

**IN THE HIGH COURT OF SIKKIM : GANGTOK*****Criminal Appeal No.4 of 2004***

(Arising out of the judgment dated 13.8.2001 passed by Dr. S. W. Lepcha, Sessions Judge (East and North) in Criminal Case No.7 of 2000)

Arbind Chettri
S/O Late Sambu Chettri,
R/O Sukhia Pokhari,
Dist.Darjeeling, West Bengal,
At present in Sikkim Jail Appellant

Versus

State of Sikkim Respondent

For the appellant : Shri B. K. Gupta, Legal Aid Counsel.
For the respondent : Shri J. B. Pradhan, Public Prosecutor.

PRESENT : **THE HON'BLE SHRI JUSTICE R. K. PATRA,**
CHIEF JUSTICE
THE HON'BLE SHRI JUSTICE A. P. SUBBA,
JUDGE

Date of hearing : 11th October, 2004.
Date of judgment : 13th October, 2004.

J U D G M E N T

A. P. Subba, J.

This appeal is directed against the judgment dated 13.8.2001 and order dated 28.8.2001 passed by Dr. S. W. Lepcha, Sessions Judge (East and North) in Criminal Case No.7 of 2000, convicting the appellant under sections 302 and 324 IPC and sentencing him under section 302 IPC to undergo imprisonment for life and to pay a fine of Rs.1000/-, in default to undergo further rigorous imprisonment for six months and under section 324 IPC to undergo rigorous imprisonment for six months. All the sentences were to run concurrently.



them. In the scuffle that ensued, the appellant gave the deceased a knife blow on the left side of his chest with the knife which he was carrying on the right side pocket of his pants. After stabbing the deceased, the appellant ran towards the door, but the deceased intercepted and grabbed the appellant from his back and dragged him along the corridor towards the side wall of the VIP room where the deceased assaulted the appellant with fist blows on his face. The appellant who was still carrying the knife on his right hand at that time gave a knife blow on the left chest of the deceased. The knife penetrated the heart of the deceased and he collapsed and fell down in front of the VIP room door. Seizing this opportunity, the accused fled away from the place of occurrence. In the scuffle, Miss Sonam Lachenpa, PW2 sustained injuries on her right hand palm and left hand shoulder while intervening to separate the two fighting friends.

3. On the basis of the FIR filed by Kaden Lachenpa, brother of the deceased, a case was registered and investigation was taken up. On completion of the investigation, the appellant was placed on trial.

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

5. To bring home the charge, the prosecution examined as many as twenty witnesses. After hearing the prosecution and the defence and mainly on the basis of the testimonies of PWs 2, 3, 4, 5 and 9 who were present in the GICI building at the time of occurrence, the learned Sessions Judge came to the conclusion that the prosecution has proved the guilt of the appellant under



2. The prosecution case briefly stated is as follows :-

On 15.10.1999, at 2300 hrs. the appellant along with his friend Banju Lachenpa, the deceased forced their way into the guest room in the first floor of Government Institute of Cottage Industry (GICI) building at Lachen by breaking open the latch of the door which was bolted from inside. Both of them were under the influence of liquor. After entering the guest room, the appellant and the deceased requested the trainee girls who were staying there, to play music in the tape-recorder so that they could have a dance. But the trainee girls expressed their inability to oblige saying that if they did so the Technical Baboo, the in-charge of the GICI will be disturbed and get angry. Upon this, the deceased asked the appellant to go to the In-charge who was residing in another room of the same building and to seek permission. As the appellant was proceeding and nearly reaching the door of the room, he was prevented by the trainee girls from proceeding further and led him to the cot where the deceased was sitting and made him sit by his side on the cot. After sometime, the deceased told the appellant that the trainee girls would not be playing music in the tape-recorder and asked the appellant to leave with him to go to bed, but the appellant showed his reluctance to leave. He rather expressed his desire to dance for half-an-hour or otherwise he would sleep in the guest room itself. At this the deceased asked the appellant to keep his mouth shut. This suddenly enraged the appellant who sprang up from the bed and seized the deceased by his chin which led to a scuffle between



sections 302 and 324 IPC beyond reasonable doubt and convicted him under sections 302 and 324 IPC and passed sentence as already stated above.

6. Out of twenty witnesses examined by the prosecution, PWs 2, 3, 4 and 5 are ocular witnesses. PW16 is the doctor who conducted autopsy on the dead body of the deceased.

7. It is not disputed at the bar that the deceased had homicidal death. The doctor's evidence shows that the deceased had sustained the following injuries :-

1. Incised wound 1 x .5 x .5 cms. over the lateral margin of the eyebrow.
2. Incised wound 2 x .5 x .5 cms. over the left side of the chin.
3. Incised penetrating wound 2 x .5 cms. entering the thoracic cavity on the left side of the chest in the 5th intercostals space 5 cm. lateral to the left nipple.
4. Incised penetrating wound 2 x .5 cms entering the thoracic cavity on the left side of the chest in the 9th intercostals space 12 cm. left of the mid-line.

On internal examination there was incised penetrating wound 1 x .5 x 2 cms on the middle lobe of the left lung laterally. There was haemopericardium of about 500 ml. There was incised perforating wound 1 cm. piercing the lateral wall of the left ventricle.

8. We have carefully gone through the evidence of the eye witnesses (PWs 2 to 5). Each of them consistently deposed that it was the appellant who inflicted the fatal blow on the deceased. Their testimony in this regard stands unchallenged. There is no reason as to why they would falsely implicate the appellant in the commission of the offence. In the circumstances, we concur with



the finding of the Sessions Judge that it was the appellant who caused the death of the deceased.

9. Shri B. K. Gupta, learned legal aid counsel appearing for the appellant submitted that, the appellant did not cause the death of the deceased with any intention, and, as such, the conviction of the appellant under section 302 was not appropriate. According to him the appropriate section under which the appellant could be convicted in the circumstances of the case would be under section 304 Part II IPC and not 302 IPC. In support of his contention, the learned defence counsel relied on the statement of PWs, Miss Chung Chung Kipa Lachenpa (PW3), Miss Kessang Diki Lachenpa (PW4) and Miss Kichok Lachenpa (PW5) in course of their cross-examination. The learned counsel led us through the relevant depositions of these PWs. All these PWs have deposed that sometime after the appellant and the deceased forced their way into the guest room of the GICI, the deceased wanted to leave, but the accused insisted on staying back which led to an argument resulting in a sudden fight between them. When they intervened and tried to separate the two fighting friends, one of their friends, namely, Miss Sonam Lachenpa (PW2) sustained cut injuries in her person. In the fight they saw the accused stabbing the deceased with a knife. Then all of them raised hue and cry and rushed out to call their neighbours. When they returned, they found the deceased lying dead below the staircase and the appellant had vanished. All eye witnesses in their cross-examination stated that when the quarrel between the appellant



impugned judgment the learned trial Court has simply observed that on the basis of the undemolished testimonials of PWs 2, 3, 4, 5 and 9 coupled with non-denial of the accused himself, the appellant must be held to be responsible for the death of the deceased.

12. The above circumstances go to show that the appellant had no intention of putting his friend to death by the knife blows. However, keeping in view the nature of the injuries inflicted on the deceased, it cannot be said that the appellant had no knowledge that he was by his act likely to cause death.

13. Even though the stab injury inflicted by the appellant proved fatal, it does not appear from the circumstances as discussed above that there was any premeditation on the part of the appellant. The facts that have come on record rather go to show that the fight between the appellant and the deceased was sudden and the knife blows were given by the appellant in the heat of a passion upon a sudden quarrel without the appellant having taken undue advantage.

14. In *Bhera versus State of Rajasthan* (2000)10 SCC 225 the facts were that the accused and the deceased were on their way home after attending a gathering where they had some argument regarding loan which the deceased had advanced to the accused. While they were on their way, a quarrel broke out between the two when the accused suddenly brought out a knife and gave the blow on the chest of the deceased which proved fatal. On these facts, it was observed by the Hon'ble Supreme Court that it was difficult to



hold that the accused gave the blow with the requisite intention of causing murder of the deceased. Accordingly, conviction of the appellant under section 302 was set aside and instead the appellant was convicted under Section 304 Part II and sentenced him to five years imprisonment. Similarly, in Kunhayippu versus State of Kerala (2000) 10 SCC 307 where both the accused and the deceased were in friendly mood when one asked for a glass of juice from the other. Shortly thereafter while the deceased had left the shop of PW1, the accused went behind and gave one knife blow on his abdomen from the back which resulted in his death. In the circumstances, it was held by the Hon'ble Supreme Court that the accused cannot be said to have had the necessary intention for causing the murder of the deceased though ultimately the blow had become fatal. Accordingly, the conviction of the appellant under section 302 IPC was set aside and he was convicted under section 304 Part II and sentenced to imprisonment for five years.

15. The facts of the present case are similar to the fact situation of the cases mentioned above. Therefore, in view of the facts stated above, we are inclined to hold that the appellant cannot be held to have caused the injury with any intention to cause death, but he cannot be denied to have knowledge to cause such bodily injury as is likely to cause death.

16. For the reasons stated above, the conviction of the appellant under section 302 IPC cannot be sustained under law. Consequently, while setting aside the conviction under section 302 the appellant is hereby convicted under section 304 Part II IPC and sentenced to rigorous imprisonment for five years.



and the deceased ensued, the appellant tried to run away but the deceased prevented him from doing so. Miss Kichok Lachenpa – PW5 has clearly admitted it as true that during the course of the fight the appellant ran away but the deceased chased him and dragged him back to the place of occurrence.

10. The question that arises for consideration is whether in the facts and circumstances of the case as unfolded by the testimony of the aforesaid eye witnesses the appellant can be held to have caused the death of the deceased with intention and can be convicted for the offence of murder under section 302 IPC or could be convicted under section 304 Part II IPC.


11. From the statement made by the above said witnesses, both in their examination-in-chief and the cross-examination, it becomes clear that the appellant and the deceased came to the GICI building as friends for the purpose of having a dance in the company of the inmate trainee girls. It is only on account of the unfavourable situation that developed on the spot after they forced themselves into the GICI building that some heated argument followed between them and that led to a scuffle between the two. What is significant to be noted here is that, after the scuffle ensued, the appellant wanted to leave the place and even reached the door of the room but it was the deceased who dragged him back and it was in the scuffle that followed after he was dragged back that the appellant gave the second knife blow to the deceased which proved fatal. This aspect of the case seems to have been overlooked by the learned trial Court. In paragraph 28 of the




17. The appellant's conviction and sentence under section 324 IPC for having caused hurt to PW2 is not disturbed. The sentences however will run concurrently.

18. The appellant shall be entitled to the benefit of set off provided under section 428 Cr.P.C.

19. In the result, the appeal is partly allowed.


(**A. P. Subba**)
Judge


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

*Dictation taken
and
typed by me.*

Aunku Tshering