

# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 10<sup>th</sup> November, 2021

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

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Crl. A. No.11 of 2020

**Appellant** : Sagar Subba

**versus**

**Respondent** : State of Sikkim

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

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**Appearance**

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Sudesh Joshi, Public Prosecutor with Mr. Yadev Sharma, Additional Public Prosecutor and Mr. Sujan Sunwar, Assistant Public Prosecutor, for the State-Respondent.

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## J U D G M E N T

Meenakshi Madan Rai, J.

**1.** The only question for determination in this Appeal is whether the offence committed by the Appellant-Accused (*hereinafter the "Appellant"*) is murder, as defined under Section 300 of the Indian Penal Code, 1860 (*for short, the "IPC"*), or whether it would fall under the *Exceptions* carved out under the said provision of law, whereby the offence would be one under Section 304 of the IPC, thereby entailing a lesser degree of penalty.

**2.** In his arguments, Learned Counsel for the Appellant contended that the Prosecution case was one of premeditated murder by the Appellant but, in fact, the offence was committed on the spur of the moment on a grave and sudden provocation given

by the deceased consequent upon which the offence was committed. While walking this Court through the evidence of the Prosecution Witnesses, more especially that of P.Ws.1, 9, 12, 15 and 16, it was urged that although P.Ws.15 and 16 were minor children and alleged eye-witnesses to the offence, however, the evidence of P.W.15 reveals that he saw the Appellant draw out a *khukuri* (sharp edged weapon) but did not witness the assault, whereas P.W.16 stated that she had seen both the Appellant and the deceased having some discussion near the shop of P.W.12. She does not speak of the Appellant having drawn out the *khukuri*. There is thus an anomaly in the evidence of these two Witnesses who were together. P.W.12, the Shopkeeper in front of whose shop the alleged offence took place, did not lodge any Complaint while P.W.9, the wife of P.W.12 and the mother of P.W.6, is the only Witness who informed her son P.W.6 after hearing a commotion outside their Shop and on seeing one boy lying in front of their Shop however P.W.6 also did not lodge an FIR. The antecedents of the Appellant were known to P.W.1 as the Appellant used to work in the house of P.W.7, the father of P.Ws.1 and 2. Evidently, there was no animosity between the deceased and the Appellant as can be culled out from the evidence of P.Ws.1, 2 and 7. That, P.W.3 the father of the deceased, did not witness the incident and was only informed of it by his niece, one Leela Subba who is not even a Witness in the instant matter, thereby raising doubts about the authenticity of the evidence of P.W.3. That, as both the deceased and the Appellant were in a drunken condition, it was essentially a drunken brawl and on sudden provocation, the Appellant struck the deceased fatally. Hence, the offence committed by him would be

under the ambit of Section 304 of the IPC and not under Section 300 thereof. To buttress his submissions, Learned Counsel placed reliance on ***Surinder Singh vs. State of Punjab***<sup>1</sup>.

**3.** Repudiating the arguments of Learned Counsel for the Appellant, Learned Public Prosecutor contended that P.W.12 had clearly seen the assault, while P.Ws.15 and 16 the minor children have both seen the Appellant and the deceased together and both have witnessed them having a discussion. That, P.W.17 the Medico Legal Consultant who examined the body of the deceased, found six ante mortem injuries, as detailed in Exhibit 10, the Medico Legal Autopsy Report pertaining to the Appellant. It thus stands to reason that the deceased being unarmed, was assaulted by the Appellant leading to his death. No grave and sudden provocation has been established by the Appellant and hence the offence falls under all Clauses of Section 300 of the IPC. That, none of the *Exceptions* carved out in Section 300 of the IPC, are attracted for the wanton act committed by the Appellant. Conceding that it may not have been a premeditated murder, Learned Public Prosecutor urged that it was undoubtedly committed with the knowledge and intention of causing murder and well within the parameters of the offence defined under Section 300 of the IPC, hence, the Appeal deserves a dismissal.

**4.** The submissions of Learned Counsel for the parties were heard *in extenso*, all evidence examined and the impugned Judgment perused as also the citation made at the Bar.

**5.** The facts of the case which have led to the instant Appeal are that on 19.10.2018, P.W.3 Amber Bahadur Limboo, the

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<sup>1</sup> 1989 Supp (2) SCC 21

father of the deceased, lodged Exhibit 3 the FIR on 19.10.2018 before the Singtam Police Station informing that on the same evening at around 6 p.m., the Appellant, a helper in the house of Puspak Ram Subba (P.W.7), had assaulted and killed his son Saran Subba in front of the shop of Hira Lal Bhagat (P.W.12), by repeatedly attacking him with a *khukuri*. Hence, legal action was sought. The Singtam Police Station registered Exhibit 3, the FIR, on the same date as FIR No.53/2018 under Section 302 of the IPC against the Appellant and the matter was endorsed to P.W.24 S.I. Sonam Dorjee Lachenpa for investigation. P.W.24, on completion of his investigation, submitted Charge-Sheet against the Appellant under Section 302 of the IPC.

**6.** The Learned Trial Court framed Charge against the Appellant under Section 302 of the IPC, to which the Appellant pleaded "not guilty." The Prosecution, in an endeavour to prove its case beyond a reasonable doubt, examined twenty five Witnesses. On closure of the Prosecution evidence, the Appellant was afforded an opportunity under Section 313 of the Code of Criminal Procedure, 1973, to explain the incriminating evidence against him. He denied any involvement in the offence. Arguments of the parties were finally heard and the impugned Judgment pronounced on 08.10.2020 convicting the Appellant under Section 302 of the IPC. The Order on Sentence was pronounced on 09.10.2020, whereby the Appellant was sentenced to suffer Rigorous Imprisonment for life and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only, with a Default Clause of Imprisonment, hence this Appeal.

**7.(i)** P.W.3 the father of the deceased, proved the contents of Exhibit 3 the FIR lodged by him. He is not an eye-witness to the

offence but had gone to the Place of Occurrence (*for short, the "P.O."*) in front of the Shop of P.W.12, after being informed of the incident by his niece Leela Subba at around 7.30 p.m. to 8 p.m. of the date of the incident i.e. 19.10.2018. At the P.O., he found his son (*deceased*) lying on the ground in a pool of blood. Thereafter he lodged Exhibit 3 at the Singtam Police Station. P.W.1 Bhaskar Hang Thebey and P.W.2 Raj Hang Thebey are the sons of P.W.7, in whose house the Appellant used to work as a Labourer. P.W.7 lent no support to the Prosecution case, however, P.Ws.1 and 2 were witnesses to the seizure of M.O.V the *khukuri* with a wooden scabbard and a black coloured sling attached to it, which were seized by the Police from the possession of the Appellant after they found him near the woods on the river side along with his bedding and the *khukuri*. P.Ws.1 and 2 had accompanied the Police to search for the Appellant along with P.W.14 Norbu Tshering Bhutia and P.W.18 ASI P.B. Subba, who duly supported the fact of seizure of M.O.V from the Appellant and confirmed the place where the Appellant was hiding. It also emerges from the evidence of P.Ws.1 and 2 that after the seizures were made, the Police packed and sealed the seized articles in their presence. P.Ws.1 and 2 both saw the body of the deceased lying in front of the Shop of P.W.12. The cross-examination of P.W.2 indicates that he had heard someone shouting that a person was being killed and he immediately went to verify. When he reached the P.O., five-six people were gathered there and the Victim lay dead on the ground in a pool of blood, thus corroborating the evidence of P.W.1 who, under cross-examination, deposed that he had also seen the deceased lying in a pool of blood.

**(ii)** P.W.5 Uma Tamang and P.W.6 Roshan Kumar Bhagat son of P.W.12 Hira Lal Bhagat and P.W.9 Shova Devi, also witnessed the body of the deceased on the ground and were also Witnesses to the Police lifting the Blood Sample of the deceased from the P.O. in their presence. P.Ws.5 and 6 both identified MO VI, MO VII and MO VIII as the blood lifted by the Police from the P.O. in their presence consequent upon which, Exhibit 6 the Seizure Memo, was prepared wherein they affixed their respective signatures. P.W.6, corroborating the evidence of P.W.9, his mother, stated that he heard her shouting and saw the deceased on the ground in a pool of blood.

**(iii)** P.W.12 was the only eye-witness to the incident. He runs a Grocery Shop at the road level floor of the building of P.W.7. According to this Witness, on 19.10.2018, at around 6.30 p.m. to 6.45 p.m., the Appellant came to his Shop and purchased two-three cigarettes. He appeared to be under the influence of alcohol. After about 5-10 minutes, the deceased also arrived at the same place. An altercation arose between the Appellant and the deceased, the details of which he did not hear. Suddenly, the Appellant started assaulting the deceased on his neck and other parts of the body. He saw the deceased falling down and blood oozing out of his neck and other parts of the body. Consequent thereto, the Witness fell down and became unconscious. Although he could not specifically identify M.O.V as the same *khukuri*, he however stated that it looked like the *khukuri* which was in the Appellant's hand. His evidence remained undecimated in cross-examination.

(iv) P.W.15 Binod Subba, a child of about twelve years saw the Appellant and the deceased having an altercation whereupon the Appellant drew a *khukuri* but being scared, he along with his sister, P.W.16 Mandira Subba, aged about eight years, returned home. P.W.16 has stated much the same, except that she did not see the Appellant drawing out his *khukuri*.

(v) By far, the most important evidence is of P.W.17 Dr. O.T. Lepcha, Medico Legal Consultant. The body of the deceased, with a history of having been assaulted by one Sagar Subba (*Appellant*) with a *khukuri*, along with Inquest Papers were received by him on 20.10.2018. He conducted autopsy on the same day, at around 12.40 p.m. On examination of the deceased, the Doctor recorded *inter alia* as follows;

*"Antemortem injuries:-*

*1) Incised chopped wound 21 cm x 6 cm x spine over the right side of neck with bevelling of the upper border of the wound. The injury is clean cut, bleeding and is directed medially and downwards. It involves the scalp and the right side muscles of the neck with fracture of the second cervical vertebrae.*

*2) Incised injury 8 cm x 0.1 cm bleeding over the left biceps.*

*3) Elliptical incised chop wound over the right side of back over the fifth and sixth lumbar vertebrae measuring 11 cm x 2 cm x bone.*

*4) Elliptical incised chop wound 12 cm x 2 cm x bone placed 2.5 cm below injury No.3.*

*5) Incised chop injury 7.5 cm x 1.8 cm placed at medline over the back 2 cm below injury No.4.*

*6) Superficial linear incised injury(5 in numbers) each measuring 7 cm x 0.5 cm to 4.2 cm x 0.5 cm and placed over right side of the back.*

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*Based on my examination, I opined that the approximate time since death was 12 to 24 hrs and the cause of death to the best of my knowledge and belief was as a result of hypovolaemic hemorrhagic shock due to multiple homicidal chop wound.*

*Exhibit 10 is medico legal autopsy report drawn by me, Exhibit 10(a) is my signature. Going through MO V shown to me I can say that it could cause the injuries mentioned in my report."*

**8.(i)** The evidence on record having thus been examined, it may relevantly be mentioned here that *Exception 4* of Section 300 of the IPC, which the Appellant seeks to invoke, provides that 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. Thus, in order to bring the instant matter within the ambit of *Exception 4*, all of the ingredients mentioned in the *Exception* have to be proved. The Appellant is necessarily to prove that the offence was **(a)** committed without premeditation, **(b)** in a sudden fight, **(c)** in the heat of passion, **(d)** upon a sudden quarrel, and **(e)** without the offender having taken undue advantage, **(f)** or acted in a cruel or unusual manner. If the Prosecution evidence does not point to a sudden fight and the Appellant had acted in a cruel manner, the least that can be said is that he took advantage of the deceased, thereby leaving no justification for applying the *Exception 4* to Section 300 of the IPC. Clearly, the Prosecution evidence does not indicate that there was a grave or sudden provocation given by the deceased. Even if the act was committed without premeditation, it is clear that the deceased was unarmed, while the Appellant was armed with the *khukuri* M.O.V. He struck the deceased relentlessly several times with the *khukuri*, leading to numerous deep injuries, as apparent from the evidence of P.W.17, Dr. O.T. Lepcha. This is a clear indication that he had taken undue advantage of the situation and also acted in a cruel and unusual manner by inflicting injuries on the neck and other parts of the body of the Victim. Consequently, no scope remains for invocation of *Exception 4* to



Section 300 of the IPC and the offence, indeed, squarely falls under Section 302 of the IPC.

**(ii)** Reliance on the ratio of *Surinder Singh supra*, by Learned Counsel for the Appellant is misplaced as in the said case, the accused and the deceased broke into a drunken brawl and the murder was allegedly committed about five-six hours later. The facts therein are clearly distinguishable from the instant matter.

**9.** Hence, in light of all the discussions that have emanated hereinabove, we are of the considered opinion that no error emanates in the findings arrived at by the Learned Trial Court.

**10.** In the end result, the impugned Judgment and Order on Sentence, dated 08.10.2020 and 09.10.2020 respectively, of the Learned Sessions Judge, Special Division-I, East Sikkim at Gangtok, in Sessions Trial Case No.02 of 2019, are upheld.

**11.** The Appeal fails and is accordingly dismissed.

**12.** No order as to costs.

**13.** Copy of this Judgment be transmitted to the Learned Trial Court, for information.

**14.** Trial Court Records be remitted forthwith.

**( Bhaskar Raj Pradhan )**  
**Judge**  
10.11.2021

**( Meenakshi Madan Rai )**  
**Judge**  
10.11.2021