



F.R.
Ami

IN THE HIGH COURT OF SIKKIM AT GANGTOK
(CRIMINAL APPELLATE JURISDICTION)

CRIMINAL APPEAL No. 3 OF 2009

Gatuk Bhutia,
Son of Late Amrit Lal,
Resident of Old Lall Bazar,
Gangtok, East Sikkim.

...Accused/Appellant

-versus-

The State of Sikkim
Through the Chief Secretary,
Tashiling Secretariat,
Gangtok, East Sikkim.

... Respondent


For the Appellant: Mr. N. Rai, Senior Advocate with Ms. Jyoti Kharka, Advocate.

For the respondent: Mr. Karma Thinlay, Additional Public Prosecutor and Mr. S.K. Chettri, Assistant Public Prosecutor for the State.

Date of Hearing : 17.03.2010

Date of Judgment : 17.03.2010

PRESENT: HON'BLE THE CHIEF JUSTICE
DR. JUSTICE AFTAB H. SAIKIA
HON'BLE MR. JUSTICE S.P. WANGDI, JUDGE





JUDGMENT AND ORDER (ORAL)


Dr. Saikia, CJ

Heard Mr. N. Rai, learned Senior Counsel assisted by Ms. Jyoti Kharka, learned Counsel for the appellant. Also heard Mr. Karma Thinlay, learned Additional Public Prosecutor and Mr. S.K. Chettri, learned Assistant Public Prosecutor appearing for the State.

2. This Criminal Appeal has been directed against the judgment and order dated 23.03.2009 passed by the learned Sessions Judge, East and North Sikkim at Gangtok in S.T. Case No. 36 of 2005 convicting the appellant under Section 302 IPC and sentencing him accordingly to undergo imprisonment for life and to pay a fine of Rs.100/-.

3. At the very outset, Mr. Rai, the learned Senior Counsel for the appellant, has submitted that he has the instruction not to challenge the conviction of the appellant for the offence committed by him. However, his limited argument is that keeping in view the facts situation emerged from the testimony of the prosecution witnesses as well as taking into consideration the mitigating circumstances as unfolded by the evidence of the eye witnesses particularly PW 2 Mrs. Kavita


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Chettri, PW 3 Santi Chettri, PW4 Ms. Laxmi Tamang, PW 5 Rinku Rai, PW 6 Passang Lhamu Sherpa and PW 9 Aita Hang Subba, the appellant may be convicted under Section 304 Part II IPC instead of Section 302 IPC and accordingly, his punishment may be commuted from life imprisonment to lesser punishment. According to him, in the backdrop of the entire evidence upon which the prosecution has wholly relied upon, the offence committed by the appellant would not come within the purview of Section 302 of the IPC and it is, evidently, a case of conviction under Section 304 Part II IPC.

4. To assess and justify the above submissions of Mr. Rai, the learned Senior Counsel, it would be prudent and essential to notice the factual matrix of the case in brief as projected by the prosecution.

5. An FIR was lodged by one Ratnaman Tamang, PW 1 on 08.10.2005 with the Officer In-charge, Sadar Police Station, Gangtok alleging that on that date in the evening around 07.15 p.m., his son Subash Tamang (hereinafter referred as 'the deceased') was stabbed with a knife by one Gaturk Bhutia, the appellant herein, a resident of same village near his own house. His son received a deep wound in the stomach and he was immediately taken to the hospital but he was succumbed







to his injuries on the way. The dead body of his son was kept in the Emergency Ward of the STNM Hospital.

6. On the basis of this FIR lodged by PW 1, the investigation by the police ensued. The appellant was arrested and the police filed charge-sheet against him under Section 302 IPC.

7. Before the trial court, during the trial, the prosecution examined as many as 27 witnesses including five official witnesses, namely, Dr. K.B. Gurung, who held autopsy of the dead body of the deceased was examined as PW 22 for medical evidence, PW 25 Dr. S.D. Sharma, who examined the appellant for injuries on his person, PW 27 Tashi Gyatso, the Investigating Officer (I.O.), PW 26 Dawa Tamang, Police Photographer and PW 24, L. Chopel, Officer In-charge, Sadar Police Station, Gangtok. Defence examined none. The appellant pleaded not guilty and sought for fair trial.

8. Having carefully appreciated and meticulously assessed the evidence on record of all the witnesses, particularly, testimony of PWs 2, 3, 4, 5, 6 and 9 as well as the medical evidence of Dr. K.B. Gurung, PW 22, the learned Sessions Judge found that the appellant was involved in






killing the deceased, who was about 15 years of age and held that the prosecution proved its case beyond reasonable doubt and accordingly by impugned judgment and order the appellant was convicted and sentenced as already recorded above.

9. Being aggrieved by the impugned judgment and order of conviction and sentence, the appellant preferred this appeal.

10. We have meticulously scanned and thoroughly scrutinised the entire evidence on record. We have found that the deposition of PWs 2, 3, 4, 5, 6 and 9 are basically found to be sufficient enough for conviction of the appellant. We do not find any convincing materials in their evidence so far as to give any benefit of doubt to the appellant as regards his involvement in the offence so charged against him. Even the deposition as regards striking a stab injury on the abdomen of the deceased person as deposed by those witnesses, has also been duly corroborated by the medical evidence of PW 22.

11. We have also gone through the statement of the appellant recorded under Section 313 Cr. P.C., which was total denial of the incident save and except the statement of





the appellant to the effect that he did not know anything as he was drunk at the relevant time, made against the question No. 37, which reads as under:


“37. It is in the evidence of the same witness P.w.11 that since you used abusive language at one ‘Dalli didi’ and ‘Shanti Didi’, they started assaulting you and you left for your house. What have you to say? ”

12. We have also appreciated the testimony of PW 25 Dr. S.D. Sharma, who examined the appellant, who was injured on being assaulted by PWs 2 and 3 as reflected from the evidence of those two witnesses themselves.

13. The close appreciation and proper evaluation of the evidence of the witnesses, especially PWs 2, 3, 4, 5, 6 and 9 including medical evidence of PWs 22 and 25 would reveal the facts situation as under:


14. PW 2, Mrs. Kavita Chettri, an independent witness, narrating the incident, deposed that the incident took place during the Puja Festival of 2005. Their locality also celebrated the Durga Puja by installing the statue of Goddess Durga in a pandal just by the side of her house. For the Durja Puja celebration, a number of boys and girls were assembled there too. In the evening time, the appellant was insisting the children present at the Durga Puja celebration place to switch


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off the music being played on a tape recorder. When this witness intervened and tried to persuade the appellant not to insist on stopping the music, the appellant also picked up quarrel with her. Thereafter, the appellant left for his house and she could overheard the appellant telling them that he was not from Nepal and that he was a Sikkim Subject holder. She got agitated over the same and she went over to the place where the appellant was standing and delivered few slaps on his head. Thereafter she returned to her house. After about 10 to 15 minutes thereafter the deceased, who was from their locality came and collapsed in front of their house. Some boys and girls of the locality removed him to the Hospital. She heard from the children of the locality that the deceased was killed by the appellant.


On her cross, she categorically stated that when the appellant told her that he was not from Nepal and he was from Sikkim having documents to that effect, she got so much annoyed that she could not restrain herself from hitting the appellant. So she hit him on his head with her bare hands since there was no other weapon with her. According to her, if she had weapon with her, she would have hit him with the said weapon at that point of time. She specifically mentioned that she hit the appellant in his residence itself. She followed






him till inside his house. When she hit the appellant, he also got very angry. She immediately returned to her house. There were no person besides herself and the appellant in the house of the appellant. The children including the deceased were not present there. When she returned to her house she left the door of her house open. However, she could not see the deceased collapsing on the ground. She could not also see as to where did the deceased came there from. She was told by the children that the deceased collapsed in front of her house. She emphasised that the appellant was not mentally sound from the very beginning.

15. Shanti Chettri, PW 3, the younger sister of PW 2, revealed a different story in her deposition. According to her, on 08.10.2005 at about 6.30 p.m. her elder sister PW 2 and the appellant were both standing outside their respective houses, at that time the appellant used abusive and filthy language against her elder sister at which herself and her elder sister asked the appellant to go back to his house. About 15-20 minutes thereafter while she was inside her house she heard from the other residents of the locality that the appellant had stabbed Subash Tamang, the deceased. Immediately thereafter the deceased came and fell down in







front of their house. Herself and her sister, PW 2, came out of their house to see what had happened. On reaching the spot, where the deceased was lying on the ground, they noticed that he had sustained a stab injury on his stomach. They also noticed some blood coming out of the injury from the body of the deceased.

On cross, this witness told that it was true that she told the police that when they heard the abusive and filthy language from the appellant, they gave him some slaps and also hit him with his own broom. According to this witness, they slapped him and also hit with the broom in front of his house. She deposed that it was not a fact that only after their action like the one she had said, the appellant went to his home and brought the knife., She denied the suggestion she did not see the stab mark on the stomach of the deceased. According to this witness, the appellant was of not unsound mind, in fact, he was totally shameless, unemployed and rants about when he was drunk.


16. On scrutiny of deposition of those two witnesses it appears that there are certain amounts of inconsistency in their evidence as regards factual aspects. For instance, according to PW 2, it was she alone who had quarrelled with






the appellant and slapped him first. It was she who intervened and tried to persuade the appellant not to insist on stopping the music and then the appellant picked up quarrel with her. It was also she who first to be agitated by the utterance of the appellant that he was not from Nepal but he was from Sikkim and she could not restrain herself and she hit the appellant on his head. It was also stated by her that had there been any weapon with her, she would have used the same against him. She categorically stated that at the relevant time, there was no person besides herself and the appellant in the house of the appellant. Even the children and the deceased were also not present there. Significantly, PW 3, in her deposition, stated that she was all along with PW 2 when the appellant used abusive and filthy language on her elder sister and both of them gave slaps having heard those abusive and filthy languages and also hit him with broom. However, the fact remains that the deceased died of stab injury being inflicted on his abdomen as has been reflected from the evidence of these two witnesses.

17. PW 4, Ms. Laxmi Tamang, the sister of the deceased, on the other hand, testified that when she was there at the house of her neighbour, one Hangsaman Subba, the





appellant came there and used abusive language at her. The appellant told her that she should mend her sister. After that she returned to her house. Thereafter, she went towards the house of the appellant where Durga Puja was being celebrated in order to call her deceased brother who was there at that time. There she saw that the appellant picked up quarrel with some other persons present there. After that she returned to her home, the appellant again followed her and after removing the curtain from the window of her house, the appellant again used abusive language at her. Thereafter, she started preparing her evening meals. The deceased brother of her also came home and after helping her with the water supply, he left home saying that the appellant was in a state of intoxication and that she should not say anything to him. Her deceased brother again left for the Durga Puja Pandal after bolting the door of her house from outside. Some time thereafter one Passang Lamu came and informed her that the appellant was picking up quarrel with her deceased brother. After a while Passang Lamu returned back saying that the appellant had assaulted her deceased brother with a knife near his house. She then rushed to the place where her deceased brother was reported to have been assaulted by the appellant. But when she reached there she saw that the friends of her deceased






brother had already lifted him from the place of occurrence and were removed him to the Hospital. She also visited her deceased brother in the Emergency Ward of STNM Hospital. After some time she was informed that her brother expired in the Emergency Ward of the STNM Hospital during the course of his treatment.


On cross, this witness stated clearly that there was a Durga Puja Pandal in their village and her brother had been engaged in the said Puja for the whole day. The house of the appellant was at the distance of 10 minutes walk from the place of Durga Puja. The appellant was in a state of intoxication. There was no enmity between the deceased and the appellant or the appellant and her family. It was her categorical statement that appellant had not picked up any quarrel either with her or with her family including her deceased brother. Since the appellant was moving around the place of Durga Puja in intoxicated condition, the local people beat him up and took him towards his house. She could not say that if the appellant was shouting to the said people saying that they had beaten up an innocent person like him. This witness even contradicted her entire evidence in-chief stating that the appellant did not follow her towards her house and the appellant was not picked up any quarrel with some


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other persons. Further she stated that the appellant had not picked up a quarrel with her deceased brother. This witness who was from the same locality did not state the presence of other two witnesses, PW 2 and PW 3 in the scene of the occurrence. She only referred that she saw the appellant picked up quarrel with some other persons present there which also she denied on her cross.


18. Another witness, PW 5, projected as eye witness by the prosecution, stated that the incident occurred on 08.10.2005 during the celebration of Durga Puja. When he with his friends were present in the Durga Puja pandal, he saw the appellant scolding the deceased over some subject. They also heard that the appellant saying that he would kill somebody in the locality. Thereafter, the appellant went inside his house, brought out a long knife, caught hold of the victim by his chest and stabbed him with the knife in his abdomen. In cross, he deposed that the deceased was his friend and they were co-villagers. According to him, Dalli Didi and the appellant had serious discussion for the reason of putting the tape on in the puja pandal by one Jeewan, who was also his friend. Dalli Didi tried to snatch away the dagger from the hand of the appellant and consequently she sustained an







injury in her hand and then she pushed the appellant who fell down and rolled down a little. Thereafter, Dalli Didi and Shanti Didi dragged the appellant towards his house. Inside the house of the appellant Shanti Didi hit two three blows with a laddle. Thereafter, Surya Daju who had already arrived there, also gave about two slaps to the appellant saying as to why he was laying hand on the woman. . Then the appellant took out some papers to show that he was a local person. Thereafter about four persons of that village including Dalli Didi, Shanti Didi and Surya Daju assaulted the appellant. When the appellant was assaulted, he started saying that he would kill one of the village members on that day out of anger. He stated that sometimes the appellant dressed like a woman.


19. PW 6, Ms. Passang Lhamu Sherpa was also examined by the prosecution as eye witness. This witness deposed that the incident was on 08.10.2005 at about 6.00 to 7.00 p.m. in the evening. They along with others were, at that time, celebrating Durga Puja. They had set up a Durga Puja Pandal in their neighbourhood. While some of her friends and herself were sitting outside the said Puja Pandal, some other persons of the locality were inside the Pandal. When devotional songs started being played on the music system in






the said Pandal, the appellant protested and asked the music to be shut down. Accordingly, the music was stopped. The same was again played on the instructions of one Dalli Aunty of the same locality. Again the appellant insisted that the music must be stopped but nobody stopped the music. At that time some altercations were took place between Dalli Aunty and the appellant. Both of them pushed each other and at one point of time, the appellant fell down. Thereafter, the Dully Aunty and her sister Shanti helped the appellant and reached him to his house. It was also deposed that when Surjya Pradhan, being a boy from the same locality, saw that situation, he reprimanded the appellant and also delivered him few slaps for quarrelling with girls and raising his hands on them. Thereafter, as she and her friends sat there talking to each other, the deceased also came there. Meanwhile, the appellant brought some papers from his residence which were his Sikkim Subject Certificate. They then told him that the documents were his Ration Card. The appellant again went back to his residence and came with more documents to prove that he was a local person. At that time, the appellant also asked the deceased to tell his sister to talk properly to him and the deceased assured him that he would explain his sister regarding the same when she come back from the shop. This






did not pacify the appellant who picked up quarrel with the deceased and caught him by his arms. In the course, the deceased also caught the appellant by one of his arms. During the scuffle that ensued between the deceased and the appellant, the appellant suddenly stabbed the deceased with a knife which was then carrying. The deceased was stabbed on the right side of his abdomen. In fact this witness noticed the appellant pulling out the knife from the abdomen of the victim during the said attack. Thereafter, she went to call the sister of the deceased and to inform her about the incident. When she returned back after informing the sister of the deceased, she noticed that the deceased was being helped to the Hospital by some of his friends. They went to STNM Hospital where the appellant was admitted to the Emergency Ward. As they were waiting outside the Emergency Ward they got the news that the deceased has expired.

In cross, this witness testified that Dalli Aunty gave two-three slaps to the appellant. When Dalli Aunty pushed the appellant he rolled down two folds below. After receiving the slaps and pushing, the appellant was in the fit of rage went to his residence. When the appellant came back, he was carrying a knife. The appellant stabbed the deceased at the right side






of the stomach. This witness categorically stated that the appellant stabbed the deceased only once.

20. Aita Hang Subba, PW 9, an another important eye witness, portraying the same story of altercation arising out playing of music system in the Puja Pandal on the relevant date, deposed that though playing of bhajan on the music system was switched off on saying of the appellant, it was again started at the insistence of Dalli Didi. At that time the appellant left the Durga Puja Pandal and after about 15 minutes he again returned back to the Pandal carrying the knife and demanded the bhajan on the music system to be stopped. This witness requested that the music which was creating problem, might be stopped. At that Dalli Didi got annoyed and tried to push the appellant and in the process her finger got a cut injury with the knife carried by the appellant. Dalli Didi then pushed the appellant who fell on the ground. The appellant got up and went to his nearby residence. Thereafter, one Shanti Didi, who was also from the same area got furious on hearing that Dalli Didi had sustained injury on her finger with the knife carried by the appellant. Shanti Didi, being a little hot-tempered, thereafter, went to the residence of the appellant and charged him for his behaviour.





The appellant once again came to the Puja Pandal and asked the deceased, Subash, to warn his sister not to joke with him. Though the deceased assured him about this, the appellant kept murmuring about the sister of the deceased. Agitated over the same, the deceased Subash wanted to go to the appellant, but this witness tried to stop him from going towards the appellant, but the deceased went to the appellant and charged him for murmuring things about his sister. At that time, the appellant stabbed the deceased with his knife that he was carrying on his stomach region. According to this witness, the knife was pulled out from the body of the deceased by the appellant himself. This witness, in his cross, reiterated the statements made in-chief.


21. The medical evidence as adduced by PW 22, the Doctor, who conducted the post-mortem on the dead-body of the deceased may be quoted as follows:

“A - General:

I started post mortem on 09.10.2005 at 10 a.m. and finished at 11 a.m. Rigor mortis was fully developed all over the body. Post mortem levidity fixed on the back. No putrefaction.

B - Head and Neck:

Intact and healthy.



C - Chest:

Intact and healthy.

D - Abdomen:

1. Abdominal wall - incised wound 4x2x5 cm on the right upper side of the abdomen. About 300 ml of blood mixed fluid was present.
2. Liver - incised wound 2 x 1 x 2 cm under outer right lobe of liver. Rest intact and healthy.


After finishing of the post mortem examination I gave opinion as to the cause of death:

- (a) Approximate time since death - 10 to 12 hours
- (b) Cause of death - Deceased died due to the injuries sustained by liver produced by sharp cutting weapon."

The Doctor, in his cross, deposed that there were two stab injuries on the body of the deceased. It was stated by this witness that he could not say whether two different weapons used to cause the two injuries as he had mentioned in his post mortem report. According to him, the weapon was not used very forcefully while stabbing.


22. PW 25, another Doctor, who examined the appellant found the following injuries on his person:




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- “1. Haematoma of about 2 x 2 cm on the right side of his forehead.
 2. Swelling with an abrasion on the left side of the forehead.
 3. Swelling of the left cheek.
 4. Abrasion on the left elbow.
 5. Swelling of the left eyelid.
 6. Swelling of the lower lip.”

The Doctor examined the appellant opined that the injuries were simple and could be produced by an assault.


23. The basic fact emerged from those witnesses is that the incident happened during the time of celebration of Durga Puja and at the time of installation of statue of Goddess Durga in a pandal. In the evening time the appellant picked up quarrel with the children as well as PWs 2, 3 and 4. Although the testimony of the witnesses would clearly go to show that at the time the appellant was under influence of liquor and he had quarrelled with children of the locality including PWs 2, 3, 4 and 5, it is manifestly on the record that PW 2 and PW 3 along with Surya Daju @ Surja Pradhan assaulted the appellant first by slapping him and hitting him on his head. It has come on evidence that such action on the part of the PW 2, PW 3 and Surya Daju @ Pradhan enraged the appellant and out of such provocation the appellant gave one single dagger blow on the abdomen of the deceased. More





significantly, the testimony of PW 6 would reveal that there was a scuffle between the deceased and the appellant and in the said course the appellant suddenly stabbed the deceased with a knife that he was carrying. At the same time, PW 9 empathetically deposed that since the appellant kept murmuring about the sister of the deceased, the same agitated the deceased and he wanted to go to the appellant to ask him as to why the appellant had been uttering such things against his sister for quite sometime. Then, this witness tried to stop the deceased from going towards the appellant, but without listening such counsel, the deceased went to the appellant and charged him. At that point of time, the appellant stabbed the deceased with the knife that he was carrying, on the deceased's stomach region. Such action is the clear indication that the appellant was provoked initially by the assault of PWs 2, 3 and Surya Daju @ Surja Pradhan and subsequently by the charge of the deceased.

24. It is also transpired from the evidence on record that there was no enmity between the deceased and the appellant or the appellant and the family members of the deceased. The entire incident happened out of sudden quarrel





and assault initiated by PW 2, PW 3 and one Surja Daju @ Pradhan.

25. Applying the factual scenario as emerged from the appreciation and assessment of the witnesses mentioned above, more particularly, the fact that the appellant was assaulted by PWs 2 and 3 including one Surja Daju @ Pradhan pursuant to a quarrel erupted between them in the puja pandal on the Durga Puja Festival as well as keeping in view the injuries inflicted on the appellant as recorded by PW 25 Dr. S.D. Sharma, we are persuaded to accept the submission of Mr. Rai, the learned Senior Counsel that it is a fit case for conversion of the conviction from Section 302 to Section 304 Part II IPC.

26. Accordingly, we, while maintaining the conviction of the appellant, are of the considered view that alteration of conviction of the appellant from Section 302 to Section 304 Part II IPC in the given circumstances of the case would be justified and proper.

27. Considering the mitigating circumstances revealed from the testimony of the prosecution witnesses, in our

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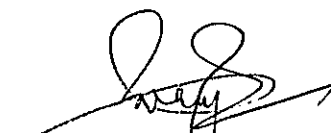
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, opinion, custodial sentence of 5 (five) years and a fine of Rs.1000/- would meet the ends of justice.

28. At this stage Mr. Rai, the learned Senior Counsel, has submitted that the appellant has already served more than 4 (four) years of the sentence in jail and such period of detention of the appellant may be set off against the term of imprisonment so imposed upon him. The submission deserves approval. It is ordered accordingly.

29. In view of what has been stated, discussed and observed above, this appeal stands partly allowed to the extent of modification of the conviction and sentence as indicated above.

30. Send down the LCR forthwith.



Judge



Chief Justice.

rsr/jks