THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 30th November, 2022

DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl.A. No.02 of 2022

Appellant : Dechen Lepcha

versus

Respondent : State of Sikkim

An Appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

Appearance

Mr. Tashi Rapten Barfungpa, Advocate (Legal Aid Counsel) for the Appellant.

Dr. (Mrs.) Doma T. Bhutia, Public Prosecutor with Mr. S. K. Chettri, Additional Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal assails the Judgment and Order on Sentence, dated 26-10-2021 and 28-10-2021 respectively, of the Learned Sessions Court, West Sikkim, at Gyalshing, in Sessions Trial Case No.01 of 2020.

2. The Appellant on 04-01-2020, having caused the death of his wife by assaulting her with a stone on her head, at Ramgaythang, West Sikkim, surrendered before the In-Charge, Yuksom Police Outpost, West Sikkim at around 1.40 p.m. and informed P.W. 3, the Assistant Sub-Inspector of Police (ASI), of the incident. P.W. 3 immediately took him into custody and reported the incident to P.W. 17, the Station House Officer (SHO), Gyalshing Police Station, who directed him to file a Report. P.W. 3 accordingly lodged Exhibit 7 at the Gyalshing Police Station at

around 3.00 p.m. Gyalshing Police Station, Case No.01/2020, dated 04-01-2020, under Section 302 of the Indian Penal Code, 1860 (hereinafter, the "IPC"), was then registered against the Accused/Appellant. P.W. 7 took up for the investigation and submitted Charge-Sheet against the Appellant under Section 302 of the IPC and Supplementary Charge-Sheet containing the Forensic Report.

3(i). The Appellant pleaded "not guilty" to the Charge under Section 302 of the IPC before the Learned Trial Court which led to the Prosecution examining seventeen witnesses to establish their case. The Appellant was afforded an opportunity to explain the incriminating evidence against him under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C"), where he denied having gone to the Yuksom Police Outpost, West Sikkim, but did not deny the evidence that appeared against him. Pursuant to the final arguments of the parties, the Learned Trial Court on consideration of the entire evidence, convicted the Appellant under Section 302 of the IPC and Sentenced him to undergo life imprisonment and to pay a fine of Rs.10,000/- (Rupees ten thousand) only.

(ii) Assailing the Judgment of conviction under Section 302 of the IPC, Learned Counsel for the Appellant submitted that the offence committed by the Appellant falls within the ambit of Section 304 Part II of the IPC and not under Section 302 of the IPC. That, *mens rea* which constitutes an essential element in an offence under Section 302 of the IPC was lacking when the incident occurred, on the spur of the moment, due to grave and sudden provocation meted out by the victim to the Appellant. The incident

was not premeditated therefore taking it out of the ambit of Sections 300 and penalty under Section 302 of the IPC. That, the statement of the Appellant under Section 27 of the Indian Evidence Act, 1872 (hereinafter, the "Evidence" Act) was correctly disregarded by the Learned Trial Court for the reason that P.W. 11 one of the witnesses to the Disclosure statement, Exhibit 16 failed to prove that it was made in his presence. That, the Appellant has no criminal antecedents and the incarceration of the Appellant is in fact penalising his child who was two years old at the time of the incident is now in foster care, devoid of the care and affection of his father.

(iii) Relying on the ratio of ***Kusha Laxman Waghmare*** vs. ***State of Maharashtra***[1], it was urged that the Hon'ble Supreme Court while considering a matter in which the Appellant had assaulted and killed his wife with a wooden stick, on analysing the entire evidence was of the view that it was not a fit case where conviction could be sustained under Section 302 of the IPC, as there was no cogent evidence to show that the Appellant had beaten the deceased with an intention to cause her death. That, in such circumstances, the conviction of the Appellant under Section 304 Part II of the IPC was held to be just and proper. That, in ***Yatendrasingh Ajabsingh Chauhan*** vs. ***The State of Maharashtra***[2], the Appellant was working as a security guard in the bungalow of a film star where the deceased and other security guards were also deployed. The deceased on that night questioned the Appellant as to why he was sitting on the chair, whether his revolver was filled with bullets or not and whether his fire arm was working. The Appellant in anger held the

[1] (2014) 10 SCC 298
[2] Criminal Appeal No.822 of 2018 decided on 04-08-2022 by the SCI : 2022 LiveLaw (SC) 664

deceased by his collar and pulled the trigger of the revolver on the deceased's chest, which led to his death. The Court took the assistance of the Judgment in ***Pulicherla Nagaraju Alias Nagaraja Reddy*** vs. ***State of A.P***[3], wherein it was observed *inter alia* that the intention to cause death can be gathered generally from the combination of a few or several of the circumstances as enumerated in the Judgment. The Supreme Court concluded that there was no premeditation and the incident was due to an altercation between the deceased and the Appellant. That, the possibility of the Appellant being short tempered and responding in an unfortunate manner, could not be ruled out. It was also remarked that, unfortunately a loaded weapon was provided to the Appellant by his employer. That, no doubt the Appellant should have exercised caution and controlled himself, however, there cannot be a straitjacket formula for deciding whether there was intention to commit murder or not. That, similarly, whether there was grave and sudden provocation which would lead the Accused to lose his power of self-control, would depend upon the facts and circumstances of each case. That, how a person responds to a particular situation would depend upon the temperament of a particular person. A hot tempered person may react differently as compared to a cool headed person. The Supreme Court was therefore of the view that the case would fall under Exception 1 of Section 300 of the IPC and the conviction under Section 302 of the IPC was converted to on under Section 304, Part I, of the IPC. That, in consideration of the facts of the instant case the offence be thus converted to one under Section 304 Part II of the IPC.

[3] (2006) 11 SCC 444

4(i). Learned Public Prosecutor for the State-Respondent conversely contended that the Appellant started a quarrel with the victim, at the place where she was doing her chores and thereafter on her refusal to return home with him, despite his persuasion, he was enraged. That, the fact that he had the intention to kill her is evident from the circumstance that he chased her across the fields and assaulted her several times to ensure that she would meet her end. The cross-examination of the Prosecution Witnesses did not indicate that the offence took place on sudden provocation at the heat of the moment. The father of the Appellant, P.W. 4, witnessed the Appellant attempting to strike his wife with a stone and he told him not to do so, thereafter the Appellant was seen chasing her towards the fields. The cross-examination of P.W. 4 or P.W. 6, the Appellant's mother, did not reveal the temperament of the Appellant to assess his reaction to the quarrel. P.W. 8 heard P.W. 4 shouting that a person had been killed establishing that the Appellant had killed the victim and P.W. 11 and P.W. 13 witnesses to the Disclosure statement under Section 27 of the Evidence Act have proved that the rock employed by the Appellant, to assault the victim on her head, was recovered at the Appellant's instance and Exhibit 16 was proved by P.W. 11 and P.W. 13.

(ii) The Public Prosecutor further contended that the arrest took place on 04-01-2020, and the Appellant's Disclosure statement was recorded by the Investigating Officer (I.O.) on 05-01-2020 in Police custody in the presence of witnesses, duly establishing compliance of the envisaged legal requirements. That, Exhibit 16 was not considered by the Learned Trial Court despite it fulfilling all requisite legal parameters. That, P.W. 14

the Doctor, on *post mortem* of the victim found her face and skull were disfigured and the presence of lacerated injuries over both her right temporal bone and left forehead, with underlying fracture of the left frontal bone, revealing repeated assaults. That, the Appellant committed the offence of murder in a cruel manner duly established by the evidence on record, hence, the Judgment and Order on Sentence requires no interference.

5. Having considered the opposing submissions, examined all documents on record and evidence of the witnesses, the questions that require determination are;

(i) *Whether the Learned Trial Court was correct in dis-regarding Exhibit 16 the Disclosure statement of the Appellant?*

(ii) *Whether the Appellant can invoke the clemency of Exception 4 to Section 300 of the IPC claiming that the offence occurred without premeditation, in a sudden fight, without the Appellant having taken undue advantage or acted in a cruel unusual manner?*

6(i). Addressing the first question flagged, Section 27 of the Evidence Act, is extracted hereinbelow;

> **"27. How much of information received from accused may be proved**.—Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.**"**

(ii) It is imperative at this juncture to notice that Section 27 is by way of a proviso to Sections 25 and 26 of the Evidence Act, by which a statement made by the accused in Police custody, which distinctly relates to the fact discovered, is admissible in evidence

against the accused. The phrase **"**distinctly relates to the fact discovered**"** refers to that part of the information supplied by the accused which leads to the immediate cause of the discovery. If a fact is thereby actually discovered it lends some guarantee of the truth of that part of the information which was the clear, immediate and the proximate cause of the discovery. In ***Pulukuri Kottaya and Others*** vs. ***Emperor***[4] the Privy Council while clarifying the requirements of Section 27 of the Evidence Act, observed as follows;

> **"**[10]. Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and there upon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. ……..**"**

(iii) On the edifice of the principles enunciated above, it is necessary to examine Exhibit 16, the disclosure statement of the Appellant. Indisputably, it has been recorded when the Appellant was in Police custody on 05-01-2020, the incident having occurred on 04-01-2020. The witnesses to the statement were P.W. 11 Tika

[4] AIR 1947 PC 67

Ram Chettri and P.W. 13 Mangal Limboo. The Learned Trial Court was unimpressed with the statement of P.W. 13, as according to him, the recovery of M.O.V and M.O.VI (stones) were made from an open field. The Learned Trial Court opined that although the seizure of M.O.V and M.O.VI could not be demolished, nevertheless P.W. 13 admitted that the spot from where the stone was seized is an open area and that when they reached the spot there was several people already gathered at the spot. The Learned Trial Court also concluded that P.W. 11 had failed to prove that Exhibit 16 was made in his presence by the Appellant and hence, the Learned Trial Court dis-regarded Exhibit 16.

(iv) It is not the case of the Accused that the stones were planted there by any other person. The fact that seizure of M.O.V and M.O.VI from the place of occurrence in the presence of P.W. 11 and P.W. 13 have been duly established and the I.O. garners this evidence. It is settled law that where the evidence of the I.O. who recovered the Material Objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure/*panch* witnesses did not support the Prosecution version. The evidence of P.W. 11 and P.W. 13 supports the evidence regarding recovery of M.O.V and M.O.VI. P.W. 13 specifically deposed that Exhibit 16 was recorded in his presence and that of P.W. 11. P.W. 11 admitted to having affixed his signature on Exhibit 16 and identified it as Exhibit 16(a) although he appears to be unsure as to whether Exhibit 16 was prepared in his presence. P.W. 17, the I.O., deposed that Exhibit 16 was recorded in the presence of two independent witnesses, wherein the Appellant revealed that the stone which was the weapon of offence, had been

kept at the crime scene and he could show the spot where he had thrown the stone.

(v) Strictly speaking, Section 27 of the Evidence Act does not even envisage witnesses at the time of disclosure. However, witnesses are kept by way of abundant precaution by the I.O. In this context, in ***State, Govt. of NCT of Delhi*** vs. ***Sunil and Another***[5], the Supreme Court held as follows;

> **"20.** Hence it is a fallacious impression that when recovery is effected pursuant to any statement made by the accused the document prepared by the investigating officer contemporaneous with such recovery must necessarily be attested by the independent witnesses. Of course, if any such statement leads to recovery of any article it is open to the investigating officer to take the signature of any person present at that time, on the document prepared for such recovery. But if no witness was present or if no person had agreed to affix his signature on the document, it is difficult to lay down, as a proposition of law, that the document so prepared by the police officer must be treated as tainted and the recovery evidence unreliable. The court has to consider the evidence of the investigating officer who deposed to the fact of recovery based on the statement elicited from the accused on its own worth.
>
> **21.** We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. **Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of**

[5] (2001) 1 SCC 652

> **witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions.”**
> **[emphasis supplied]**

(vi) Hence, in light of what has been elaborated above, the disregarding of Exhibit 16 by the Learned Trial Court was erroneous, considering that the requisite parameters of law had been duly complied with. There is no eye witness to the ultimate incident and the ensuing death of the victim. P.W. 4 the eighty-one year old father of the Appellant was present when a quarrel broke out between the Appellant and the victim. According, to P.W. 4 at the time of incident the victim, his daughter-in-law, had come to their house (house of parents-in-law) and spent the night there. The next morning the Appellant arrived and asked the victim to return to their marital home, with him, which she refused. A quarrel thus ensued between them. The Appellant attempted to strike his wife with a stone in the presence of P.W. 4, who was holding their baby, he thus verbally restrained him. The victim thereafter fled towards the fields and the Appellant ran in her pursuit. P.W. 4 followed them and when he reached the spot at some distance below his house, he found her dead, lying face down on the ground with her clothes torn, with the Appellant nowhere in sight. His cross-examination could not decimate the evidence-in-chief. P.W. 1, the Learned Judicial Magistrate, had recorded the statement of P.W. 4 under Section 164 of the Cr.P.C which was

duly admitted by P.W. 4. The statement under Section 164 of the Cr.P.C and his evidence before the Learned Trial Court pertaining to the incident are consistent.

(vii) P.W. 2, the Doctor who examined the Appellant on the evening of the incident, around 10.30 p.m., prior to his Police custody, opined in Exhibit 6 her report, that he was fit for custody. He had admitted to her that the he had consumed alcohol at 11.00 a.m., that morning. P.W. 3 was the person to whom the Appellant reported the incident after the death of his wife. Upon such information when P.W. 3 reached the place of occurrence, he found the deceased lying face down on the ground, a blood stained stone nearby and a big boulder next to her body which also had blood stains. He found her face blood stained and her nose smashed, he also saw blood over her head and ears. The fact that the Appellant had reported to P.W. 3 that he had assaulted the victim and she had died was not demolished under cross-examination of P.W. 3. P.W. 5 the Vice-President of the Gram Panchayat Unit also went to the place of occurrence where he saw the body of the deceased lying face down near a big rock and saw the Appellant and P.W. 4 the Appellant's father at the spot. P.W. 6 mother of the Appellant had seen her son and the victim quarrelling but she left to fetch a *shaman*, prior to the occurrence of the incident.

(viii) P.W. 8 heard P.W. 4 shouting that a person had been killed despite which, she continued with her chores, on completion of which she went to the spot located above her house and saw the body of the victim and the villagers gathered there. P.W. 9 helped the police carry the body of the deceased from the place of occurrence to the road. P.W. 10 accompanied the sister-in-law of

the deceased to Gangtok with the dead body for its *post mortem*. P.W. 11 along with P.W. 13 were at the place of occurrence where the Police showed them a big rock which had blood stains and the Police chipped off part of the blood stained stone and took it. P.W. 11 testified that he was made to sign on Exhibit 14 and Exhibit 15 Seizure Memos of articles seized in the presence of both witnesses and on Exhibit 16, the Disclosure statement of the Appellant. The cross-examination did not decimate the facts stated in his evidence. P.W. 12 was a hearsay witness, while P.W. 13 the second witness to the Disclosure statement of the Appellant, stated with clarity that the Appellant in his presence and that of P.W. 11, at the Yuksom Police Outpost, disclosed in Exhibit 16, that he had killed his wife with a stone and he could show them where he had left the stone. Thereafter, according to him they accompanied the Police and the Appellant to a spot below the Appellant's house where the blood stained rock was seen and he also showed them another stone from where the Police took samples. The recovered articles which were sealed and packed in their presence.

(ix) The Doctor, P.W. 14, who conducted the *post mortem* of the deceased at a Government Hospital in Gangtok on 05-01-2020 at around 03.40 p.m. which concluded at 04.30 p.m. recorded the findings in his report as follow;

> "*On external examination I found the following:-*
>
> *Face was fully blood stained. Bleeding from nose and ear. Rigor mortis also present.*
>
> *Ante mortem injuries found were as under:-*
>
> *1. Bilateral bruised black eye.*
>
> *2. Face and the skull found disfigured.*
>
> *3. Lacerated injury measuring 4x3 cm over the right side of scalp over the right temporal bone.*

4. Lacerated injury measuring (5x4xbone) over the left forehead with underlying fracture of the frontal bone (left side).

5. Fracture of the left maxilla (cheek).

6. Abrasion measuring 4x3 cm over the right shoulder.

7. Abrasion measuring 5x8 cm over the extensor aspect of the right forearm.

On internal examination I found the following:-

1. Skull/Head and neck – found presence of extradural hemorrhage measuring 6x4x2 over the frontal lobe with fracture of the frontal bone. The said fracture extended up to the interior cranial cavity.

2. Both lungs were oedematous (puffed up).

3. Stomach contained around 800 ml of fluid (with few food particles with alcoholic smell).

4. Uterus was non-gravit (not pregnant).

Based on my autopsy findings, I opined that the approximate time since death was 12-24 hours and the cause of death to the best of my knowledge and belief was a result of intra-cranial hemorrhage caused as a result of blunt trauma force.

After the autopsy, I handed over the blood in filter paper, liquid blood and hair sample with root (all sealed and packed) over to the I.O. of the case."

The cross-examination conducted could not demolish his evidence in chief.

(x) P.W. 16, the DNA Examiner in the laboratory of DNA Fingerprinting Services, CDFD, Hyderabad since January, 2020, had the experience of having examined around a thousand cases. He concluded that the biological fluids on the sources of Exhibit 'A', 'C', 'E', 'G', 'H', 'I', 'J' and 'K' is from the source of Exhibit 5 (stained filter paper said to be containing blood stains of the deceased). He indentified the articles examined by him being, Exhibit 'A' (M.O.I) the T-shirt of the deceased, Exhibit 'C' (M.O.VII) a floral design top of the deceased, Exhibit 'G' (M.O.III) the blue jacket of the Appellant, Exhibit 'H' (M.O.III) a stone seized from the scene of offence. M.O.VI collectively (being Exhibit 'I', Exhibit 'J' and Exhibit 'K' marked in the laboratory) stone chips containing

blood samples from the rock at the scene of offence. Exhibit 'D' was the stained filter paper said to contain blood stains of the deceased. The biological fluid on M.O.I, M.O.VII, Exhibit 'E' (hair strands of deceased) M.O.III, M.O.V, M.O.VI (collectively stone scrapings) tallied with the blood stains of the deceased collected on Exhibit 'D'.

7. The relevant evidence having been seen, it is now essential to consider the provisions of Section 300 of the IPC, which reads as extracted below;

> "**300. Murder.**—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—
>
> *Secondly.*—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,—
>
> *Thirdly.*—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—
>
> Fourthly.—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 as aforesaid.
> ……"

8. Learned Counsel for the Appellant sought to convince this Court that the incident took place without premeditation in a sudden fight in the heat of passion. We find no evidence to assist us to conclude that the victim provoked the Appellant so gravely as to incite him to the extent of killing her. The exceptions to Section 300 IPC provide for the acts which would exempt the act of the Accused as being a murder. Exception 4 to Section 300 of the IPC which the Appellant seeks to invoke, reads as follows;

> "…….
> ……..
> ……..
>
> *Exception 4.*—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.
> …….……."

9. Premeditation can be established by direct or circumstantial evidence which could be expression of ill-feeling and also the manner in which the act was committed. Premeditation is also a state of mind which manifests itself in the acts of the accused. The facts in ***Yatendrasingh*** (*supra*), in our considered opinion, are distinguishable from the facts in the instant Appeal. In ***Yatendrasingh*** (*supra*) there was one single bullet injury which led to the death of the victim on the perpetrator being suddenly gravely provoked. In the instant matter, several injuries were found in the face and head of the victim, as indicated by P.W. 14, revelatory of the fact of repeated assaults on the head and face of the hapless victim. The infliction of the injuries which are serious and repeated proves the intention of the Appellant. No proof of grave and sudden provocation meted out by the deceased to the Appellant at the relevant time was furnished. On this point, the evidence of P.W. 4 is clear that the victim was not agreeable to the persuasions of the Appellant to return home, upon which he attempted to strike her. The victim fled from the place, but was followed into the fields by the Appellant where she was later found dead. It is also essential to note that a fight is essentially a psychical combat in which a person inflicts a blow on the other, which is retaliated to. The victim had several injuries on her face and head, but no injuries were found on the body of the Appellant

on his medical examination indicating that it was not a physical fight between them. It was merely a female pitted against the male, who repeatedly hit her on the various parts of her head with a stone. The assaults were made at random and the number of injuries indicate that the Appellant had acted in a cruel and unusual manner apart from which he disrobed her and left her with one garment to cover her shame.

10. In view of the above facts and circumstances, we find that the clemency provided under *Exception* 4 of Section 300 of the IPC cannot be invoked here. Thus, the Appellant having taken undue advantage of the victim and the circumstances and acted in a cruel manner by disrobing her and inflicting several injuries on her, his act falls within the ambit of *Fourthly* of Section 300 IPC.

11. We thereby uphold the Judgment of conviction of the Learned Trial Court handed out to the Appellant under Section 302 of the IPC and the Order on Sentence.

12. Appeal is dismissed and disposed of accordingly.

13. Pending applications, if any, stand disposed of.

14. No order as to costs.

15. Copy of this Judgment be forwarded to the Learned Trial Court along with its records.

(Bhaskar Raj Pradhan)
Judge
30-11-2022

(Meenakshi Madan Rai)
Judge
30-11-2022

Approved for reporting : **Yes**

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