THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 09-09-2013

CORAM

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

Crl.A. No. 05 of 2013
(Jail Appeal)

Mani Raj Rai,
Son of Late Jas Bahadur Rai,
Resident of Pupung Busty,
Denchung Block,
South Sikkim.
(At present – Rongyek Jail) ... **Appellant**

versus

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

For Appellant : Mr. N. Rai, Senior Advocate as Legal Aid Counsel with Mr. Sushant Subba, Advocate.

For Respondent : Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S. K. Chettri, Assistant Public Prosecutor.

J U D G M E N T

Wangdi, J.

This Appeal is directed against the impugned judgment dated 30-07-2012 of the Learned Sessions Judge, South and West Sikkim at Namchi in S. T. Case No.02 of 2010, by which the Appellant, Mani Raj Rai, was convicted for offence under Section 302 of the Indian

Penal Code (in short the "IPC") and accordingly sentenced to undergo simple imprisonment for life and a fine of Rs.3,000/- (Rupees three thousand) only and to undergo further imprisonment of 2 months in the event of default of payment of the fine.

2. The genesis of the case against the Appellant is a First Information Report (in short the "FIR") lodged by the Appellant's elder brother, Raj Kumar Rai, P.W.1, in the Jorethang Police Station, South Sikkim, to the effect that his youngest brother, the deceased, had succumbed to an injury on the neck caused by a 'khukuri' blow inflicted by his second brother, the Appellant, in the night of 26-11-2009. Investigation of the case registered under Section 302 IPC against him culminated in the filing of a charge-sheet under that offence in the Court of the Learned Sessions Judge, South and West Sikkim at Namchi. After the trial, the Appellant having been found guilty of the offence was convicted and sentenced as already set out earlier.

3(i). The facts of the prosecution case germane for consideration in this Appeal is that the Accused/Appellant, Mani Raj Rai and the deceased, Anil Rai, second and the

youngest siblings of the three in their family, were humble farmers, married and living in a joint family. The eldest of the siblings, P.W.1, Raj Kumar Rai, who had lodged the FIR, had his own establishment and living separately. At the material time, the wife of the deceased, Shanta Kumari Rai, P.W.10, was in possession of Rs.500/- (Rupees five hundred) only that belonged to her husband, Anil Rai. On 26-11-2009 both these persons and two other boys in the locality, Tika Ram Rai, P.W.3 and Subhas Rai, P.W.18, were engaged in extracting “kalo dal” (locally grown pulse) in the paddy field. In the midst of the work at about 1600 hours the Appellant went to the house and asked P.W.10 to lend him Rs.200/- (Rupees two hundred) only but after consulting her deceased husband she gave him only Rs.100/- (Rupees one hundred) out of Rs.500/- (Rupees five hundred). P.W.10 followed by the Appellant then returned to the field where she handed over the balance of Rs.400/- (Rupees four hundred) to her deceased husband. While at work the Appellant again asked the deceased to lend him Rs.100/- (Rupees one hundred) more but the deceased refused to accede to this. When they returned home with three bags of “kalo dal” extracted during the day the Appellant still persisted with

his request for Rs.100/- (Rupees one hundred) only from the deceased who finally gave him that amount. The Appellant then left the house without eating the food offered to him threatening the deceased with dire consequences and went to the house of one Kumar Rai, P.W.17, where he consumed four bottles of locally brewed alcohol and returned home at around 1100 hours. On reaching the house, the Appellant picked up the sacks of "kalo dal" harvested during the day and spilled them all over the verandah. On hearing the noise, the deceased Anil Rai came out of his room and thereafter an altercation followed between him and the Appellant. After the altercation had subsided, the deceased went to relieve himself during which time the Appellant went to the kitchen and returned with a 'khukuri' and struck the deceased with it on the neck resulting in the deceased bleeding profusely from the wound. Relatives and the people from the neighbourhood then rushed the deceased to the District Hospital, Namchi, South Sikkim, but on the way he succumbed to his injury.

(ii) These are the salient facts of the case based upon which the Appellant was found guilty of having

committed the offence under Section 302 IPC by the impugned judgment.

4(i). At the threshold of his arguments before this Court, Mr. N. Rai, Learned Senior Counsel, appearing as Legal Aid Counsel, submitted that he was not assailing the merits of the findings of the Learned Trial Court but, was restricting his submissions only to the limited extent that having regard to the evidence on the records, the Appellant ought to have been convicted under Part II of Section 304 IPC instead of Section 302 IPC.

(ii) Mr. N. Rai urged that the evidence and the facts and circumstances of the case would clearly show that there was no intention on the part of the Appellant to cause the death of the deceased and that the act was not premeditated. That it was committed in the heat of anger in a sudden fight resulting from a quarrel between him and the deceased and that the Appellant had not taken undue advantage or acted in a cruel or unusual manner.

(iii) As per the Learned Senior Counsel, the incident was the aftermath of the deceased not having lent him the money as asked for which stands established by the evidence of P.W.10, the wife of the deceased and P.W.18,

a co-villager who had worked with them in the field during the day. That after returning home from the field the Appellant had left the house in a huff without taking the food offered to him threatening the deceased with dire consequences. It is also established by the evidence of P.W.11, Parthaman Rai, that he had gone to the house of P.W.17 at about 7 p.m. and purchased and consumed three bottles of local brew, a fact corroborated by P.W.17. Mr. Rai went on to submit that the Appellant returned home at about 11 p.m., obviously in an inebriated condition, where he picked up the bags of “kalo dal” harvested during the day and spilled them scattering all over the floor. Awakened by the noise and the commotion, the deceased had gone to the place to inquire and when he saw the Appellant throwing the “kalo dal” he tried to stop him leading to an altercation between them which was ultimately stopped by their mother, Suk Maya Rai, P.W.2, who held the Appellant enabling the deceased to leave. When the deceased returned after attending to the nature’s call, the Appellant who managed to free himself from the clutches of the mother, struck the deceased with a ‘khukuri’ which landed on the left side of his neck causing him to bleed profusely. That the

'khukuri' blow that landed on the neck was by accident and not by design as it was quite dark and that the injury caused was a solitary one.

(iv) That the established fact deduced from the evidence of P.W.15, Ganga Bahadur Rai, that the Appellant had held the deceased after felling him and accompanied the villagers and relatives to the hospital with him, would indicate that there was no intention on the part of the Appellant to cause the death of the deceased.

(v) In support of his submission, Mr. Rai referred to the judgment dated 17-03-2010 of this Court in Criminal Appeal No.3 of 2009 in the matter of ***Gatuk Bhutia*** vs. ***State of Sikkim*** and ***Gurmukh Singh*** vs. ***State of Haryana*** : ***2010 CRI.L.J. 450 (SC)*** and ***Yomeshbhai Pranshankar Bhatt*** vs. ***State of Gujarat*** : ***(2011) 6 SCC 312***. As per the Learned Senior Counsel, in all these cases where circumstances were quite similar, sentences were reduced to one under Part II of Section 304 IPC from Section 302 IPC.

6(i). Mr. Karma Thinlay, Learned Additional Public Prosecutor, on the other hand, urged that the Appellant

did not deserve any leniency in view of the well-established evidence of him having committed the offence intentionally and in a premeditated manner thereby clearly attracting the provisions of Section 300 IPC read with Section 302 IPC. As per him, the incident of reluctance on the part of the deceased and his wife to lend him money that had angered the Appellant, took place at about 4 p.m. of the fateful day. On the other hand, the altercation between the Appellant and the deceased had taken place after 11 p.m., i.e., more than 5 hours later and, therefore, the question of the Appellant having committed the offence due to grave and sudden provocation or on account of a sudden fight or in the heat of passion upon a sudden quarrel did not arise at all. That the fact that the Appellant had carried a 'khukuri' with him as would appear in the evidence of P.W.2, the mother (though retracted) would lead one to draw a reasonable inference that the Appellant had intended to cause the death of the deceased by using that weapon.

(ii) Relying upon ***Mariadasan and Others*** vs. ***State of Tamil Nadu*** : ***(1980) 3 SCC 68***, it was submitted that the intention and premeditation on the part of the Appellant to cause the death of the deceased gets fortified

by the nature and severity of the injury caused on the neck, a vital part of the body, which as per the medico-legal autopsy report, Exhibit 16 was "Elliptical shaped chop incised injury over the base of left side neck measuring 21 x 6.5 x 1.5 cm over the front and 8 cm over the back. The anterior tip of the wound is placed 156 cm above the heel and the posterior tip is 166 cm above the heel. The wound includes the skin, resection of the left side vessels involving the left lateral aspect of C7 bone and bone incision (3 cms)" and the cause of death as per the opinion of the Medico-Legal Specialist was "due to Hypovolaemic shock as a result of Homicidal chop wound caused by a sharp cutting moderately heavy weapon".

(iii) It was submitted that contrary to what was urged on behalf of the Appellant, undue advantage was taken by the Appellant and had acted in a most cruel manner. This is evident from the nature of the attack and the weapon used by the Appellant. Reliance on this was placed in ***Babulal Bhagwan Khandare and Another*** vs. ***State of Maharashtra*** : ***(2005) 10 SCC 404*** where it has been held as under:-

> **"19.** Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In *Kikar Singh* v. *State of Rajasthan* [(1993) 4 SCC 238] it was held

> that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that by using the blows with the knowledge that they were likely to cause death he had taken undue advantage. In the instant case blows on vital parts of unarmed persons were given with brutality. The abdomens of two deceased persons were ripped open and internal organs come out. In view of the aforesaid factual position, Exception 4 to Section 300 IPC has been rightly held to be inapplicable.**"**

(iv) The Learned Additional Public Prosecutor would submit that all these established facts would lead one to draw an irresistible conclusion that the Appellant had committed the act of causing the injury with the intention to cause the death of the deceased thereby attracting the provisions of Section 300 IPC. Reliance on this was also placed upon ***Suraj Bhan*** vs. ***State of Haryana*** : ***(2002) 10 SCC 362*** (paragraph 9).

7(i). I have given anxious consideration to the divergent submissions placed by the Learned Counsel, the evidence and the record. The limited question that falls for consideration by this Court is, having regard to the facts of the case, whether the Appellant is entitled to reduction of the sentence from one under Section 302 IPC to that under Part II of Section 304 IPC.

(ii) Before embarking upon the deliberations on the factual aspects and the evidence, it is essential to lay

down the principle governing such consideration. Section 300 IPC provides that "except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or— …….". On a bare perusal of this, it is amply clear that in order for an act to constitute an offence under Section 300 IPC the primary requirement is that it should have been done with the intention of causing death. The underlying requirement to fall under Section 300 IPC, therefore, is conscious act coupled with intention to cause death.

(iii) Exceptions 1 and 4 to Section 300 IPC with which we are presently concerned, however, contemplates that the offender ought to have committed the act whilst deprived of the power of self-control by grave and sudden provocation of the persons, who gave the provocation and 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. In both these exceptions what is inherent is the suddenness of action in causing the death of the person and loss of self-control. Part II of Section 304 IPC contemplates that the act ought to have been committed with the knowledge that it is likely to cause

death but without any intention to cause death or to cause such bodily injury as is likely to cause death.

8(i). Upon consideration of the essence of the relevant provisions of the Penal Code alluded to above, let us now examine the facts that have emerged from the evidence of the case. The submission on behalf of the Appellant essentially is that although the deceased died due to the act of the Appellant he had no intention to cause the death of the deceased by that act.

(ii) It is an admitted position that this alternative plea of the offence with lesser sentence was not raised before the Learned Trial Court. Naturally, no effort was made by the Appellant to discharge his burden under Section 105 of the Indian Evidence Act, 1872, of proving that the case of the Accused falls within the Exceptions to Section 300 IPC. Relying upon the judgment dated 01-09-2011 in Criminal Appeal No.1 of 2011 in the matter of ***Mona Hang Subba*** vs. ***State of Sikkim*** rendered by this very Court, Mr. N. Rai submitted that even if such a plea was not raised before the Learned Trial Court yet in the interest of justice it would be permissible for this Court to consider that aspect and grant the relief if the Appellant is

found entitled to under the facts and circumstances of the case. On this proposition, Mr. Rai sought to rely upon ***State of U.P.*** vs. ***Lakhmi*** : ***(1998) 4 SCC 336***, which was also referred to in ***Mona Han Subba (supra)*** the relevant portion of which is reproduced below:

> **"17.** The law is that burden of proving such an exception is on the accused. But the mere fact that the accused adopted another alternative defence during his examination under Section 313 of the IPC without referring to Exception I of Section 300 of IPC is not enough to deny him of the benefit of the exception, if the Court can cull out materials from evidence pointing to the existence of circumstances leading to that exception. It is not the law that failure to set up such a defence would foreclose the right to rely on the exception once and for all. It is axiomatic that burden on the accused to prove any fact can be discharged either through defence evidence or even through prosecution evidence by showing a preponderance of probability.**"** **[underlining mine]**

(iii) Based upon this proposition of law, in ***Mona Hang Subba's case*** also where the alternative defence had not been taken during the trial, it was allowed to be urged at the stage of Appeal. In view of this, it would but fair that the Appellant is permitted to take the plea for consideration by this Court in this case also.

(iv) We have noticed from the evidence that the Appellant seriously resented to the deceased and his wife being reluctant in lending him the money that he had asked for. Although this incident had taken place at about

4 p.m. of that day we find that the anger of the Appellant persisted even later when he left the house in a huff without having the meal served for him as would appear from the evidence of P.W.10. He returned late in the night as the evidence reveals and created a ruckus by lifting the sacks of “kalo dal” collected during the day time and spilling them all over. This, in my view, was a tantrum thrown by the Appellant at the deceased who was but his elder brother. The situation got aggravated only when the deceased “pushed the accused” to stop him from what he was doing as revealed from the evidence of P.W.10, the wife of the deceased. Passion appears to have mounted when P.W.2, the mother of the deceased, caught hold of the deceased when she saw two of them having a tussle trying to pull each other out of the house as disclosed in her evidence. It is also in the evidence of P.Ws 2 and 10 that while the deceased went towards the cowshed the Appellant managed to free himself from the grips of his mother and struck the deceased with a dagger that he was carrying felling him at the spot resulting in the deceased bleeding profusely from the wound. We also find in the evidence of P.W.15 that the Appellant and P.W.2 were holding the victim who lay on the ground.

(v) The sequence of events narrated above would negate the existence of an intention or premeditation on the part of the Appellant to cause death of the deceased. The evidence no doubt reveals the resentment and the anger of the Appellant against the deceased but the cause of the anger and resentment, i.e., reluctant lending of Rs.200/- (Rupees two hundred), in my view, is quite trivial and not so grave as to make one to seek revenge. The act committed by the Appellant clearly appears to have been committed in a heat of passion and rage that arose in the tussle with the deceased as already discussed. The evidence of P.Ws 11 and 17 also reveal that the Appellant had consumed at least three bottles of alcohol and by this it may reasonably presumed that he was in an inebriated condition. The medical examination of the Appellant no doubt does not indicate that he had consumed alcohol but we find from his medical report, Exhibit 22, that the medical examination for which he had been referred was for the limited purpose of finding out the existence of injury on his body. The requisition for medical examination of the Appellant, Exhibit 21, clearly sets out the purpose as being “Medical examination for opinion for physical fitness”.

(vi) In ***K. M. Nanavati*** vs. ***State of Maharashtra*** : ***AIR 1962 SC 605*** where we find reference having been made to the following passage from ***Mancini*** vs. ***Director of Public Prosecutions*** : ***1942 AC 1 at p.9***:-

> **"**The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies.**"**

(vii) From the above, the necessary corollary that would follow is that the act should have been committed during the continuance of the temporary loss of self-control and that the fatal blow should be clearly traced to that condition of mind. In the very case of ***Nanavati (supra)*** the Indian condition of law has been set out as under:

> **"**(85) The Indian law, relevant to the present enquiry, may be stated thus : (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to S. 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise

> giving room and scope for premeditation and calculation.”

(viii) In the present case, the deceased and the Appellant were poor farmers for whom Rs.200/- (Rupees two hundred) is a substantial sum. It was, therefore, quite natural for the deceased to have been reluctant to part with and, for the Appellant to be resentful of the reluctance. The commotion and the din created by the Appellant was clearly a tantrum being thrown by him being the youngest brother. It certainly cannot be considered as a precursor to the commission of the offence. The act that caused the fatal injury appears to have been triggered by the deceased pushing the Appellant, the tussle that followed and aggravated by the mother, P.W.2, in holding him. The evidence also reveals that the Appellant had struck a single blow with the weapon under the circumstances discussed above. The other aspect is the conduct of the Appellant in sitting by the side of the Appellant after he had fallen which is reflective of the state of his mind and a mitigating circumstance in his favour being quite incongruous to a situation where there is a premeditated act of murder. There is of course the evidence of the Appellant having

hidden the weapon of offence behind the cowshed. But this fact in isolation cannot indicate Appellant's intention to cause the death of the deceased. This at best may be inferred as being the result of his nervousness.

9. In ***Gurmukh Singh (supra)*** two earlier cases decided by the Hon'ble Supreme Court have been discussed the facts of which are somewhat similar to the case at hand. The relevant portions are reproduced below for convenience:-

> **"17.** In Jagtar Singh v. State of Punjab (1983) 2 SCC 342 : (*AIR 1983 SC 463*), the accused in the spur of the moment inflicted a knife blow in the chest of the deceased. The injury proved to be fatal. The doctor opined that the injury was sufficient in the ordinary course of nature to cause death. This Court observed that the quarrel was of a trivial nature and even in such a trivial quarrel the appellant wielded a weapon like a knife and landed a blow in the chest. In these circumstances, it is a permissible inference that the appellant at least could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death. This Court altered the conviction of the appellant from section 302 IPC to section 304 Part II IPC and sentenced the accused to suffer rigorous imprisonment for five years.
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> **18.** In Hem Raj v. State (Delhi Administration) (1990) Supp. SCC 291 : (*AIR 1990 SC 2252*), the accused inflicted single stab injury landing on the chest of the deceased. The occurrence admittedly had taken place in the spur of the moment and in heat of passion upon a sudden quarrel. According to the doctor the injury was sufficient in the ordinary course of nature to cause death. This Court observed as under:
>
> "14. The question is whether the appellant could be said to have caused that particular injury with the intention of causing death of the deceased. As the totality of the established facts and circumstances do show that the occurrence had happened most

> unexpectedly in a sudden quarrel and without pre-meditation during the course of which the appellant caused a solitary injury, he could not be imputed with the intention to cause death of the deceased or with the intention to cause that particular fatal injury; but he could be imputed with the knowledge that he was likely to cause an injury which was likely to cause death. Because in the absence of any positive proof that the appellant caused the death of the deceased with the intention of causing death or intentionally inflicted that particular injury which in the ordinary course of nature was sufficient to cause death, neither Clause I nor Clause III of Section 300 IPC will be attracted. ....."
>
> This Court while setting aside the conviction under section 302 convicted the accused under section 304 Part II and sentenced him to undergo rigorous imprisonment for seven years.**"**

10. On consideration of the entire evidence including the medical evidence, I am clearly of the view that the conviction of the Appellant cannot be sustained under Section 302 IPC, but the appropriate Section under which the Appellant ought to be convicted is Section 304 Part II IPC.

11. On the question of sentence, it is the submission of Mr. N. Rai that the Appellant was a young man of 30 years when he committed the offence and has already undergone imprisonment for a period of 3 years 11 months and 4 days as on the date of final hearing before this Court, i.e., 04-09-2013, and accordingly, prays that the sentence be limited to the extent of the period of imprisonment already undergone.

12. Upon consideration of the facts and circumstances of the case, I am of the view that interest of justice would be served if the Appellant is sentenced to undergo imprisonment of 5 years duly setting off the period of detention already undergone by him. However, the sentence of fine imposed by the Learned Trial Court shall remain unaltered.

13. In the result, the Appeal is partially allowed and the impugned judgment and sentence of the Learned Sessions Judge, South and West Sikkim, hereby stands modified to the extent stated above.

14. No order as to costs.

15. A copy of this judgment be transmitted forthwith to the Learned Sessions Judge, South and West Sikkim at Namchi for its due compliance.

16. Records of the Learned Court below also be returned forthwith.

Sd/-

(S. P. Wangdi)
Judge
09-09-2013

Index : Yes
Internet : Yes

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