

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 3rd July, 2024

**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 2023

Appellant : Tsheten Tshering Bhutia

versus

Respondent : State of Sikkim

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

Appearance

Mr. T. R. Barfungpa, Advocate (Legal Aid Counsel) for the Appellant.

Mr. S. K. Chettri, Additional Public Prosecutor for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The only plea advanced by Learned Counsel for the Appellant is that the sentence imposed vide the impugned Order on Sentence, dated 30-03-2021, of the Court of the Learned Sessions Judge, South Sikkim, at Namchi, in Sessions Trial Case No.02 of 2018 (*State of Sikkim vs. Tsheten Tshering Bhutia*), for a term of ten years under Section 304 Part II of the Indian Penal Code, 1860 (hereinafter, the "IPC"), against the Appellant, be reduced to the period of incarceration already undergone by him.

2. Learned Counsel for the Appellant canvassed the contention that while the Appellant is not aggrieved with the finding of the Learned Trial Court vide the impugned Judgment, this Court in ***Satar Gurung vs. State of Sikkim***¹, wherein the facts and circumstances were identical to the instant case, reduced the sentence of imprisonment to the period already undergone by the Appellant. That, the Appellant in ***Satar Gurung*** (*supra*) had

¹ 2022 Cri. L. J. 3867 : AIROnline 2022 SK 50

attempted to defend himself resulting in the wounds inflicted on the deceased, to which he succumbed. It was also observed therein that there was no premeditation, planning or the requisite *mens rea*, to bring the offence within the ambit of Section 300 of the IPC. That, the Appellant therein 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. Similarly, in the Appeal at hand the Appellant had inflicted the wounds on the deceased while attempting to defend himself from the physical assault being perpetrated on him, by the deceased and had no intention to cause his death. Hence, it is a fit case for reduction of the sentence.

3. Learned Additional Public Prosecutor had no specific submissions to advance in this context.

4. Although, the plea put forth by Learned Counsel for the Appellant is only for reduction of the sentence imposed by the Learned Trial Court in its impugned Order of Sentence, we may for clarity briefly narrate the facts as per the Prosecution.

(i) On 10-12-2017, at around 1740 hours, the Appellant along with his brother PW-10 were returning home. Both were inebriated and got into a brawl with each other, their elder brother PW-6 and his wife PW-8 tried to pacify them, in vain. In the meanwhile, the deceased Phurba Ongdi Bhutia arrived at the spot and also attempted to separate the two, unsuccessfully. PW-8 then sought the help of the co-villagers upon which PW-2, PW-3, PW-5 and PW-12 arrived at the spot to intervene. Whilst the brawl ensued, the duo also argued with the persons who had come to separate them. PW-12 then slapped both of them, after which the

matter was seemingly put to rest and PW-6 then served tea to all present. The Appellant was seen to have left the kitchen but returned after sometime and started challenging PW-12, who allegedly pushed the Appellant out to the lawn, a scuffle then ensued between them. Meanwhile, after having served tea to all, PW-8 looked out of the window and saw the deceased lying on the ground with the Appellant standing beside him. She yelled out that "*maanchey larecha*" (a man has fallen). On hearing her shout, all the men inside the house rushed out and found the deceased lying in a pool of blood with the Appellant standing beside him with blood smeared over his shirt and his body. Consequent, upon such discovery PW-1 lodged Exbt 1, informing the concerned Police Station, at around 07.30 p.m., of the occurrence of the incident. The Police Station registered a case against the Appellant under Section 302 of the IPC and endorsed it to the PW-22, the Investigating Officer (IO), for investigation. Investigation conducted *inter alia* revealed that the deceased had been stabbed in his right chest and right cheek by the Appellant. On completion of investigation, Charge-Sheet was submitted against the Appellant under Section 302 of the IPC.

(ii) Charge was framed against the Appellant under the same section of law by the Learned Trial Court, to which he entered a plea of "not guilty". The trial commenced consequently, where the Prosecution examined twenty-two witnesses including PW-22, the IO to establish its case. The Learned Trial Court in Paragraphs 76 and 77 of the Judgment concluded that it was established that due to a sudden fight between the deceased and the Appellant, the deceased was assaulted by the Appellant with a knife (MO-I), on a

vital part of his body, his chest, in the courtyard of the house of PW-6, and succumbed to his injuries. That, the circumstantial evidence produced by the Prosecution unerringly pointed to the fact that the Appellant had committed the crime by which the life of an innocent person had ended. It was further observed that, it was difficult to conclude that there was any motive, premeditation or intention on the part of the Appellant to cause the death of the deceased. Accordingly, in the absence of the above factors, the Prosecution had proved its case against the Appellant under Section 304 Part II of the IPC but not under Section 302 of the IPC, hence the Judgment and impugned Order on Sentence.

(iii) In this context, while addressing the argument of Learned Counsel for the Appellant that the facts of the instant case are identical to that of **Satar Gurung (supra)**, it is essential to notice that in **Satar Gurung (supra)** this Court, after having examined and discussed the evidence of the Prosecution witnesses, detailed at Paragraph 12 of the Judgment as follows;

"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 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."

(emphasis supplied)

(iv) In the backdrop of the above conclusion, while discussing the evidence on record pertaining to the instant case it

is apparent PW-2 was called and requested by PW-8 to pacify the quarrelling brothers i.e., the Appellant and PW-10. According to PW-2, the deceased was standing on the doorstep of the kitchen, situated separately from the main house. On reaching the place Appellant questioned PW-12 as to why he had slapped him. The deceased, a close relative of the Appellant, who was standing on the doorstep asked the Appellant as to why he was creating problems. When the Appellant did not pay heed to the deceased, a quarrel broke out between them, where the deceased slapped the Appellant once, after which a "tug of war" ensued between them where the Appellant pulled the deceased to the courtyard. PW-8 entreated them not to fight, when she later looked out at the courtyard she shouted "*maanchey maryo*" (a man is killed) and ran towards them. PW-2 also went to the place of occurrence and saw the deceased lying on the ground and the Appellant standing nearby holding a knife in his hand. PW-3 witnessed the deceased advising the Appellant not to quarrel with his brother when the Appellant was standing outside the kitchen and the deceased was near the kitchen door. PW-4 also saw the deceased and the Appellant involved in a discussion and saw the deceased going out of the kitchen, while the Appellant was already outside. PW-5 too noticed the argument between the deceased and the Appellant and heard the deceased slapping the Appellant. After some time he heard PW-8 shouting "*maanchey maryo*" (a man is killed). PW-6 was also witness to the Appellant and the deceased standing near the door of the kitchen and they went quarrelling towards the courtyard of the house, in a while they heard PW-8 shouting and saw him dead. PW-8 witnessed much the same events as the

other witnesses. In pith and substance the evidence of the Prosecution witnesses corroborates with each other. It is evident from the deposition of the witnesses that the deceased being elder to the Appellant attempted to pacify him and on the aggressiveness of the Appellant rendered him a slap but the Appellant being armed with a knife assaulted him, which led to his death.

(v) These facts are clearly distinguishable from that of **Satar Gurung** (*supra*). The Appellant therein was surely not the aggressor. In Paragraph 7(i) of **Satar Gurung** (*supra*) it has been recorded *inter alia* that, PW-2 told the deceased not to argue with the 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 him with fists and blows. That, PWs 2 and 3 separated the deceased and the Appellant and PW-2 took the deceased and escorted him to the road to enable him to go to his house however thereafter, the deceased suddenly returned and jumped upon the Appellant, whereupon a physical fight ensued between two and the fatal wounds came to be inflicted on the deceased. It is thus reiterated that the Appellant in **Satar Gurung** (*supra*), was not the aggressor by any stretch of the imagination. In the facts of the instant case, the Appellant is without a doubt the aggressor having earlier left the house of PW-6 and PW-8 and returned armed with a knife and indulged in an uncalled for verbal duel with all and sundry, including the deceased and then assaulting him fatally with the knife.

5. Accordingly, we are constrained to observe that there is no reason to interfere with the Order on Sentence imposed by the

Learned Trial Court to reduce it as prayed for by Learned Counsel for the Appellant.

- 6.** Appeal dismissed and disposed of accordingly.
- 7.** Copy of this Judgment be forwarded to the Learned Trial Court for information along with its records.

(Bhaskar Raj Pradhan)
Judge
03-07-2024

(Meenakshi Madan Rai)
Judge
03-07-2024

Approved for reporting : **Yes**