HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Single Bench : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.31/2014

APPELLANT - Subash Rai,
S/o Late D. B. Rai,
R/o Meyong Sagbari,
West Sikkim.
At present
State Central Prison, Rongyek,
East Sikkim.

Versus

RESPONDENT - State of Sikkim

APPEARANCE - Mr. Jorgay Namka,
Legal Aid
Counsel for the Appellant.

Mrs. Pollin Rai, Assistant
Public Prosecutor for the
State/Respondent.

An Appeal u/S 374(2) of the Cr.P.C. 1973

J U D G M E N T

(22.05.2015)

Meenakshi Madan Rai, J.

The Appellant, by filing this Appeal, assails the Judgment and Sentence of the Learned Sessions Court, South Sikkim at Namchi, in Sessions Trial Case No.03 of 2014. The Learned Court convicted the Appellant under Section 307 of the Indian Penal Code, 1860 (for

short "**IPC"**) and sentenced him to undergo Simple Imprisonment for a

period of five years and to pay a fine of Rs.20,000/- with a default clause of imprisonment on non-payment.

2. The facts of the case giving rise to the instant incident are that the Appellant on 22.11.2013 at around 11.00 p.m. entered the house of the PW-1, the victim after knocking on her door. On PW-1 answering the door, he entered and enquired as to where she kept her money and gold jewellery. At the same time he assured her that in a short while he would return the amount of Rs.1000/- (Rupees One Thousand) only, which he owed her, from the total loan of Rs. 15,000/- (Rupees Fifteen Thousand) only. He then left the house, while the victim went to a room to lie down without bolting the door from inside. After sometime, the Appellant again entered her house armed with an iron rod and rice cooker cable and attacked her on her head with the iron rod. She managed to snatch both articles from the Appellant and dragged him out of her house, where PW-2 and PW-4 were standing outside.

3. After hearing the submissions of the Learned Public Prosecutor and the Learned Defense Counsel, the Learned Sessions Court finding *prima facie* materials against the accused, under Section 307 of the IPC framed charge accordingly against the

Appellant. The Prosecution witnesses were examined and the Learned Trial Court relying on the evidence so furnished, convicted

the Appellant as detailed hereinabove. It is against this conviction and order of sentence that the Appeal has been preferred.

4. Mr. Jorgay Namka, the learned Legal Aid Counsel for the Appellant, before this Court submitted that the Learned Trial Court erred by not taking into consideration the evidence adduced by PW-7, the Medical Officer and the Medical Report and arrived at an erroneous finding. That, the Learned Trial Court failed to take into consideration that the essential ingredients for an offence under Section 307 of the IPC were not proved. It is prayed that the Judgment and Order of the Learned Trial Court be set aside. In the alternative, it is also prayed that the offence may be brought down to one under Section 324 of the IPC instead of Section 307 of the IPC, 1860. On this count, the arguments put forth were that the evidence of PW-1, PW-2 and PW-4 clearly indicated that the victim had in fact dragged the Appellant outside from her house, therefore, the question of the victim being grievously hurt does not arise. That, the accused had no intention of committing the offence under Section 307 of the IPC and in all probability was attempting to commit theft. To support his contentions that the offence does not fall u/S 307 of the IPC, Learned Legal Aid Counsel for the Appellant, placed reliance on **Kundan Singh** vs. **State of Punjab** : **AIR 1982 SC 62**, **Jai Narayan Singh & Ors.** vs.

The State of Bihar : AIR 1972 SC 1764 and Hari Kishan and State of Haryana vs. **Sukhbir Singh & Ors. : AIR 1988 SC 2127**. It was mentioned

in passing that the FIR was lodged after the investigation commenced, but that the Appellant does not press this aspect for the purposes of this Appeal.

5. *Per contra*, the arguments of Mrs. Pollin Rai, Learned Assistant Public Prosecutor, was to the effect that the Learned Trial Court had correctly appreciated the evidence on record and convicted the Appellant and sentenced him accordingly. That the incident took place at 11.00 p.m. on 22.11.2013 and there is sufficient evidence on record to indicate that the Appellant had prepared for the offence and had the "intention" and "knowledge" as required for an offence under Section 307 of the IPC. According to her, the evidence given by PW-1, has not been demolished while PW-4 "*is as good as an eye witness*" since he was outside the house of the victim when the fracas was ensuing inside and heard it. To fortify her submissions, she has drawn the attention of this Court to the decisions of the Hon'ble Apex Court in **Parsuram Pandey & Ors.** vs. **State of Bihar : 2004 (13) SCC 189** and **Sagayam** vs. **State of Karnataka : 2000 (4) SCC 454**. That, in the facts and circumstances, it is evident from the testimonies of the witnesses that there is no requirement to interfere with the decision of the Learned Trial Court.

6. I have heard the rival contentions of the Learned Counsels and given careful and anxious consideration to the same. I have also carefully perused and considered the entire evidence of the Prosecution furnished before the Learned Trial Court, the documents on record and the impugned judgment.

7. What falls for consideration before this Court is whether the Prosecution has been able to prove that the Appellant committed an offence under Section 307 of the IPC or whether it was an offence only under Section 324 of the IPC.

8. In **Parsuram Pandey & Ors.** (supra), relied on by the Learned Assistant Government Advocate, it has, *inter alia,* been held that Section 307 of the IPC clearly contemplates an act which is done with the intention of causing death, but which fails to bring about the intended consequence on account of intervening circumstances. That, the intention or knowledge of the accused, must be such as is necessary to constitute murder. In the absence of intention or knowledge which is the necessary ingredient of Section 307, there can be no offence of attempt of murder. That, intent which is a state of mind cannot be proved by exercise of direct evidence, as a fact it can only be detected or inferred from other factors such as from the nature of the weapon

used, the nature and place where the injuries were inflicted, and the circumstances in which the incident took place. In the said case, one Parsuram and Bishram had opened fire indiscriminately in an open area where villagers were present and the

villagers sustained simple injuries. None of the witnesses therein stated that the fire arm causing injuries was being used by any particular accused for causing injuries to them and in fact the injured persons had not seen the accused persons using the fire arms. The Hon'ble Apex Court found no intention or knowledge to commit either murder or attempt to murder and acquitted the accused persons.

9. In **2000 (4) SCC 454 : Sagayam** vs. **State of Karnataka** relied on by the Learned Assistant Government Advocate, it was, *inter alia*, held that to justify a conviction under Section 307 of the IPC, it is not essential that bodily injury capable of causing death should have been inflicted. An attempt, in order to be criminal need not be the penultimate act foreboding death. It is sufficient in law if an intention is present coupled with an overt act in execution thereof such act being proximate to the crime intended and if the attempt has gone so far that it would have been complete, but for the extraneous intervention which frustrated its consummation. The Hon'ble Apex Court in the said decision has held that there are different stages in a crime, first, the intention to commit it, second, the preparation to commit it and third,

the attempt to commit it, if at the third stage the attempt fails, the crime is not complete but the law punishes for attempting the same.

10. On the other hand, in **Jai Narayan Singh & Ors.** (supra) relied on by the Learned Legal Aid Counsel for the Appellant, while discussing the facts of the case, it was, *inter alia*, held that –

> "……..Where four or five persons attack a man with deadly weapon it may well be presumed that the intention is to cause death. In the present case, however, three injuries are of simple nature though deadly weapons were used and the fourth injury caused by Suraj though endangering life could not be deemed to be an injury which would have necessarily caused death but for timely medical aid. The benefit of doubt must, therefore, be given to Suraj with regard to the injury intended to be caused and, in our opinion, the offence is not one under Section 307- IPC but Section 326-IPC……."

The conviction of the accused in the said case under Section 307 IPC was set aside and he was convicted under Section 326 of the IPC.

11. In **Kundan Singh & Ors.** (supra) the Hon'ble Apex Court was held as follows ;

> "We are of the view that having regard to the facts and circumstances of the present case and particularly in view of the fact that P.W.6 and P.W.7 were in the courtyard of their house when the appellant fired gun shots and he could not, therefore, have intended to injure them, the conviction of the Appellant under S. 307 I.P.C. was not justified. We think that the conviction of the appellant could be maintained only under S. 324 of the I.P.C, since P.W.6 and P.W.7 received simple injuries. We accordingly allow the appeal and alter the conviction of the appellant to one under S. 324 of the I.P.C, for causing simple injuries to P.W. 6 and P.W. 7 and since the appellant has already suffered imprisonment for about 16 months, we direct that the sentence imposed on the appellant be reduced to that already undergone by him and he may be set at liberty forthwith.
>
> Appeal allowed."

12. In **Hari Kishan and State of Haryana** (supra), cited by Learned Counsel for the Appellant, the Hon'ble Apex Court opined that ;

> "On the first question as to acquittal of the accused under S. 307/149 IPC, some significant aspects may be borne in mind. Under S. 307, IPC what the court has to see is, whether the act irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in that section. The intention or knowledge of the accused must be such as is necessary (to) constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under S. 307 the intention precedes the act attributed to accused. Therefore, the intention is to be gathered from all circumstances, and not merely from the consequences that ensue. The nature of the weapon used, manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury
> is inflicted are some of the factors that may be taken into consideration to determine the intention."
>
> ……
> ……."

In the said case, it was found that two parties in the course of a fight inflicted injuries on each other both serious and minor. The accused though armed with '*ballam*' used only the blunt side and never the sharp edge, despite being attacked by the other side. It appeared to the Hon'ble Apex Court that this fact appeared to prove that they had no intention to commit murder neither did they have any motive. Hence, the acquittal was not disturbed.

13. It would be pertinent to mention here that for an offence under Section 307 of the IPC, it is essential that the accused has the "intention" or "knowledge", and under such circumstances that, if he by that act caused death, he would be guilty of murder, and

would be penalized in terms of the penalty given therein. Thus, this Section applies to an attempt to murder in which there has been not merely a commencement of an execution of the purpose, but the consummation thereof is hindered by circumstances beyond the will of the accused. The act committed by the accused must be an act capable of causing death in the natural and ordinary course of things.

14. In addition to the above, attempt, for the purposes of Section 307 IPC should emanate from a specific intent to commit the offence and this condition of mind may be gathered from direct or circumstantial evidence which includes the conduct of the accused. It may also be borne in mind that intention and knowledge are a man's state of mind and direct evidence thereof cannot be obtained except through his own confession. Thus, intention and knowledge clearly have to be inferred from the attending circumstances of the case such as motive, preparation, the weapon of offence used, persistence of the assault and the nature of the injuries caused, as also the location of the injuries.

15. In this regard, it would be relevant to note that; **"***Although a spear thrust in the chest is likely to have fatal results, if the spear penetrates sufficiently deep, still however having regard to the nature of the injury, namely, that the thrust caused a punctured wound which only extended up to the pleural cavity and did not*

cause injury to the pleura or to the lungs or to any other vital organ of the body, it would be a doubtful case whether the hurt in question could be said to be of that category which has the effect of endangering life. Hence the proper section that would apply would be Sec. 324 I.P.C., namely, voluntarily causing hurt with dangerous weapons." **(See Hari Singh Gour's Penal Law of India 11th Edition page 3234).**

16. After taking into consideration all principles of law enunciated in the above matters, and the discussions put forth, it would be worthwhile taking into consideration the facts of the case at hand, the evidence furnished thereof and to analyse where the same would be sufficient to sustain the conviction under Section 307 of the IPC. or whether the offence could be one under Section 324 of the IPC.

17. For proper appreciation of the rival contentions, I deem it necessary to set out Sections 307 and 324 of the IPC for convenience ;

> "**307. Attempt to murder. –** Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment to life], or to such punishment as is hereinbefore mentioned."

> "**324. Voluntarily causing hurt by dangerous weapons or means.-**
> Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting,

> stabbing or cutting, or any instrument which, used as weapon of offence, is likely to cause death, or by means of fire or any heated

substance, or by means of any poison or any corrosive substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

18. PW-1, Passang Lhamu Sherpa, aged about 60 years, is the victim and is the only eye witness to the incident for obvious reasons. The Appellant and she were well acquainted and she had loaned out Rs.15,000/- to him of which he was to return a balance of Rs.1000/-. On the relevant night i.e. 22.11.2013 at around 11.00 p.m., according to her, the Appellant came to her house and verified from her as to where she kept her jewellery and cash, assuring that he would repay the balance loan owed by him after some time. Thereafter, he left her house and while the victim was in another room lying down, he reentered her house armed with an iron rod and a rice cooker cable. He lifted the rod with both his hands and attacked PW-1 on her head.

19. This evidence with regard to the Appellant attacking PW-1 with an iron rod using both hands appears to be unreliable, in view of the evidence of PW-7, Medical Officer, Dr. Reena Tamang. The reasons being; if as PW-1 has stated, the Appellant had used both his hands to assault her with an iron rod then obviously she would have sustained grievous injuries on her head and not merely an injury as

described in Exbt. 6 i.e. a '*Cut injury mark by Rod (about 3.5 cms.) in length.*"

20. In fact, on perusal of Exbt. 6 the medical report of the victim prepared by PW-7 the Doctor, reads as follows ;

> 'The alleged is conscious, well oriented and cooperative.
> B.P. 160/100 mg
> P. – 73/minute
> Chest – B/L Ckear
> CVS } Normal
> CUS }
> Bowel/Bladder habits (N)
> O/E:- : Cut injury mark by rod (about 3.5 cms) in length
> Bleeding (+)
> Tenderness (++)
> No Alcoholic smell
> Grievous type of injury
>
> Sd/-
> Dr. Reena Tamang, Geyzing"

21. Firstly, PW-7 the Doctor has failed to even indicate the part of the body of the victim on which the cut injury was found by her on examination of the patient. Secondly, Exbt. 6 describes the injury as "*Cut injury mark*" and not specifically as a "*Cut injury*", added to which the depth of the injury has not been detailed, thereby indicating it was only a superficial cut injury measuring about 3.5 cms in length, amazingly, though PW-7 has classified the injury as "*Grievous type of injury*". She further states that "*On her examination, I found a cut injury mark measuring about 3.5 cms* ***probably inflicted with a rod***". This opinion, that a rod was used,

appears to be based on the requisition filed by the SHO, Hingdam P.S. in Exbt. 7 as follows :-

> *" Brief facts of the case (as known to the police at this moment) :*
>
> *Assaulted to* (sic) *Passang Lhamu Sherpa aged – 60 years with the iron rod on the head tonight at 1100 hrs at NHPC Colony. Hence, I am forwarding them for medical examination & opinion for Police Custody, whether the person has consumed alcohol or substance if any."*

Although PW-7 has said *"In my opinion, the concerned injury was grievous in nature."* She has failed to put forth the reasons for her opinion.

22. In this context, one may usefully refer to Section 320 of the IPC which deals with grievous injuries and reads as follows ;

> "**320. Grievous hurt –** The following kinds of hurt only are designated as "*grievous*" :-
>
> | | | |
> |---|---|---|
> | *First* | - | Emasculation. |
> | *Secondly* | - | Permanent privation of the sight of either eye. |
> | *Thirdly* | - | Permanent privation of the hearing of either ear. |
> | *Fourthly* | - | Privation of any member or joint. |
> | *Fifthly* | - | Destruction or permanent impairing of the powers of any member or joint. |
> | *Sixthly* | - | Permanent disfiguration of the head or face |
> | *Seventhly* | - | Fracture or dislocation of a bone or tooth. |
> | *Eighthly* | - | Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits." |

The injury on PW-1 as per Exbt. 6 and the evidence of PW-7 is by no stretch of the imagination an injury which is covered by the ambit of Section 320 IPC.

23. Although it was stoutly argued by Mrs. Pollin Rai, Learned Assistant Public Prosecutor that the nature of an injury cannot lead to the conclusion that the Appellant had no intention but from an inference of the entire facts and circumstances, there is nothing to establish that the Appellant had any intention to murder the victim or was making an attempt towards such an offence. It is not the Prosecution Case that he failed to repay her loan and, therefore, had a motive. This argument, in any event, would have been incongruous in consideration of the fact that out of Rs.15,000/- taken as loan by him, he had repaid Rs.14,000/-. Evidently, as argued by Mr. Jorgay Namka, Learned Legal Aid Counsel for the Appellant, he had entered the house of PW-1 in an attempt to commit theft but as luck would have it, he was overpowered by PW-1 as appears from her own evidence wherein she has stated that "*I struggled for saving myself and started screaming for help. But somehow managed to get hold of him. In the meantime my neighbor D. B. Gurung and others came in front of my house by which time I had managed to push the accused towards the main door*."

24. The evidence of PW-1 is supported by the evidence of PW-2 who had gone to the place of occurrence on hearing people shouting. "*…. When I checked I saw Ms. Passang Lhamu Sherpa*

catching hold of the accused by his collar. She also had one rod in her other hand and was bleeding profusely from her head. She was screaming saying that the accused had tried to kill her."

25. PW-4 has further supported the evidence of PW-1 and PW-2 as according to him "*……When I came out and checked I saw that some people had gathered in front of the apartment of Ms. Passang Lhamu Sherpa. We could hear Ms. Passang Lhamu Sherpa shouting from inside her apartment. After few moments she came out dragging the accused. In fact she had got the accused by his collar and was also holding an iron rod on her other hand. She was bleeding from her head and was screaming.*"

26. The evidence reflected hereinabove, clearly indicates that the injury inflicted on the victim was not sufficient in the ordinary course of nature to have caused her death. It is also evident that even after being injured, she was able to overpower the Appellant and drag him outside. Had the Appellant the intention of doing away with the victim PW-1, he could have repeatedly assaulted her with the iron

rod, but there is no evidence of any persistent assault. It cannot be said that only on extraneous intervention the crime could not be committed. The evidence on record of PW-2 reveals that PW-1 had the rod, MOI in her hand which is also substantiated by the evidence of PW-4. PW-1 is a lady of about 60 years, while the Appellant is a strapping lad of about 27 years, obviously the physical strength of PW-1 would have been no match for the Appellant had he really had the intention to kill PW-1.

27. Therefore, from an inference of the facts and attending circumstances, it cannot be ruled out that the Appellant and the victim had a free fight in which the Appellant managed to assault the victim, but in due course of time she overpowered him.

28. In view of the evidence on record and the discussions hereinabove, I am of the considered opinion that the offence committed by the Appellant does not fall under Section 307 of the IPC but fulfils the ingredients under Section 324 of the IPC.

29. Consequently, the Judgment of the Learned Trial Court convicting the Appellant under Section 307 of the IPC is set aside and so also the Sentence.

30. The Appellant is convicted of the offence under Section 324 of the IPC.

31. In consideration of the submissions on Sentence made by Learned Counsel for the Appellant, I am of the considered opinion that the following Sentence would meet the ends of justice**.**

32. The Appellant is sentenced to undergo Simple Imprisonment for 17 months u/S 324 of the IPC, setting off the period of imprisonment already undergone by him as an under-trial-prisoner and after conviction.

33. He is also sentenced to pay a fine of Rs.2500/- (Rupees two thousand five hundred) only, in default of payment of fine, to undergo further S.I. of 3 (three) months.

34. In the event that the Appellant has paid the fine imposed by the Learned Trial Court, the amount in excess of the fine imposed by this Court shall be returned to him.

35. Appeal disposed of accordingly.

36. Records of the Learned Trial Court be remitted.

Sd/-

(Meenakshi Madan Rai)
Judge
22.05.2015

Approved for Reporting : Yes / No
Internet : Yes/ No

at/