



THE HIGH COURT OF SIKKIM : GANGTOK

CRIMINAL APPEAL NO.4 OF 2005

(Judgment and order on sentence dated 28th March, 2005 and 31st March, 2005 respectively passed by the Sessions Judge, Special Division - II, Sikkim at Gangtok in Sessions Trial Case No. 3 of 2004)

In the matter of an appeal under section 374 of the Code of Criminal Procedure, 1976

and

in the matter of

Pema Tamang,
S/o Late Mangal Singh Tamang,
R/o Lower Syari,
P.O. + P.S. Gangtok,
East Sikkim
At Present - Sikkim State Jail **Convict/Appellant.**

versus

State of Sikkim **Respondent.**

For the convict-appellant : Mr. B. K. Gupta, learned counsel.

For the respondent : Mr. J. B. Pradhan, learned Public Prosecutor.

C.A.V. on 16th March, 2006

**PRESENT : HON'BLE MR. JUSTICE BINOD KUMAR ROY, CHIEF JUSTICE.
HON'BLE MR. JUSTICE N. SURJAMANI SINGH, JUDGE.**


DATE OF JUDGMENT : 25th MAY, 2006.

J U D G M E N T

Justice N. S. Singh, J.

This appeal is directed against judgment dated 28.03.2005 and order of sentence dated 31.03.2005 passed by the learned Sessions Judge (Special Division-II) Sikkim at

N.S. Singh




Gangtok in Sessions trial case No. 3 of 2004 convicting the appellant under Section 302 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment of life and also to pay fine of Rs. 1,000/-.

2. The prosecution story which lies in a short compass brings to light a sad and shocking incident of a son (accused/appellant) beheading his own father with a sharp *Khukuri* in a hot altercation over the disruption of a drinking water pipe line in a small village called Lower Syari in East Sikkim. The prosecution versions as unfolded during the trial of the case are as follows: -

3. The deceased Mangal Singh Tamang aged about 59 years who was a widower used to live with his only son Pema Tamang, the accused/appellant herein in Lower Syari Busty, East Sikkim. One Miss Mysang Tamang aged about 64 years an unmarried sister of the deceased also used to live with the family of the deceased Mangal Singh Tamang in his house. The accused/appellant Pema Tamang who is aged about 33 years had married one Smt. Ganga Tamang and had two children born out of his wedlock. Sometime after his marriage the accused/appellant separated from his father, the deceased and started living separately in his own house built by him nearby the house of the deceased in the same compound. The affectionate relations between the deceased as the father and the accused as the son had gone sour over the years on the question of landed property of the family. The deceased who


N. S. Chel



had taken to drinking often used to get drunk and hurl abuses at the accused/appellant saying that he was not going to give a single piece of land to the accused/appellant and that the accused/appellant should leave the place so that he could dispose of the land.

4. On the fateful day, i.e., on Thursday 25.12.2003 at about 3.00 p.m. Mysang Tamang sister of the deceased reached the courtyard of the house of the accused followed by the deceased for checking up the point of disconnection in the water pipe line which was laid through the courtyard. On checking up the pipeline, the deceased found a piece of polythene pipe cut and thrown away and lying in the courtyard. On this, a hot altercation ensued in course of which Mrs. Ganga Tamang wife of the accused attacked the deceased with a heavy stone. As she had lifted the stone and was about to hurl the same at the deceased Mysang Tamang (PW3) intervened and the stone fell off to the ground. However, she clutched Mysang Tamang so tightly that she could not set herself free. At this point of time the accused Pema Tamang pushed the deceased to the ground and chopped off his neck with a *Khukuri* and after severing the head from the body placed the same on the roof top of the nearby chicken coop. After placing the severed head on the roof top of the hencoop he spat at it thrice hurling abuses at the same time. Being shocked by the horrifying incident that took place in front of her eyes Mysang Tamang, raised hue and cry calling for attention of the other


N. 27/02/04



villagers and later on she narrated the whole incident to one Dawa Lama of the same locality.

5. The said Dawa Lama lodged a written FIR with Police Station at Gangtok on the same day. On receipt of the FIR Sadar Police Station case No. 162(12) 03 dated 25.12.2003 under section 302 I.P.C. was registered against the accused/appellant and investigation was taken up by Shri P.M. Rai, O.C. Sadar Police Station. After the case was registered a police team headed by the I.O. reached the place of occurrence where the police found a headless body of deceased Mangal Singh Tamang lying on the courtyard in a pool of blood, fresh blood still oozing out from the truncated neck and the severed head placed on the roof top of the nearby chicken coop in the same courtyard. The blood stained *Khukuri* i.e. the weapon of offence was also found placed near the severed head on the roof top of the chicken coop. The police conducted inquest of the dead body, prepared rough sketch of the place of occurrence and also took several photographs of the place of occurrence from different angles. After the formalities were completed the police removed the headless dead body along with the severed head to S.T.N.M. Hospital at Gangtok for autopsy. The police also arrested Pema Tamang the accused/appellant from the place of occurrence and took him to the police station. At the police station a red cotton T-shirt worned by the accused/appellant with blood stains on it was also seized in presence of witnesses. After the autopsy of the

N. 20
C. 20




dead body of the deceased was completed the same was handed over to the local Panchayat. In course of the investigation, the Investigating Officer examined the available witnesses who were acquainted with the facts and circumstances of the case and also sent the sample of blood soaked in cotton gauge preserved by the Medical Legal Consultant which was already taken into possession, to C.S.F.L. Calcutta for forensic examination.

6. On completion of the investigation the Investigating Officer submitted charge sheet against the accused/appellant under section 302 I.P.C. in the Court of Chief Judicial Magistrate (East & North) at Gangtok. Later, on receipt of the blood test report and serological report from C.S.F.L. Calcutta, supplementary charge sheets were also submitted.

7. On committal of the case by the Court of Chief Judicial Magistrate (East & North) at Gangtok to the Court of the Sessions Judge (Special Division-II), having found sufficient materials, framed charge against accused/appellant Under Section 302 IPC. The accused/appellant pleaded not guilty to the charge and claimed trial. The learned trial Court, on going through the materials on record and on hearing Prosecution as well as the defence came to the conclusion that the prosecution had been able to prove the case against the accused beyond reasonable doubt and accordingly, held accused guilty of causing death of his father, the deceased and convicted him under Section 302 IPC and sentenced him to undergo rigorous

N. J. G. S.




imprisonment of life and also to pay a fine of Rs.1000/- as already noted above.

8. Being aggrieved by the conviction and the order on sentence the appellant has come up with the present appeal before this Court.

9. Mr. J.B. Pradhan, learned Public Prosecutor and Mr. B.K. Gupta, learned defence counsel for appellant/petitioner were heard. It was the submission of the learned Public Prosecutor that the case against the accused appellant was proved beyond reasonable doubt and the conviction and order of sentence passed on the appellant was appropriate. As against this the learned defence counsel contended that the accused appellant had caused the death of the deceased under grave and sudden provocation without any intention to cause the death. Hence, it was the submission of the learned defence counsel that the case against the accused falls under Part II of section 304 IPC and not under section 302 IPC under which he has been convicted and sentenced. Accordingly, it is his further submission that the accused appellant ought to have been convicted under section 304 Part II instead of section 302 IPC.

10. As it may be seen from the above, the case of the prosecution that the death of the deceased was caused by the accused has not been disputed. The only submission urged by the learned defence counsel in this Court was that the accused/appellant caused the death of the deceased under

Handwritten signature



grave and sudden provocation without any intention to cause death. In view of this his specific submission was that the severe sentence of rigorous imprisonment for life imposed upon the accused appellant along with the amount of fine under section 302 IPC was uncalled for and unwarranted.

11. In view of the above, the only question that this court is required to examine is as to whether there are any mitigating circumstances and if so whether the case against the accused/appellant fall under section 304 Part II IPC and not under section 302 IPC.

12. In order to appreciate the above contention of the learned defence counsel that the accused appellant caused the death of the deceased without any intention to cause his death, it would be necessary to take a look at the overall circumstances in which the crime was committed. Even though 11 witnesses were examined in all the evidence which brings the relevant aspect of the case into sharp focus, is the evidence of Mysang Tamang (PW3) the only eyewitness in the case. No doubt, one Mrs. Ganga Tamang (PW10) wife of the accused was also present on the spot during the occurrence but as correctly observed by the learned trial Court she being the wife of the accused has not deposed anything about the incident. Therefore, even though the evidence on record consists of as many as 11 witnesses, the evidence of the sole eye witnesses as might be seen presently, would be sufficient to throw light on the exact fact situation prevailing at the time of occurrence.

N. J. B. S.




Therefore, it would be sufficient to refer to the deposition of Mysang Tamang (PW3) the lone eyewitness, for a graphic account of what happened on the spot.

13. It would be relevant to note that Mysang Tamang (PW3) the lone eyewitness is the aunty of the accused and unmarried sister of the deceased who was living with the deceased at the relevant time. On the fateful day, she reached the courtyard of the accused Appellant being followed by the deceased to check up the drinking water pipeline that was laid through the courtyard of the accused appellant. In her deposition, she stated that the accused, the only son of her brother the deceased, was related to her as nephew. His name was Pema Tamang @ Santosh Tamang. In the village he was also known as Chaptey. Being unmarried, she was residing with her deceased brother at Syari. The accused who was staying together with his father separated from the family after his marriage and started living separately. The witness then stated as follows: -

"I do not know the date, month and the year of English Calender. The incident took place in the Nepali month of Push last. It must have been about 3.00 P.M. that day my deceased brother was slightly down the fever and taking rest at his residence I had gone to the nearby field to graze my goat. When I returned home after grazing the goats I heard the cows moowing for water. Accordingly, I scolded my deceased brother for not attending to the cows which appears thirsty, while I was telling my deceased brother to give water I overheard some one from towards the house of the accused saying that my deceased brother had chopped off the water pipe line.

N. S. Oei



Thereafter I proceeded towards the house of the accused and requested the wife of the accused to provide two buckets of water to give to the cows. I noticed that my deceased brother had also followed behind me. At that time the wife of the accused lifted one stone weighing approximately 2 Kgs. to strike my deceased brother with the same. I tried to prevent the stone from striking my deceased brother and the stone fell on the ground. At that the wife of the accused tightly caught hold of my hands. Thereafter, the accused pushed my deceased brother to the ground and chopped his neck with a 'Khukuri'. The accused severed the neck of my deceased brother. I noticed pool of blood on the ground where the accused had chopped my deceased brother's neck. After severing the neck of my deceased brother from his body, the accused lifted the head and placed it on the roof top of the hencoop nearby. While the accused was assaulting my deceased brother I raised alarm and called for help. I, myself, could not prevent the accused from assaulting my deceased brother as I was tightly caught hold by my arm by the wife of the accused. After commission of the offence the accused himself came and freed my hands from the grip of this wife. Immediately after commission of the offence i.e. after severing the head of my deceased brother and placing the same on the roof of the hencoop, the accused also herled abuses on the severed head of my deceased brother and spat on the same thrice".

14. It may be noted that the learned Sessions Judge fully relied on the above evidence of the sole eyewitness for coming to the conclusion that the case against the accused stands proved. While convicting the accused, it has been specifically observed by him that the statement of Miss Mysang Tamang (PW3) that the accused chopped the neck of the deceased after severing the head placed the same on the rooftop of the hencoop is fully supported by the medical report

N.3.2
Aee


and the recovery of the beheaded body and the severed head of the deceased from the very spots mentioned in the evidence.

15. It is to be noted that the sole eyewitness relied on by the Learned Trial court happens to be a relative of both the deceased and the accused. It is, however, well established that a witness cannot be disqualified merely on the ground of being close relation of the parties if the evidence of such witness is otherwise reliable and trustworthy. There is therefore no legal bar in accepting the testimony of such eyewitness if it is cogent, truthful and trustworthy. It has been clearly held by the Hon'ble Supreme Court in ***Prem Sagar vs. Dharamvir and Others*** reported in ***AIR 2004 SC 21*** that testimony of an eye witnesses if otherwise found trustworthy should not be discredited on the ground of the accused being a relative of either of the parties.

The next aspect of the matter is that the conviction is based on the testimony of the single witness. However there seems to us to be no infirmity on this account also as it is settled law that conviction can be based on the testimony of a single witness if such witness is wholly reliable. Reference in this regard may be made to the recent decision of the Apex Court rendered in ***Chacko @ Aniyam Kunju and Others vs. State of Kerala*** reported in ***AIR 2004 SC 2688 wherein it has been held as follows: -***

"No particular number of witnesses is required to establish the case. Conviction can be based on the testimony of single witness if he is

N. S. Q. S.



wholly reliable. Corroboration may be necessary when he is only partially reliable. If the evidence is unblemished and beyond all possible criticism and the Court is satisfied that the witness was speaking the truth then on his evidence alone conviction can be maintained".

16. As it may be noticed from the above it is open to a court to rely on the testimony of a single witness if it is wholly reliable and bare conviction thereon. Hence, relying on the above evidence of Mysang Tamang, the sole eyewitness, together with the other materials like the medical evidence and the evidence of recovery there can be no doubt that the materials on the record establish the following.

On the fateful day, Mysang Tamang (PW3) accompanied by the deceased reached the courtyard of the accused at around 3.00 p.m. After reaching the house of the accused, she had hardly asked the wife of the accused for two buckets of water for serving the same to the thirsty cows, when the wife of the accused picked up a heavy stone so as to hurl it at the deceased who was by her side. However, on her intervention, the stone fell down on the ground but the wife of the accused seized her hands so tightly that she was unable to free herself. At that point of time, the accused knocked down the deceased on the ground and chopped off his neck with a *Khukuri*, severing the head from the body. After severing the head, the accused placed it on the rooftop of the hencoop and hurling abuses at the severed head, spat at it thrice.

15.7
15.7



That the above facts stand established by the evidence of the sole eyewitness duly corroborated by other evidence as stated above is not disputed even by the defence and in our view, correctly so.

We have already indicated above the legal position with regard to evidentiary value of a witness related to the parties and the permissibility of basing a conviction on the testimony of a single witness. Thus the legal position being what is highlighted above and the established materials on the record being as summarized above, we find no infirmity in the finding arrived at by the Learned trial court and the order of conviction and sentence based thereon.

17. Now the next question is, whether the learned trial Court is right in holding that the case against the appellant falls under Section 302 of the Indian Penal Code. It is the contention of the learned defense counsel that the case against the accused falls under section 304 Part II and not under section 302. The case sought to be made out by the learned counsel for the defence in support of his submission is that, the accused committed the alleged offence under grave and sudden provocation. In order to show that the incident occurred on the spur of the moment without any premeditation, the learned Counsel pointed out that it was not the accused who had gone to the house of the deceased, but it was the deceased who had come to the house of the accused and had started assaulting his wife. It was when the accused who was inside his house at

N. S. Qee


that time saw that his wife was being assaulted by the deceased that he was provoked and thus lost his self-control and committed to the unfortunate crime. In support of this submission the Learned Counsel placed heavy reliance on the evidence of Smt. Ganga Tamang (PW10), the wife of the accused. The said witness deposing as PW10 has stated that her father-in-law used to drink, get drunk and hurl abuses in filthy language while they were residing in the joint family. Not only this, her father-in-law also used to throw hot ashes on her head and even after they started living separately her father-in-law continued his ill behaviour towards her and the accused. On the relevant day's incident she stated as follows:

"On the date of incident also my father-in-law came to our residence abusing me and using the filthy language alleging that we had disconnected his water pipe line. The accused was in the residence at that time. My father-in-law also assaulted me with stones. As a result I fell down and became unconscious. As a result I cannot say what happened thereafter. When I gained my consciousness I saw the dead body of my father-in-law with the head severed."

The witness has, no doubt stated that she was assaulted by the deceased with a stone, as a result of which she fell down and became unconscious. This statement of the witness, has however been rejected by the learned trial Court giving cogent reasons as follows: -

"The counsel for the accused placed great reliance in the evidence of Smt. Ganga Tamang (P.W.10) the wife of the accused. The evidence of this witness does not help the accused as she has not deposed about the


N. J. O'Leary



incident at all on the plea that she became unconscious. Moreover, the evidence of this witness cannot be acted upon without any corroboration as she is an interested witness being the wife of the accused. The credibility of this witness is seriously shaken as in her cross examination she states that the incident occurred due to provocation by the deceased but in her examination in chief she had stated that she fell down and became unconscious and could not say what happen thereafter".....

The evidence of Ganga Maya (PW10) as can be noticed from above, mainly relates to past events rather than to the events of the day of occurrence. It is thus to be noted that the past happenings, even if taken to be correct, do not contribute to the theory of grave and sudden provocation. On the contrary they indicate evidence of past hatred and ill feeling which make the theory of premeditation more likely than the theory of grave and sudden provocation. The version given by the witness that she was knocked down unconscious by the deceased and the same was the cause of grave and sudden provocation for the accused to commit the alleged crime is not corroborated by any evidence on record. It is unlikely that the deceased would aspect his daughter in law with a stone in the manner as alleged. Even if it were so and it were conceded that there was provocation from the deceased, the provocation which allegedly emanated from a quarrel triggered by a petty matter like cutting off of a polythene water pipe line would not in our considered view, justify a brutal act like beheading of the deceased. There is no evidence of the resistance or retaliation

N. S. Q. S.




on the part of the deceased much less an assault on the wife of the accused or on the accused himself.

As it is clear from the materials on record, the deceased reached the courtyard of the accused on the fateful day along with his sister (PW3) and on reaching there, Ganga Maya Tamang (PW10) attacked the deceased by picking up a heavy stone, and had it not been for the intervention of PW 3 she would have hurled the heavy stone at the deceased. It is also clear that the accused was very much present in the house at the relevant time. It was when Smt. Ganga Maya (PW10) seized Mysang Tamang (PW3) severely restricting the mobility of her hands that the accused knocked down the deceased and once he fell down the accused chopped off the neck of the deceased with a *Khukuri* and severed the head right in front of her eyes. In view of these facts, we find it difficult to agree with the learned defence counsel that the accused committed the alleged crime being under grave and sudden provocation without any intention to cause the death of the deceased. These facts that have come on record and which have been established do not support the contention that the accused had no intention to cause the death of the deceased.

Thus, keeping in view the circumstances in which the occurrence took place, the type of weapon used and the manner in which the offence was committed, we are unable to agree that the accused had no intention to cause the death of the deceased by the kind of injury he had inflicted. In our

N. B. Oei




considered view, it will be absurdity of the extreme kind to say that one who severs the head of an unarmed person with a sharp cutting weapon without any justifiable reason did not intend to cause the death of the person.

18. Now coming to the question of applicability of section 304 Part II IPC, it may be noted that section 304, which prescribes punishment for culpable homicide not amounting to murder, divides, for the purposes of awarding sentence, the offence into two categories according to intensity and gravity of the crime. While Part I covers offences which are more serious and more grave in nature and the liability to punishment is determined on the basis of the intention to be gathered from the circumstances, Part II deals with offences which are less serious in nature, and liability to punishment does not depend on intention. Thus it is the intention which is the basis of liability in the first part whereas it is knowledge which is the basis of liability in the second part.

It is therefore clear from the above that Section 304 Part II applies when the act is done with the knowledge that it is likely to cause death but with no intention to cause death. We have already held above that from the manner the crime has been committed and the kind of injury inflicted on the deceased, it cannot, by any stretch of imagination, be said that the accused did not by his act intend to cause the death of the deceased and that he had done the act only with knowledge that it was likely by his act to cause death.

Handwritten signature



Thus, keeping in view the whole scenario in which the ghastly crime was committed, it is clear that the act of the accused/appellant does not fall under any of five exceptions stated in Section 300 I.P.C. which lays down when an act amounts to murder and when it amounts only to homicide not amounting to murder. It thus follows that the act of the accused squarely falls within the meaning of murder as stated in Section 300.

As regards the appropriate punishment that is called for in the circumstances of the present case we can do no better than quote the following observation of the Apex Court in ***Shanker Narayan Dhadulkar vs. State of Maharashtra*** reported in ***AIR 2004 SC 1966***.

"For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the I.P.C. practically recognizes three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree. " This is the gravest form of culpable homicide, which is defined in Section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304".

It is thus clear that it is only the lowest type of culpable homicide that is punishable under second part of section 304 and for more serious type of culpable homicide as the one

N. 21
Cee

committed by the accused-appellant in the present case falling within the definition of murder under section 300 IPC the appropriate section under which it is punishable is section 302 and not under section 304.

19. For the reasons given above, we are of the considered view that the conviction and sentence are well merited and as such, interference of the court is not called for.

Accordingly, the appeal is dismissed thus affirming the impugned conviction and sentence.



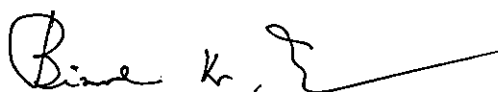
(Justice N. Surjamani Singh)

Judge

25-05-2006

Justice B. K. Roy, C.J.

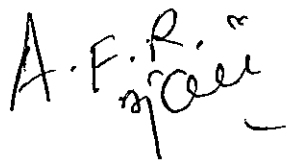
20. I agree.



(Justice Binod Kumar Roy)

Chief Justice

25-05-2006



Prepared by

Dipak Saha

Private Secretary

to Hon'ble Shri Justice N. S. Singh