THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 28th July, 2022

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

Crl.A. No.05 of 2021

Appellant : Satar Gurung

versus

Respondent : State of Sikkim

Application under Chapter XXIX Section 374(2) of the Code of Criminal Procedure, 1973

Appearance

Mr. N. Rai, Senior Advocate (Legal Aid) with Mr. Sushant Subba, Advocate (Legal Aid) for the Appellant.

Mr. Sudesh Joshi, Public Prosecutor with Mr. Yadev Sharma and Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutors for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. On a First Information Report, Exhibit 1, being lodged before the Temi Police Station, South Sikkim, on 18-10-2017, by P.W.1, against the Appellant herein, investigation was taken up after registration of Temi PS FIR Case under Sections 326/307 of the Indian Penal Code, 1860 (for short "IPC"). On completion of investigation, Charge-Sheet was submitted against the Appellant, Satar Gurung (Accused No.1), one Suman Subba (Accused No.2) and one Dil Bahadur Gurung alias Diwash Gurung (Accused No.3), under Sections 302/34 of the IPC. The Learned Trial Court on taking cognizance of the matter framed Charges against the above-named persons under Sections 302/34 of the IPC for which they individually entered a plea of "not guilty". The Prosecution examined thirty-four witnesses to prove its case against the

accused persons. On closure of Prosecution evidence, the accused persons were examined under Section 313 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C."). On consideration of the entire evidence on record, the Learned Trial Court convicted the Appellant Satar Gurung (Accused No.1) under Section 304 Part II of the IPC, but acquitted him of the offence under Sections 302 read with Section 34 of the IPC, while Suman Subba (Accused No.2) and Dil Bahadur Gurung alias Diwas Gurung (Accused No.3) were acquitted of the charges under Sections 302 read with Section 34 of the IPC, vide the impugned Judgment dated 24-02-2021, in Sessions Trial Case No.01 of 2018. The Appellant (Accused No.1) vide the impugned Order on Sentence, dated 24-02-2021, was sentenced to undergo simple imprisonment for a term of ten years under Section 304 Part II of the IPC and to pay a fine of Rs.10,000/- (Rupees ten thousand) only, with a default clause of imprisonment. Aggrieved thereof, the Appellant assails the Judgment and Order on Sentence before this Court.

2(i). Learned Senior Counsel for the Appellant contended that the Appellant in fact ought to have been acquitted of the offence along with other accused persons and that, in the alternative, the offence if found to have been committed by him would be one under Section 324 of the IPC and not under Section 304 Part II of the IPC as erroneously concluded by the Learned Trial Court. That, P.Ws 9, 14, 23 the Doctors who examined the wound on the victim each gave a different size of the injuries found on the person of the deceased, leading to doubts regarding the injuries. That, the observation of the Learned Trial Court in Paragraph 60 of the impugned Judgment is perverse as P.W.1 has

not given any evidence to the effect that she had seen her deceased brother bleeding profusely and that he disclosed in her presence and in the presence of the witnesses that he was stabbed by the Appellant. The Learned Trial Court also observed in Paragraph 77 of the Judgment that the key chain knife was not the weapon of offence and arrived at the finding that a sudden fight had ensued between the deceased and the Appellant. Consequently, there was no intention or knowledge but the Appellant has been foisted with the offence under Section 304 Part II of the IPC.

(ii) That, the Learned Trial Court placed reliance on the Section 164 of the Cr.P.C. statement of P.W.2 which is not legally tenable as there is a discrepancy in his statement with that of his deposition in the Court. That, in fact the incident occurred on account of the aggression of the deceased himself, as deposed by P.W.2, an eye-witness to the incident. P.W.3 has also in his cross-examination stated that he did not see the Appellant assaulting the deceased. That, P.W.19 had recorded the alleged statement of the deceased in his mobile phone, but no Certificate under Section 65B of the Indian Evidence Act, 1872 (hereinafter, "Evidence Act"), was furnished by the Prosecution and hence, the electronic evidence is inadmissible, consequently the evidence of P.W.19 with regard to the video recording on his mobile phone cannot be relied on. P.W.14, the Doctor who conducted the autopsy admitted that the weapon of offence was not produced before her at the time of the autopsy. She further deposed that the death of the deceased was due to the combined effect of Peritonitis and Pneumonia which was confirmed by her in cross-examination but the Prosecution did not

seek to recross-examine the witness to decimate this evidence. P.W.32 the Scientist at CFSL, Kolkata, opined that the cut marks (CC1 and CC2) on M.O.XV (T-shirt of the victim) could not have been caused by a key chain knife, like M.O. XIV, hence it is evident that the deceased did not die as a result of the alleged stab injuries said to have been caused by M.O.XIV. That, no single witness had seen the Appellant actually stabbing the deceased. That, despite the observation of the Learned Trial Court that it was unsafe to hold that the key chain knife, M.O.XIV was the weapon of offence in view of the evidence of P.W.32, yet the Court proceeded to wrongly convict the Appellant under Section 304 Part II of the IPC. The fact that the Appellant was not the aggressor was not considered by the Learned Trial Court when it is an established principle of law that when two views are possible the one favourable to the convict/Appellant has to be accepted. To buttress his submissions, reliance was placed on *Yogendra Morarji* vs. *State of Gujarat*[1]*; Deoka and Others* vs. *State of Maharashtra*[2]*; Ghansham Dasharath Waghmare* vs. *The State of Maharashtra*[3]*; Mihir Gope Etc.* vs. *State of Jharkhand*[4]*; Ramesh alias Dapinder Singh* vs. *State of Himachal Pradesh*[5] and *Jasdeep Singh alias Jassu* vs. *State of Punjab*[6]. Hence, the impugned Judgment be set aside and the Appellant be acquitted of the offences or in the alternative he be convicted under Section 324 of the IPC.

3. Learned Public Prosecutor *per contra* conceded that the other two accused persons who faced trial were in fact persons who

---

1 (1980) 2 SCC 218

2 (1993) Supp 1 SCC 447

3 2004 SCC OnLine Bom 1227

4 AIR 2021 SC 534

5 AIR 2021 SC 1547

6 AIR 2022 SC 805

were at the place of occurrence and had witnessed the incident and were not party to the offence and hence their rightful acquittal. The evidence of P.W.2 with regard to the incident has remained resolute and he is a truthful witness. He placed reliance on ***Rakesh and Another*** vs. ***State of Uttar Pradesh and Another***[7]. That, P.W.31 has supported the evidence of P.W.2 while the seizure of the weapon of offence M.O.XIV has been proved by the Prosecution. That, conviction can be based on the testimony of a sole witness as held by the Hon'ble Supreme Court in ***Edward*** vs. ***Inspector of Police, Aandimadam Police Station***[8], in the instant case it was not only one witness but P.W.2 and P.W.3 who witnessed the incident and their evidence fortifies the Prosecution case. The Learned Trial Court has in the impugned Judgement given consideration to all the relevant facts and circumstances and then correctly convicted the Appellant of the offence under Section 304 Part II of the IPC, therefore, no requirement arises to interfere with the findings of the Learned Trial Court and the Appeal be dismissed.

4. We have given due consideration to the submissions of the Learned Counsel for the parties, carefully considered the evidence on record and perused the impugned Judgment and citations made at the Bar.

5. The facts which led to the trial in the instant matter was the result of a fight between the deceased and the Appellant that occurred on 18-10-2017 at Adarsh Gaon, South Sikkim, outside the temporary shed of P.W.6. Investigation revealed that the Appellant along with Diwash Gurung (Accused No.3) and Suman Subba (Accused No.2) returned to the room of Suman

[7] (2021) 7 SCC 188

[8] (2015) 11 SCC 222

Subba in Adarsh Gaon after spending some time at the river side. The accused Suman Subba and his nephew P.W.18 lived in two separate rooms, in one shed. These three persons were joined in the room of Accused No.2 by P.W.2 and P.W.3. After some time the deceased entered the room where the five persons had congregated and went into the room of P.W.18, in his absence and bolted the door from inside. When P.W.2 knocked on the door and enquired as to why he was inside the room of P.W.18, a discussion ensued between the three accused persons on one side and the deceased on the other. P.W.2 then pacified the warring factions. The victim was escorted till the road by P.W.2 while the Appellant was told by Accused No.2 to return home. The deceased suddenly returned and attacked the Appellant which resulted in a violent fight, during the course of which the Appellant took out a key chain knife (*khukuri*) which was in his trouser's pocket and stabbed the victim multiple times. The Accused No.3 intervened and stopped the fight between them after which the Appellant fled from the scene while the victim lifted his shirt and showed the stab injuries on his stomach to P.W.2 and told him that he had been stabbed by the Appellant. The victim was evacuated to Singtam District Hospital, thereafter to the CRH Manipal where he succumbed to his injuries on 26-10-2017. P.W.19 recorded the video of the victim at the CRH, Manipal, in which the deceased named Accused Nos.2 and 3 as being involved in the incident and that he was stabbed by the Accused No.1/Appellant with a knife. Charge-sheet under Sections 302/34 of the IPC was submitted against all three accused persons, which on conclusion of trial led to the impugned Judgment and Order on Sentence.

6. The only question that falls for consideration before this Court is; Whether the Learned Trial Court was in error in convicting the Appellant under Section 304 Part II of the IPC?

7(i). It emerges that P.W.2 and P.W.3 were present at the place of occurrence along with the deceased and the accused persons. P.W.2 and P.W.3 along with the three accused persons had witnessed the deceased entering the room of P.W.18. Later, an argument ensued between the deceased and the Accused No.2 initially regarding the entry of the deceased into the room of P.W.18 in his absence, upon which the Accused No.1 intervened and questioned him as to why he was arguing with the Accused No.2 who was elder than the deceased. Accused No.3, according to P.W.2, also advised the deceased not to argue with Accused No.2. P.W.2 himself also told the deceased not to argue with Accused No.2. The deceased and the Appellant entered into a verbal altercation upon which the deceased challenged the Appellant to a physical fight and assaulted the Appellant with fists and blows. That, they separated the deceased and the Appellant and P.W.2 took the deceased and escorted him to the road to enable him to go to this house situated about 80 feet away from the place of incident. P.W.2 saw the Accused Nos.2 and 3 sending the Appellant to his house located at a considerable distance from the place of occurrence. P.W.2 also witnessed the deceased suddenly returning and jumping upon the Appellant, whereupon a physical fight ensued between the two. The deceased threw the Appellant to the ground and after about 4 to 5 minutes of the fight the deceased lifted his shirt and showed P.W.2 a wound and told him in Nepali, which translated into English would be; **"**look what

Satar has done Durga *Mama***"**. P.W.2 thereupon noticed a cut mark each on the chest and abdomen of the deceased with blood stains. Learned Senior Counsel had argued that there was discrepancy in the Section 164 Cr.P.C. statement of P.W.2 with his deposition in Court inasmuch in his Section 164 Cr.P.C. statement. P.W.2 had not mentioned that the deceased named 'Satar' (Appellant) as having caused the wound, whereas in the Court he had made a bid to improve his statement by deposing that the victim had told him that Satar had inflicted the injury. That, the evidence of P.W.2 was thus untenable and unreliable. In this context, it is relevant to notice that the Section 164 Cr.P.C. statement of P.W.2 was recorded on 07-11-2017 while his evidence in the Court was recorded on 03-05-2018. The lapse in time would obviously lead to a difference of a few words during the deposition of P.W.2 in Court. It is not possible for any witness to state verbatim in the Court what he has stated either in his Section 161 Cr.P.C. statement or in his Section 164 Cr.P.C. statement, it suffices that the gist of his statements are consistent. It is now settled law that minor discrepancies that do not strike at the root of the case are not to be given emphasis by the Courts. In ***Yogesh Singh*** vs. ***Mahabeer Singh and Others***[9] the Supreme Court while considering the question of minor discrepancies opined that;

> **"29.** It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such

[9] (2017) 11 SCC 195

> inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission. ……..**"**

It is evident that no incongruity has arisen due to the minor discrepancy in the statement of P.W.2 before the Court and in his Section 164 Cr.P.C. statement. The fact remains that P.W.2 was present when the physical fight between the deceased and the Appellant took place. It is not the Prosecution case that the deceased had any injuries before the fight started, evidently it is only after the fight that he sustained the injuries and he lifted his shirt and showed the wounds to P.W.2. This fact is a common thread in the statement of P.W.2, both in his deposition before the Court and in his Section 164 Cr.P.C. statement. P.W.1, the Complainant, did not witness the fight between her deceased brother and the Appellant, but she did hear someone shouting that her brother had been stabbed with a knife, she came down from the terrace of her building and saw her father and uncle helping her brother and taking him out from the bathroom of their house. The victim was bleeding profusely. Although she had stated that the victim disclosed that 'Satar' had stabbed him, under cross-examination she admitted that she had not stated this fact to the Police when her statement was recorded during investigation. The argument advanced by Learned Counsel for the Appellant that P.W.1 nowhere stated that the Appellant disclosed in her presence that he was stabbed by the Appellant is incorrect as it appears in her evidence-in-chief.

(ii) P.W.3 was the other witness who was also present at the spot where the fight occurred. He was witness to the exchange of the words between the three accused persons on one side and the victim on the other. He also witnessed the physical fight between the deceased and the Appellant. According to him, during the fight between them, the deceased kicked the Appellant several times before throwing him to the ground. P.W.2 separated them and thereafter P.W.3 left for his home located opposite to the place of the incident. Six-seven minutes later he saw a gathering at the same place where the fight had taken place and he witnessed P.W.2 informing P.W.20, the father of the deceased and P.W.31 a relative of P.W.20 that, a fight had taken place between the Appellant and the deceased and that the deceased had sustained a stab injury. It is evident from the statement of P.W.3 that the deceased was intoxicated at the time of the incident. Under cross-examination P.W.3 has stated that he did not see the Appellant assaulting the deceased and had witnessed him trying to pacify the deceased and Accused No.2, who were arguing. That, it was the deceased who was the aggressor both verbally and physically.

(iii) P.W.6 alleged to have witnessed the incident was declared hostile as she failed to support the Prosecution case. However, it emerges from her evidence that she did not witness the incident, but only heard the commotion outside the door to her room. It may relevantly be noted that the Supreme Court in a catena of decisions has held that the evidence of a hostile witness need not necessarily be rejected as a whole. The evidence of such witness which supports or demolishes the Prosecution case can be taken into consideration. In ***Ramesh Harijan*** vs. ***State of Uttar***

Pradesh[10] while dealing with the aspect of hostile witnesses, the Supreme Court held as below;

> **"23.** It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examine him.
>
> *'6. …* The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof.'
>
> [Vide *Bhagwan Singh* v. *State of Haryana* [(1976) 1 SCC 389]; *Rabindra Kumar Dey* v. *State of Orissa* [(1976) 4 SCC 233]; *Syad Akbar* v. *State of Karnataka* [(1980) 1 SCC 30] and *Khujji* v. *State of M.P.* [(1991) 3 SCC 627] (SCC p. 635, para 6).]**"**

Even after careful scrutiny of the evidence of P.W.6 it fails to substantiate the Prosecution case, save to the extent that a commotion occurred outside her room and is therefore of no assistance to the Prosecution case.

(iv) P.W.18 the occupant of the room which the deceased had entered without permission on account of which the verbal fight initially started, also reached the place of occurrence where he saw all three accused persons in the room of Accused No.2 drinking Beer. He too witnessed the deceased quarrelling with the Appellant and others, in the room of Accused No.2 and advised them not to quarrel but thereafter immediately left the place as he had to collect his wages from a third person. His evidence lent no succour to the Prosecution case. P.W.20 the father of the deceased was not a witness to the incident but was informed by P.W.2 that the deceased, his son, had been stabbed. He went in search of his son to the house of P.W.18 and on not finding him there returned home. He heard someone saying that the deceased appeared to have gone into the bathroom of their house. When he entered the bathroom he saw the deceased stooping over a bucket in the

[10] (2012) 5 SCC 777

bathroom. He shook him but the deceased did not respond. He called his sons-in-law and with their help took the deceased from the bathroom and laid him on the floor. When he lifted the black vest that the victim was wearing he saw cut marks/stab injuries over the right side of his stomach. He immediately evacuated the victim, his son, to the District Hospital with the help of P.W.19 and other boys. The victim was referred to CRH Manipal. As per P.W.19 he accompanied the victim and P.W.20 to the CRH. According to P.W.20, the deceased was speaking to P.W.19 who took his video where the deceased stated that the Appellant had stabbed him in the presence of Accused Nos.2 and 3.

8(i). P.W.31 was not at the place of occurrence but he was at the house of the deceased where a family gathering was under way. Before the incident the deceased told P.W.31 that he would fetch a mobile charger from his friend and left the house. After some time P.W.2 told him that the Appellant had stabbed the deceased with a knife. He went in search of the victim and found him on the ground floor in the bathroom crying in pain. He noticed a cut injury in his abdomen and saw blood flowing from his abdomen. He also assisted the family to evacuate the victim to Singtam Hospital from where he was referred to CRH, Manipal. According to him, he affixed his signature Exhibit 40(a) on Exhibit 40, a document prepared by the Police in his presence. The other witness who gave evidence with regard to Exhibit 40 was P.W.33 who while admitting that Exhibit 40 bore his signature which he signed at Adarshgaon Police Out Post, under cross-examination, stated that he had signed on all Exhibits and M.Os at Adarshgaon Police Out Post, on the request of the Police.

(ii) Exhibit 40 allegedly was the statement of the Appellant under Section 27 of the Evidence Act, allegedly given in the presence of P.W.31 and P.W.33. However, as evident from the foregoing statements, neither of the witnesses have stated that the Appellant made any disclosure statement to the Police in their presence. As per P.W.31 the document Exhibit 40 was prepared by the Police and as per P.W.33 he signed on Exhibit 40 on the request of the Police. Their evidence lends no support to the Prosecution case with regard to the preparation of Exhibit 40, or the Appellant having made a disclosure statement in terms of Section 27 of the Evidence Act. In this light of the matter, the Learned Trial Court has correctly disregarded Exhibit 40 furnished by the Prosecution.

9(i). The Learned Trial Court had also disregarded M.O.XIV as the weapon of offence observing that in the absence of definite proof, augmented by the evidence of P.W.32 who opined that the cut marks present on M.O.XV could not have been caused by M.O.XIV, it was unsafe to hold that the key chain knife, M.O.XIV, was the weapon of offence. That, this would however not absolve the Appellant since non-recovery of weapon of offence by itself cannot be the reason to reject the testimony of witnesses which is reliable. On this aspect, it is necessary to examine the evidence on record to analyse whether M.O.XIV was the weapon of offence or not.

(ii) P.W.9 the Medical Officer at the Central Referral Hospital, Tadong, examined the victim and *inter alia* found the following injuries;

"On examination, following injuries were found;

1. stab injury measuring 1 x 1 cms was found over left hypochondrial region;
2. stab injury measuring 1 x 1 cms was found over right lower thorax. Active bleeding present in the stab injuries.

Breath sound absent on the right side of the chest.

BP was 70/80 mmhg. Pulse – feeble. Saturation – 88% in room air.

Patient was semi conscious, irritable and not oriented to time, place and person.

Opinion:- Nature of injury – grievous.

Remarks:- patient was drowsy and in shock on arrival due to tremendous loss of blood.**"**

The witness was not shown the weapon of offence at the time of examination and has opined under cross-examination that injuries mentioned in Exhibit 6, the wound certificate prepared by her, could not be the result of a fall on the "edgy stones".

(iii) P.W.14, the Assistant Professor, Department of Forensic Medicines and Toxicology, Sikkim Manipal Institute of Medical Sciences, conducted the autopsy of the deceased along with one Dr. Chedup Lepcha, Senior Tutor of the same Department as P.W.14, and found the following injuries;

"External injuries:-

1. Surgically stitched stab wound 3 cms length bearing two black silk sutured (sic, sutures) on right lower anterior chest wall placed obliquely 8.5 cms below and medial to right nipple, 26 cms from tip of right shoulder and 116 cms from right heel;
2. Superficial scratch abrasion 8.5 cms long placed diagonally with reddish brown scab 4.5 cms below left nipple and 5 cms lateral to it;
3. Surgically incised wound of 20 cms length bearing 16 staples placed vertically at midline left lateral to umbilicus;
4. Similar wound at left subcostal region of 15 cms length bearing 15 staples;
5. Surgically staple (sic, stapled) stab wound of 2 cms length bearing 2 staples at tip of seventh rib of left hypochondrium, 16 cms below left nipple and 101 cms from heel;
6. Brownish scab which peeled off leaving a hypopigmented region at mid forehead 1 cm above glabella above 0.25 cm diameter;
7. Abrasion 2 x 0.25 cm on dorsum of left elbow;

8. Surgically incised wound 2.5 cms x 0.5 cms x cavity deep at fourth intercostal space along right mid axillary line for chest drainage with chest tube removed;
9. Similar wound at left iliac fossa for peritoneal drainage;
10. Multiple very small injury at left lateral aspect of neck for central line.

Internal injuries:-

Head and neck: Scalp contused along the posterior 1/3rd aspect of sagittal sutured (sic, suture) 4 x 3 cms and on right parietal eminence. Skull intact. Meninges intact. Brain intact, pale and edematous.

Chest (Thorax): Vertically perforated rib cage on right medial aspect of sixth rib at costochondral junction underneath external injury No.1.

Pleural cavity: filled with straw coloured fluid serosanginous in nature 250 ml in right pleural cavity.

Lungs: Lacerated lingula of right lungs surrounded by contusion of lung parenchyme over an area 3 x 2 cms. Consolidated bilateral lower lobe of lung with gritty sensation on cut section with brownish coloured discharge.

Abdomen: Surgically repaired anterior abdominal wall. Surgically repaired greater omentum with dull, non glistening, matted appearance and pus discharge with adherent peritoneum. Surgically repaired tip of pancreas.

Opinion:-

(1) The above mentioned injuries were ante mortem in nature and could have been caused by sharp cutting weapon;

(2) External injury No.1, 2 & 5 were caused by sharp cutting weapon, out of which injury No.1 & 5 were fatal in nature;

(3) The cause of death was due to combined effect of peritonitis and pneumonia;

(4) Time since death was within 6 hours prior to autopsy.**"** **[emphasis supplied]**

This witness was also not shown the weapon of offence at the time of the autopsy. Under cross-examination, she volunteered to add that the death of the deceased was due to the injuries mentioned in Exhibit 22, the Medico Legal Autopsy Report prepared by her and Dr. Chedup Lepcha.

(iv) P.W.23 was at the relevant time a Senior Resident in the Department of Surgery at the CRH, Manipal. He examined the victim on 19-10-2017 and found the following injuries;

> **"**1. Two stab injuries, one at mid anterior slightly right side of chest and another at left upper abdomen.
>
> 2. a) Chest wound was approximately 2.5 x 1 cm and depth could not be appreciated, but it penetrated the lung parenchyma, which lead to right sided hemo-thorax (blood in lung).
>
> b) Left upper abdomen wound approximately 3 x 1 x 10 cm, which leads to injury to both walls of stomach and pancreas, lino-renal ligament and retroperitoneal hematoma.
>
> **3. Both injuries are incised wounds, margins are clean cut, penetrating, and elliptical in shape.**
>
> **4. Nature of injuries are stab injury.**
>
> **5. Sharp object injury.**
>
> **6. Probably caused by knife or any sharp object."**
>
> [emphasis supplied]

Before this witness also, the weapon of offence was not produced when the victim was being examined.

(v) On perusal of the evidence of P.W.32, the Scientist at CFSL, Kolkata, it was found that he examined M.O.XIV and M.O.XV, i.e., one key chain knife and one black and white coloured torn T-shirt, respectively, and found the following;

> **"**…… On my examination, the following results were obtained.
>
> 1. The cut mark marked CC1 on the exhibit G was found to be sharp cut having length of 2.1 cm approximately and cloth fibers were found to be pulled out at some placed at the cut mark.
>
> 2. The cut mark marked CC2 on the exhibit G was "L" shaped cut having total length of 4.4 cm (length-1.7 cm and breadth-2.7 cm) approximately and cloth fibers were found to be pulled out at some places at cut mark.
>
> 3. The keychain knife of exhibit A was found to be on one side blunt and one side not very sharp with curbed shape. There were some engraved designs on both sides of the knife. The dimension of the knife was as given below:
>
> a) The total length of the knife – 8.85 cm
>
> b) The total length of metallic handle – 3.3 cm
>
> c) The total length of blade portion – 5.55 cm
>
> d) The maximum thickness of blunt edge – 1.45 mm (approx.)
>
> e) The minimum thickness of sharp edge – 0.6 mm (approx.)
>
> 4. Test cuts (marked TC-1, TC-2, TC-3, TC-4 and TC-5) were made on the exhibit G by using keychain

> knife of exhibit A and found to be just pierce through in blunt form when cut/punched forcefully.
>
> 5. The cut marks CC1 and CC2 on Exhibit-G were found to be not consistent with test cut marks TC-1, TC-2, TC-3, TC-4 and TC-5 on Exhibit-G.**"**

On the basis of the above findings, he opined that the cut marks CC1 and CC2 on Exhibit 'G' (M.O.XV) could not have been caused by a tool such as the key chain knife of Exhibit 'A' (M.O.XIV).

(vi) With regard to the Appellant having caused the stab wounds, the reliance of the Prosecution is also on the video recording made by P.W.19. The Prosecution has not furnished a Certificate in terms of Section 65B of the Evidence Act. On this aspect, we are therefore in agreement with Learned Senior Counsel for the Appellant that such evidence is not permissible as held by the Hon'ble Supreme Court in the absence of a Certificate required under Section 65B of the Evidence Act. In ***Ravinder Singh alias Kaku*** vs. ***State of Punjab***[11] the Supreme Court observed as follows;

> **"61.** We may reiterate, therefore, that the certificate required under Section 65-B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in *Anvar P.V.* [*Anvar P.V.* v. *P.K. Basheer*, (2014) 10 SCC 473], and incorrectly "clarified" in *Shafhi Mohammad* [*Shafhi Mohammad* v. *State of H.P.*, (2018) 2 SCC 801] . Oral evidence in the place of such certificate cannot possibly suffice as Section 65-B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in *Taylor* v. *Taylor* [*Taylor* v. *Taylor*, (1875) LR 1 Ch D 426], which has been followed in a number of the judgments of this Court, can also be applied. Section 65-B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65-B(4) otiose.**"**

(vii) However, at this stage, it is relevant to carefully analyse the evidence of P.W.29, who is the Scientist 'B' (Biology), CFSL, Kolkata. The Learned Trial Court has completely ignored the

[11] 2022 SCC OnLine SC 541

evidence of this witness and no reference whatsoever is made to his evidence in the impugned Judgment. According to P.W.29,

> **"**In connection with this case, on 09.01.2018 our lab had received one sealed cloth parcel containing following exhibits:-
>
> 1. Exhibit A: Knife – One keychain knife bearing no visible stain;
>
> 2. Exhibit B: T-shirt – One white color T-shirt bearing few reddish brown stains i.e. MO-VII (*shown to me in the Court today*);
>
> 3. Exhibit C: Containing three paper packets marked as C1, C2 & C3 respectively –
>
> i) Exhibit C1: Nail clippings – Five number of nail clippings i.e. MO-VIII (*coll.*) (*shown to me in the Court today*);
>
> ii) Exhibit C2: Hair – Not opened i.e. MO-IX (*shown to me in the Court today*);
>
> iii) Exhibit C3: Blood sample – Reddish brown stains on a gauze piece said to be blood sample of the deceased i.e. MO-X (*shown to me in the Court today*);
>
> 4. Exhibit D: Stone – One big stone is having few dark brown stains along with some small pebbles and soil i.e. MO-XI (*shown to me in the Court today*);
>
> 5. Exhibit E: Blood Sample – Dark brown fluid in plastic container said to be blood sample of the deceased i.e., MO-XII (*shown to me in the Court today*);
>
> 6. ……
>
> 7. Exhibit G: T-shirt – One black color T-shirt with white stripes in torn condition, bearing reddish brown stains.**"**

After he conducted the Scientific tests as detailed in his evidence, the witness concluded as follows;

> **"**From the above results, it was observed that:
>
> a) The Autosomal STR profile recovered from the human blood stain positive Exhibits A [Knife], B/MO-VII [T-shirt], C/MO-VIII [Nails] and D/MO-XI [Stone] are identical in all respective amplified loci and tailed with the genetic profile of the deceased (Source of Exhibit C3/MO-X: Blood sample of the deceased).
>
> b) Mixed Autosomal STR profile was recovered from the human blood stain positive Exhibit G [T-shirt].
>
> From the above observations, it was concluded that -
>
> a) Human blood could be detected on Exhibits A [Knife], B/MO-VII [T-shirt], D/MO-XI [Stone] and Exhibit G [T-shirt].
>
> b) The genetic profile of the deceased (Source of Exhibit C1/MO-VIII and C3/MO-X) is consistent as the

> source of human blood present on Exhibit A [Knife], B/MO-VII [T-shirt], D/MO-XI [Stone] and Exhibit G [T-shirt].
> ……..**"**

Despite a prolonged cross-examination the evidence of the witness stating that the human blood stain on the knife, T-shirt, nails and stone were identical with the genetic profile of the deceased as found in his blood sample was not demolished.

(viii) Hence, in light of the scientific evidence of P.W.29 which is self-explanatory and detailed, we are constrained to differ with the observation of the Learned Trial Court on M.O.XIV not being the weapon of the offence. Indeed the injuries on the body of the victim were inflicted by a sharp weapon as per the evidence of the Doctors P.W.9, P.W.14 and P.W.23. The evidence of P.W.29 clinches the Prosecution case of M.O.XIV being the weapon of offence and the ocular evidence of P.W.2 and P.W.3 regarding the incident and injuries inflicted on the victim, seen by them, finds fortification in the evidence of P.W.9, P.W.14, P.W.19, P.W.20, P.W.23 and P.W.31.

10(i). Learned Senior Counsel had relied on ***Yogendra Morarji*** (*supra*), wherein it has been held therein that the right of private defence accrued to the Accused/Appellant but he had exceeded his right by causing the death of the deceased, hence his conviction under Section 304 Part II of the IPC was upheld by the Supreme Court. This ratio therefore lends no support to the arguments of Learned Senior Counsel that the offence committed by the Appellant would be one under Section 324 of the IPC.

(ii) In ***Deoka*** (*supra*) relied on by Learned Senior Counsel the Supreme Court had held that even if evidence regarding motive is eliminated the Court has to consider whether the offence alleged

against the Accused is established by ocular evidence of the witness. This observations also lends no support to the Appellant's case as P.W.2 and P.W.3 ocular witnesses, have consistently deposed that they witnessed the physical fight between the Appellant and the deceased where the deceased was the aggressor.

(iii) In ***Ramesh alias Dapinder Singh*** (*supra*) the Supreme Court had absolved the Appellant of the liability under Section 34 of the IPC insofar as the charges under Sections 302 and 324 of the IPC were concerned, after delving into a deep discussion about the provisions of Section 34 of the IPC and the necessity/requirement of a prior meeting of minds of the principal culprit and his companions with regard to the offence committed. The facts therein are distinguishable from the instant matter and thereby garners no support to the Appellant's case. The other ratiocinations (*supra*) relied on by Learned Senior Counsel for the Appellant also fail to support his contentions.

11. In fine, in consideration of the entire evidence as discussed hereinabove, it emerges that the case of the Prosecution comes within Exception 4 of Section 300 of the IPC which reads as follows;

> **"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, or—
>
> *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.
>
> .....
>
> ***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.**
>
> *Explanation*.—It is immaterial in such cases which party offers the provocation or commits the first assault.
>
> ....." **[emphasis supplied]**

12. Although the Learned Trial Court has failed to explain in detail as to why the offence fell under Section 304 Part II of the IPC instead of Section 300 IPC, from the evidence on record it obtains that the deceased was the aggressor and initiated both the verbal and the physical duel with the Appellant. However, it cannot be said that the offence would be one under Section 324 IPC as urged by Learned Senior Counsel for the Appellant, as it was not a voluntary act as envisaged by the Section 324 of the IPC. The Appellant after being kicked and thrown to the ground evidently made an effort to defend himself resulting in the wounds inflicted on the deceased. There was indeed no premeditation, planning or the requisite *mens rea* to bring the offence within the ambit of Section 300 of the IPC. The Appellant committed the offence without premeditation, in a sudden fight in the heat of passion, upon a sudden quarrel and it cannot be said that the Appellant took undue advantage.

13. Hence, it is evident that the ultimate conclusion of the Learned Trial Court convicting the Appellant under Section 304 Part II of the IPC is not erroneous and we accordingly uphold the conviction under the said provision of law. However, considering the facts and circumstances of the case and in view of the

submission of Learned Senior Counsel that the Appellant has already undergone incarceration for a period of approximately 4 (four) years 7 (seven) months and 25 (twenty-five) days as on the date of hearing, we reduce his sentence as detailed hereinbelow as we are of the considered opinion that it meets the ends of justice.

14. The Appellant is accordingly sentenced to undergo simple imprisonment of 4 (four) years and 7 (seven) months and to pay a fine of Rs.10,000/- (Rupees ten thousand) only, under Section 304 Part II IPC. In default of payment of fine to suffer six months of rigorous imprisonment.

15. No order as to costs.

16. Copy of this Judgment be forwarded to the Learned Trial Court for information, along with its records.

17. Copy of this Judgment also be forwarded to the Jail Authority at the Central Prison, Rongyek, for information.

(Bhaskar Raj Pradhan)
Judge
28-07-2022

(Meenakshi Madan Rai)
Judge
28-07-2022

Approved for reporting : **Yes**

ds