

THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No. 21 of 2019

Kewal Rai,
Aged about 34 years,
Son of Amrit Rai,
Resident of Taza Busty,
Pakyong,
East Sikkim.

*Presently lodged at Central Prisons,
Rongyek, East Sikkim.*

..... Appellant

Versus

State of Sikkim

..... Respondent

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

Appearance:

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) for the Appellant.
Dr. Doma T. Bhutia, Public Prosecutor for the Respondent.

Date of hearing : 07.10.2020 & 12.10.2020

Date of judgment: 09.11.2020

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The learned Sessions Judge, District Court at Namchi, South Sikkim (learned Sessions Judge), has convicted the appellant for culpable homicide not amounting to murder, attempt to murder and for voluntarily causing hurt by a knife in Sessions Trial Case No. 09 of 2016 (*State of Sikkim vs. Kewal Rai*), on 28.09.2019. He was

sentenced to simple imprisonment of 10 years and a fine of Rs.10,000/-, 5 years and a fine of Rs.5000/- and 1 year and a fine of Rs.2000/- for each of the offences, respectively. The judgment of conviction and order on sentence, both dated 28.09.2019, are assailed by the appellant.

2. Heard Mr. Jorgay Namka, learned Legal Aid Counsel for the appellant and Dr. Doma T. Bhutia, learned Public Prosecutor, for the respondent.

3. Mr. Namka submitted that the evidence produced by the prosecution does not establish the case under sections 304 II and 307 IPC. He further submitted that as the appellant has been found not guilty of the charge under section 302 IPC, he could not have been, in any case, convicted under section 307 IPC. It was argued, at the most, the appellant could have been convicted for causing grievous hurt. The learned Public Prosecutor, on the other hand, submitted that the prosecution has been able to lead cogent evidence and all the ingredients of the offences have been duly established beyond all reasonable doubt. She relied upon the judgment of the Hon'ble Supreme Court in the *State of M.P. vs. Deshraj & Anr.*¹, in which it was held that conviction under section 304 II IPC would be proper as there was a sudden quarrel and death was caused as a result of the injuries inflicted.

¹(2004) 13 SCC 199

4. The learned Sessions Judge after taking into consideration the evidence of the first informant – Basanti Subba (PW-2), injured witnesses – Purna Subba (PW-1) and Kedar Subba (PW-5), and other witnesses who were present during the incident, held the appellant guilty.

5. 30 witnesses were examined by the prosecution. They have been elaborately discussed by the learned Sessions Judge. We shall only discuss the evidence of the material witnesses needed for the proper adjudication of the present appeal.

6. The incident occurred on 04.09.2016 at Gairi Gaon, Mamring, South Sikkim. The place of occurrence, it transpires, had the common residences of all the material witnesses as well as the appellant – the tenant in the house of Jasman Subba @ Laxuman (PW-6) and Ashmati Subba (PW-3) who are the parents of Mangal Dhoj Subba (deceased) and Purna Subba (PW-1) – one of the injured witnesses. There was an altercation between the deceased and the appellant in the house of the deceased. Basanti Subba (PW-2), wife of the deceased, was an eyewitness to the altercation between them. Basanti Subba (PW-2), Jasman Subba *alias* Laxuman (PW-6), Ashmati Subba (PW-3), Purna Subba (PW-1), Kedar Subba (PW-5) – nephew of PW-6 and PW-3, and Bunu Sherpa (PW-4) - wife of PW-1, all identified the appellant.

7. The FIR (Exhibit-13) was lodged by Basanti Subba (PW-2). She gave a detailed account of what transpired on 04.09.2016 when

her husband - the deceased, died and her two brothers-in-law, Purna Subba (PW-1) and Kedar Subba (PW-5), were injured. The altercation between them was regarding the mobile phone of the deceased. The appellant had taken it a few days ago and damaged it. The appellant had assured the deceased that he would have the mobile phone repaired. On the day of the incident, in the evening, the deceased, Kedar Subba (PW-5) and the appellant had gone to Rangpo for marketing and to have the mobile phone repaired. The mobile phone could not be repaired. The appellant and the deceased returned home. The appellant was also angry that the deceased had not taught him driving. According to Basanti Subba (PW-2), the altercation continued in their courtyard. Around the same time, Kedar Subba (PW-5) had also arrived from the market and a quarrel started between him and the appellant as well. When she went out on hearing the deceased shout that he had been hit by the appellant, she saw the deceased lying in a pool of blood with injuries. She also saw the appellant stabbing Kedar Subba (PW-5) and Purna Subba (PW-1) with a knife.

8. Purna Subba (PW-1) - the brother of the deceased, and Kedar Subba (PW-5), are both injured victims and prosecution witnesses. Both of them identified the appellant as the one who stabbed them with a knife. They too have given detailed accounts of what transpired on 04.09.2016 and how they sustained injuries. Kedar Subba (PW-5) deposed that the appellant suddenly stabbed him when he tried to separate the appellant and the deceased while they were having a physical fight. Purna Subba (PW-1) deposed that the appellant stabbed him and he sustained injuries on both his wrists

when he intervened and tried to separate the appellant after the appellant stabbed Kedar Subba (PW-5). Both, Purna Subba (PW-1) and Kedar Subba (PW-5), identified the knife (MO-XIII) as the knife which was used by the appellant to injure them.

9. Dr. O.T. Lepcha (PW-16), Medico Legal Consultant, STNM Hospital, conducted the autopsy over the body of the deceased on 05.09.2016. Thereafter, he handed over the clothes worn by the deceased to the Investigating Officer who in turn sent it for forensic examination.

10. Dr. Silash Rai (PW-8), the Medical Officer at District Hospital, Namchi and Lab Technician Mansingh Kalikotay (PW-17) collected the blood sample of Purna Subba (PW-1) on 23.09.2016 and handed it over to the Station House Officer of the Namchi Police Station. Dr. Yogesh Verma (PW-11), Professor, Department of Pathology, Sikkim Manipal Institute of Medical Sciences, Tadong, East Sikkim and Lab Technician Pemba Sherpa (PW-12) collected the blood sample of Kedar Subba (PW-5) for DNA profiling on 26.09.2016 and handed it over to Kessang D. Bhutia, the Investigation Officer.

11. Dr. Rajiv Sharma (PW-15), Medical Officer, District Hospital, Namchi, examined the appellant on 04.09.2016 itself and noted that he had two incision wounds on his left wrist. One was 2 x 1 cm long and the other was a 'C' shaped wound 4 x 2 cms. He noted that the appellant had a faint smell of alcohol but his gait and speech were normal. On the request of the duty officer, the wearing apparel of

the appellant was collected and handed over to the police escort. Nanda Kishore Sharma (PW-25) and Ramesh Rai (PW-26) are the seizure witnesses when the Investigating Officer seized the clothes worn by the appellant at Namchi District Hospital. Although the appellant denied that his clothes had been seized at the hospital, he stated that they were seized at the Namchi Police Station in his statement recorded under section 313 Cr.P.C. The appellant admitted to his injuries when he was examined under section 313 Cr.P.C.

12. On 27.09.2016, Dr. Sanjay Rai (PW-9), the Medical Officer, District Hospital, Namchi, collected the blood sample of the appellant with the assistance of Lab Technician Chandra Lachi Rai (PW-10) and handed it over to the Investigating Officer. The appellant admitted to this fact in his statement recorded under section 313 Cr.P.C.

13. The material exhibits collected during investigation along with the blood samples of Purna Subba (PW-1), Kedar Subba (PW-5) and the appellant, were sent for forensic investigation by the Investigating Officer and Dr. Kshitij Chandel (PW-27), Scientist from the Central Forensic Science Laboratory, Directorate of Forensic Science Services, Ministry of Human Affairs, Government of India, Kolkata, examined them and prepared his forensic report (Exhibit-39). As per his forensic report, human blood could be detected in the appellant's navy blue vest (MO-VII), black colour jeans pant (MO-IX), a pair of black and white coloured shoes (MO-XI) and knife (MO-XIII), cotton gauzes (MO-XX and MO-XXI), filter paper (MO-XXII), filter paper (MO-XXIII), filter paper (MO-XXIV) and in red coloured half pant (MO-

XXVI) and blue coloured underwear (MO-XXVII) of the deceased. Dr. Kshitij Chandel (PW-27) also opined that the blood stains present on the navy blue vest (MO-VII), black coloured jeans pant (MO-IX), a pair of black and white coloured shoes (MO-XI), filter paper (MO-XXII), filter paper (MO-XXIII) and filter paper (MO-XXIV) belonged to the appellant. He opined that the blood stains present on the knife (MO-XXIII), cotton gauzes (MO-XX and MO-XXI) collected from the place of occurrence and the red coloured half pant (MO-XXVI) was that of the deceased.

14. Kishan Gurung (PW-23) was the Head Constable, Mamring Outpost under Namchi Police Station, South Sikkim. He corroborated the deposition of Bunu Sherpa (PW-4), Basanti Subba (PW-2), Purna Subba (PW-1) and Jasman Subba @ Laxuman (PW-6) that the appellant fled away after the incident. He was later informed that the appellant was found hiding in between the space of a building and was apprehended. The Investigating Officer confirmed that the appellant was rounded up on 04.09.2016 itself.

15. The evidence of the injured witnesses and the eyewitnesses makes it evident that the appellant had a petty quarrel with the deceased which led to the altercation and physical fight with the deceased. When Kedar Subba (PW-5) tried to separate them, the appellant suddenly stabbed him. Purna Subba (PW-1) was stabbed by the appellant on both his wrists when he intervened and tried to separate the appellant after he stabbed Kedar Subba (PW-5). The appellant sustained incision wounds on his left wrist. There is evidence that his wearing apparels also had blood stains. The failure of

the prosecution and the appellant to explain the injury and the blood stain leads us to believe that the appellant sustained them during the occurrence.

16. The presence of the injured witnesses, the eyewitnesses along with the appellant in the place of occurrence at the relevant time cannot be doubted. Basanti Subba (PW-2) and Kedar Subba (PW-5) witnessed the altercation between the appellant and the deceased. Besides them, Ashmati Subba (PW-3) saw the appellant standing nearby when she saw the deceased and Kedar Subba (PW-5) lying injured in the courtyard. Bunu Sherpa (PW-4) also saw the appellant carrying a knife at the place of occurrence and thereafter fleeing away. She saw Purna Subba (PW-1), Kedar Subba (PW-5) and the deceased injured. Jasman Subba *alias* Laxuman (PW-6) also saw the deceased, Purna Subba (PW-1) and Kedar Subba (PW-5) injured and helped evacuate them to the hospital. There is no doubt that the appellant was the sole person armed with a knife (MO-XIII) at the relevant time. The fact that the sheath (MO-I) of the knife (MO-XIII) had the name of the appellant on it also sufficiently proves that it was the appellant's knife. The forensic evidence proves the fact that the knife (MO-XIII) had stains of blood of the deceased on it.

17. Section 304 II IPC reads:

“304. Punishment for culpable homicide not amounting to murder. — Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing

death, or of causing such bodily injury as is likely to cause death,
or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

18. To make out an offence punishable under section 304 II IPC, the prosecution has to prove the death of the person in question and such death was caused by the act of the accused and that he knew such act of his was likely to cause death. If there is intent and knowledge both, the same would fall under section 304 I IPC but if it is only a case of knowledge and not intention to cause death or bodily injury the same would fall under section 304 II IPC. The death of the deceased is proved beyond reasonable doubt. According to Dr. O.T. Lepcha (PW-16), the death of the deceased was due to hypovolaemic shock as a result of stab injury to the femoral vessels by a sharp single edged weapon. Dr. O.T. Lepcha (PW-16) noted spindle shaped 2.1 x 1.5 x 6 cms injury placed diagonally over the left inguinal space. The injury was directed downwards, backwards and medially. The margins of the wound were clean cut with sharp cut on the medial and wedge shaped over the lateral end (single edged sharp weapon). He also noted that the upper and middle area of the left thigh, testis and the penis were swollen and tensed with multiple blood clots and blood. According to Dr. O.T. Lepcha (PW-16), the injury had incised the left femoral artery and vein leading to profuse haematoma, clot formation and bleeding which also involved the muscles of the left anterior thigh. The injury was caused by a sharp-edged weapon. The depositions of the two injured witnesses, i.e., Purna Subba (PW-1) and Kedar Subba

(PW-5), along with the depositions of Ashmati Subba (PW-3), Bunu Sherpa (PW-4) and the first informant – Basanti Subba (PW-2), makes the fact leading to the stabbing of the deceased and the immediate facts thereafter, abundantly clear leaving no room to doubt that there was an altercation between the appellant and the deceased over two petty issues which led to a physical fight between them and culminated in the appellant stabbing the deceased. Although, it is certain that there was no intention to cause death of the deceased, it is apparent that the appellant had the requisite knowledge that by using an 8-inch sharp edged knife (MO-XIII) and stabbing him over the left inguinal space with substantial force to have caused spindle shaped 2.1 x 1.5 x 6 cms injury as deposed by Dr. O.T. Lepcha (PW-16) would have caused such bodily injury as is likely to cause death.

19. Although, Dr. O.T. Lepcha (PW-16) was not shown the knife (MO-XIII), which must be the practice in such cases by investigating officers, there is no confusion that it was the appellant and the appellant alone who caused the injury and it was the appellant's 8-inch knife (MO-XIII) which was the weapon of offence. The prosecution has been able to cogently prove that the appellant used his own knife (MO-XIII) to stab the deceased. The evidence of the Investigating Officer and Dr. Kshitij Chandel (PW-27) establishes that the knife (MO-XIII) had the blood stains of the deceased on it. In the circumstances, the conviction of the appellant under section 304 II IPC is confirmed.

20. Section 307 IPC reads as follows:

“307. Attempt to murder. - Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act cause death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.”

21. Kedar Subba (PW-5) has given a detailed account as to how the appellant stabbed him on his chest. According to Basanti Subba (PW-2), Kedar Subba (PW-5) had gone to Rangpo with the appellant and the deceased for marketing and repairing the mobile phone that evening before the incident. There was thus no strong previous animus between the appellant and Kedar Subba (PW-5). Although, Basanti Subba (PW-2) deposed that the appellant had a quarrel with Kedar Subba (PW-5) just before the act of stabbing him, Kedar Subba (PW-5), however, did not state so. According to him, the appellant stabbed Kedar Subba (PW-5) when he sought to intervene in the physical fight between the deceased and the appellant. The evidence produced by the prosecution thus establishes that Kedar Subba (PW-5) was attacked with a knife by the appellant when he was having a physical fight with the deceased. Purna Subba (PW-1) also saw the appellant stabbing Kedar Subba (PW-5) with a knife (MO-XIII). Dr. Nima Dolma Sherpa (PW-24) examined Kedar Subba (PW-5) on 04.09.2016 and found deep cut injury on his right-side upper chest and a cut injury on his right forearm. Dr. Deepika Gurung (PW-29), who also examined Kedar Subba (PW-5) on the same day, opined that the stab injury measuring 7 x 3 cms on his anterior chest wall was a grievous injury. Kedar Subba (PW-5) identified the knife (MO-XIII) as

the one the appellant was carrying in the sheath (MO-I) a day earlier and by which he had sustained injuries. In order to bring home the charge for attempt to murder it must be shown that the appellant acted with such intention or knowledge or under such circumstances that if he by that act caused death, he would be guilty of murder. Intention or knowledge to commit murder must thus necessarily exist. Both the intention or knowledge relating to commission of murder and the doing of the act towards it form the two vital ingredients of the offence punishable under section 307 IPC. If both the ingredients are established, irrespective of the resultant injury, the offence of attempt to murder is made out. In ***State of Madhya Pradesh vs. Kanha alias Omprakash***², the Hon'ble Supreme Court after examining several judgments rendered by it earlier held that proof of grievous or life threatening hurt is not a *sine qua non* for the offence under section 307 IPC. It was also held that the intention of the accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Amongst other things, the nature of the weapon used, and the severity of the blows inflicted can be considered to infer intent. The established fact reflects a sudden attack, a singular stab injury on Kedar Subba's (PW-5) right anterior chest wall which was grievous in nature caused by an 8-inch sharp edged knife (MO-XIII). It seemed to have happened on the spur of the moment, in a fit of rage and not with any intention or knowledge relating to commission of murder.

22. Although not argued before us, we deem it appropriate to contrast the provision of section 307 IPC with section 308 IPC, i.e.,

²(2019) 3 SCC 605

attempt to commit culpable homicide at this stage. Section 308 IPC reads:

“308. Attempt to commit culpable homicide. — Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.”

23. In *Om Prakash vs State of Punjab*³, the Hon’ble Supreme Court in paragraph 9 of the judgment, held as follows:

“9. that a person commits an offence under Section 308 when he has an intention to commit culpable homicide not amounting to murder and in pursuance of that intention does an act towards the commission of that offence whether that act be the penultimate act or not. On a parity of reasoning, a person commits an offence under Section 307 when he has an intention to commit murder and, in pursuance of that intention, does an act towards its commission irrespective of the fact whether that act is the penultimate act or not. It is to be clearly understood, however, that the intention to commit the offence of murder means that the person concerned has the intention to do certain act with the necessary intention or knowledge mentioned in Section 300. The intention to commit an offence is different from the intention or knowledge requisite for constituting the act as that offence. The expression “whoever attempts to commit an offence” in Section 511, can only mean “whoever: intends to do a certain act with the intent or knowledge necessary for the commission of that offence”. The same is meant by the expression “whoever does an act with such intention or knowledge and under such circumstances that if he, by that act, caused death, he would be guilty of murder” in Section 307. This simply means that the act must be done with the intent or knowledge requisite for the commission of the offence of murder. The expression “by that act” does

³AIR 1961 SC 1782

not mean that the immediate effect of the act committed must be death. Such a result must be the result of that act whether immediately or after a lapse of time.”

24. In the totality of the facts and circumstances, we are of the view that the offence committed by the appellant on Kedar Subba (PW-5) would not amount to attempt to murder punishable under section 307 IPC but would amount to attempt to commit culpable homicide under section 308 IPC. The fact that the appellant used an 8-inch sharp edged knife (MO-XIII) and stabbed the right anterior chest wall of Kedar Subba (PW-5) causing him grievous injury convinces us that the appellant by doing so had the requisite knowledge that if he had by that act caused death he would be guilty of culpable homicide not amounting to murder. Although, no charge was framed under section 308 IPC in view of the fact that the punishment prescribed under section 308 IPC is lesser in degree than the one prescribed under 307 IPC, we deem it appropriate to convict the appellant for the offence of attempt to commit culpable homicide and sentence him with simple imprisonment for a term of 7 years and a fine of Rs.5000/-. In default of payment of fine, the appellant shall undergo further simple imprisonment of one month. Consequently, his conviction under section 307 IPC and sentence thereof, are set aside.

25. Section 324 IPC reads:

“324. Voluntarily causing hurt by dangerous weapons or means. - Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive

substance, or by means of any explosive substance or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

26. Section 324 IPC provides for punishment for voluntarily causing hurt by dangerous weapons or means. The evidence of Purna Subba (PW-1) clearly establishes that the appellant had stabbed him when he had intervened when the appellant was stabbing Kedar Subba (PW-5). As a result of this, Purna Subba (PW-1) sustained deep cut injuries on his wrists. This was not an accident as the appellant had stabbed the deceased and Kedar Subba (PW-5) as well. The appellant had voluntarily caused hurt on the wrists of Purna Subba (PW-1) with an 8-inch sharp edged knife (MO-XIII). According to Dr. Nima Dolma Sherpa (PW-24), the injuries needed seven stitches on each of the wrists. Dr. Nima Dolma Sherpa (PW-24) opined that the injuries sustained by Purna Subba (PW-1) were simple in nature. It has been established that those injuries were caused by the appellant’s knife (MO-XIII) which is a dangerous weapon. As a result, it is clear that the conviction of the appellant for voluntarily causing hurt by a dangerous weapon must be sustained as well.

27. Resultantly, the conviction of the appellant under sections 304 II and 324 IPC are confirmed. The conviction under section 307 IPC is set aside. He is, however, convicted under section 308 IPC. We are also of the considered view that the sentences awarded to the appellant for the offences under sections 304 II and 324 IPC, are well

balanced and correct and need not be interfered with. All the sentences shall run concurrently.

28. The appeal is partly allowed. The impugned judgment and the order on sentence, both dated 28.09.2019, are modified to the above extent.

29. Copy of this judgment be sent to the learned trial Court for information and a copy granted free of cost to the appellant.

30. Lower Court records be remitted forthwith.

**(Bhaskar Raj Pradhan)
Judge**

**(Arup Kumar Goswami)
Chief Justice**

Approved for reporting : **Yes**
Internet : **Yes**

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