaulted with it the victim would definitely sustain injuries on his person and there was bound to be blood stains. Strangely, Sambu Gurung PW-22 did not find any injuries or blood stains on the person of the deceased. As indicated above, the weapon of offence exhibit P-1, was a heavy wooden piece and if the deceased was assaulted with it on the head 3 or 4 times with force, there would have definitely been visible injuries which could have been noticed by the doctor but both the doctors have clearly stated that they did not find any internal or external injuries on the person of the deceased. The conduct of Sambu Gurung PW-22 in this regard appears to be suspicious and his entire family seemed to falsely entangle the appellant because he was having illicit relationship with Ratna Gurung PW-10 which created uproar in the village.

9. For all the reasons mentioned above, I have no hesitation to hold that the conviction of the appellant under section 323 IPC cannot

be sustained.

10. Resultantly the conviction of the appellant under section 323 IPC and the consequential order asking him to enter into bond are hereby set aside. The appellant is acquitted of the charge.

11. The appeal is thus allowed.

(R.K. Patra)
Chief Justice
3.11.2003.