IN THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

SINGLE BENCH:- BHASKAR RAJ PRADHAN, JUDGE.

Crl. Appeal No. 04 of 2017

Sanjay Subba,
S/o Late Suk Raj Subba,
R/o Lumchung Busty,
Gyalshing, West Sikkim … Appellant.

Versus

The State of Sikkim … Respondent.

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

Appearance:

Mr. Udai P. Sharma assisted by Mr. Anup Gurung, Advocates for the Appellant.

Mr. S.K Chettri, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T
(27.11.2017)

Bhaskar Raj Pradhan, J

1. The facts are not much in dispute in the present appeal. The interpretation and the application of the law is however, contested. There is a solitary eye witness to the offence of culpable homicide not amounting to murder, on proof of which, the learned Sessions Judge, has sentenced the Appellant to simple imprisonment for a period of three years and to pay a fine of Rs. 25,000/- for the offence under Section 304 Part II, Indian Penal Code, 1860 (IPC). In default, a further incarceration of simple imprisonment of six months.

2. Heard Mr. Udai P. Sharma, learned Counsel for the Appellant and Mr. S. K. Chettri, learned Assistant Public Prosecutor for the State.

3. Mr. Udai P. Sharma, would admit the assault on the deceased but would submit that it was done accidentally and in exercise of his right of private defence. He would draw the attention of this Court to the statement of the solitary eye witness, Chandra Subba, in cross-examination and submit that the said prosecution witness having not been declared hostile, the evidence in cross-examination, as above was binding on it. To counter the objection of the State-Respondent to the Appellant's additional plea of private defence not urged in the memorandum of appeal, Mr. Udai P. Sharma, would draw the attention of this Court to the answer to question No. 69 of the statement of the Appellant under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) The Appellant was asked: *"do u have any statement to make in your defence?"* to which he answered: *"I am innocent, I have assaulted the deceased on my private defence under the sudden provocation without any intention to kill him."* He would thus argue that private defence plea having been taken by the Appellant himself during the trial, this Court could examine the said plea and in any case additional grounds of private defence has been sought for vide the Appellant's application being I.A. No. 2 of 2017. Mr. Udai P. Sharma, would rely upon the following authorities in support of his submissions:- 1. ***Munshi Ram & Ors. v. Delhi Administration***[1]***;*** 2. ***Mohinder Pal Jolly v. State of Punjab***[2]***;*** 3. ***Buta Singh v. State of Punjab***[3]***;*** 4. ***Sekar Alias Raja Sekharan v. State Represented by Inspector of Police, T.N***[4]***.;*** 5. ***James Martin v. State of Kerala***[5]***;*** 6. ***Prakash Subba v. State of Sikkim***[6]*.* He would further submit that the prosecution evidence of Chandra Subba clearly stating that the Appellant had assaulted the deceased only once,

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[1] **AIR 1968 SC 702**
[2] **(1979) 3 SCC 30**
[3] **(1991) 2 SCC 612**
[4] **(2002) 8 SCC 354**
[5] **(2004) 2 SCC 203**
[6] **2017 CRI. L. J. 2713**

the multiple injuries on the head ought to have been explained by the prosecution but instead vide the impugned judgment the onus has been shifted to the accused dehors the settled principles of law. Mr. Udai P. Sharma, would draw the attention of the Court to the evidence of Nirmal Chettri, the brother of the deceased. He testified that his deceased brother had gone to Singring, Lachung to collect ration but did not return. On the following day some Police Personnel from Lachung Police Station along with his employer, Palzor Lama came to the jungle where they were working and his employer told him that *"Police had assaulted my brother Mahesh."* Mr. Udai P. Sharma would urge that as the prosecution had failed to explain the multiple injuries on the head sustained by the deceased, contrary to the clear and cogent evidence of the sole eye witness, Chandra Subba, that the Appellant had hit the deceased only once, it is quite clear that two views were possible. He further urged that in view of the fact that Nirmal Chettri was also not declared hostile two views were discernible from his evidence too and in such cases it is settled law that the one in favour of the accused must be accepted. ***(Anne Nageswara Rao v. Public Prosecutor, Andhra Pradesh[7])***. He would submit that the learned Sessions Judge had faulted in not appreciating that in criminal trials the standard of guilt of the accused to be established is that the accused 'must be' and not 'may be' guilty. ***(Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra[8]).*** He would submit that the impugned judgment has failed to appreciate that there is a presumption of innocence of the accused in criminal trials and that the burden of proving the guilt of the accused is always upon the prosecution. ***(Kali Ram v. State of Himachal Pradesh[9]).*** Mr. Udai P. Sharma would urge that the purported

[7] **(1975) 4 SCC 106**
[8] **(1973) 2 SCC 793**
[9] **(1973) 2 SCC 808**

confession in the disclosure statement (exhibit-2), in view of the clear provision of Section 27 of the Indian Evidence Act, 1872, cannot be used against the Appellant. Mr. Udai P. Sharma would submit that there is no mention of blood being seen by the Investigating Officer during inquest. However, the property seizure memo (exhibit-1) records the seizure of one blue jeans pant which is recorded to have been sent to CFSL, Kolkata. It is in the evidence that the deceased was not bleeding at the time of the assault and there is no explanation as to how blood stains were alleged to have been seen in the blue jeans pant seized. The prosecution failure to place the forensic report of CFSL, Kolkata further creates grave suspicion on the prosecution version in view of the clear admission of the Investigating Officer that he did not find any injury upon the deceased in his inquest. Mr. Udai P. Sharma, would further state that the half burnt firewood was not shown to Doctor O.T. Lepcha who gave his medical opinion as to the cause of death. He would thus submit that in a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. **(*Mohinder Singh v. State*[10])**.

4. Per contra, Mr. S. K. Chettri, learned Assistant Public Prosecutor for the State, defending the impugned judgment would take this Court meticulously to all the evidence recorded as well as exhibited. He would heavily rely upon the evidence of the solitary eye witness, Chandra Subba and draw the attention of the Court to what she had stated in her examination-in-chief. Drawing the attention of the Court to the evidence of Lakpa Sherpa and Suk Maya Rai he would submit that the factum of

[10] **AIR 1953 SC 415**

there being a fight between the Appellant and the deceased stands proved. He would submit that from the testimony of Dr. O.T. Lepcha, it is evident that the deceased had died as a result of the injuries sustained in the skull due to the blunt force of the burnt firewood used to hit the deceased by the Appellant. He would submit that the nature of injury sustained coupled with the admission of the Appellant that he had hit the deceased on the head with the burnt firewood was enough to attribute knowledge that by assaulting the deceased in such manner he would have known that it was likely to cause death. He would submit that the learned Sessions Judge having already considered the aspect of private defence while converting the Appellant's conviction from Section 302 IPC, 1860 to that of Section 304 Part II, IPC, 1860 there was no further necessity to interfere with the impugned judgment. In support of his arguments, Mr. S.K. Chettri, would rely upon the following authorities:- 1. ***State of Rajasthan v. Raja Ram***[11]***;*** 2. ***Sonam Sherpa v. State of Sikkim***[12]***;*** 3. ***Arjun Rai v. State of Sikkim***[13]***;*** 4. ***Natvarsingh Bhalsingh Bhabhor v. State of Gujarat***[14]***;*** 5. ***State v. Sanjeev Nanda***[15]***.***

5. In re: ***State v. Sanjeev Nanda (supra)*** the Apex Court and in re: ***Sonam Sherpa (supra) and Arjun Rai (supra)*** this Court was not called upon to examine a plea of private defence. All the three cases were cases in which the offence of section 304 Part II, IPC, 1860 was clearly established.

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[11] **(2003) 8 SCC 180**
[12] **2004 Cri LJ 4152**
[13] **Criminal Appeal No.3/2004**
[14] **2008 Cri.LJ 4074 (Guj)**
[15] **(2012) 8 SCC 450**

Facts

6. On 27.02.2016 First Information Report (FIR) No.01(02)16 dated 27.02.2016 under Section 302 IPC, 1860 was registered at the Lachung Police Station, North District, Sikkim on an oral information given by the Appellant which read:-

> *"To,*
>
> *The Judicial Magistrate*
> *Mangan, North Sikkim.*
> *Sir,*
>
> *That on 27/02/2016 at 1350 hrs one Sanjay Subba came to PS and reported that he has assaulted one person on last night at around 2000 hrs.*
>
> *On the basis of above information self proceeded to P.O. for enquiry. On reaching P.O. (Faka Lachung) it was found that the person lying dead, and Lachung PS case No. 01(02)2016 dtd 27/02/2016 U/S 302 IPC was registered against accussed Sanjay Subba Age 25 yrs S/o Suk Raj Subba R/o Lumchung Busty, P.O. Gayzing West Sikkim. Case has been registered on the Suo Motto basis and investigation taken up.*
>
> *Sd.*
> *S.I. Kaziman Pradhan*
> *SHO Lachung CP/PS"*

7. It is recorded in the said FIR that the Appellant had stated that on the intervening night of 26.02.2016 and 27.02.2016 at around 2000 hrs he had assaulted one person. The Investigation of the case culminated in filing of the final report No.3 dated 07.05.2016 by which the Appellant was charge-sheeted under Section 302 IPC, 1860. Permission to file supplementary charge-sheet on receipt of CFSL report from Kolkata was also sought for. In the said final report the prosecution would also rely upon the disclosure statement pursuant to which property seizure memo was prepared seizing a half burnt firewood. Statement of the accused recorded under Section 164 Cr.P.C. was also placed before the learned Sessions Judge. On 07.06.2016 the learned Sessions Judge framed charges under Section 304 IPC, 1860. On completion of the trial the Appellant was examined under

Section 313 Cr.P.C. on 28.09.2016. The trial examined 16 witnesses and exhibited equal number of documents. After having heard the prosecution as well as the Defence and learned Sessions Judge would render his judgment dated 27.10.2016 convicting the Appellant under Section 304 Part II IPC, 1860. Vide an order of sentence rendered on the same date the learned Sessions Judge would sentence the Appellant as detailed above.

8. The learned Sessions Judge would find force in the submission of the learned Legal Aid Counsel for the Appellant that the Appellant having struck the deceased only once in order to free himself from the deceased who had caught him by his chest and verbally abusing him the case clearly fell under the fourth exception of Section 300 IPC, 1860. The learned Sessions Judge would find that the Appellant was struggling to free himself and struck the deceased without any premeditation. The learned Sessions Judge would further hold that this was not the case where he had taken undue advantage or acted in a cruel or in an unusual manner. However, the learned Sessions Judge would hold that the Appellant could be attributed with the knowledge that he was likely to cause the death of the deceased as he was striking the deceased on his head a vital part with a firewood and so it cannot be said that he had actual intention to cause death of the deceased or cause such bodily injury as was likely to cause the death of the deceased. On such finding of fact the learned Sessions Judge would hold that the case, thus, squarely falls within the fourth exception to Section 300 IPC and Part II of Section 304 IPC. The learned Sessions Judge would rely upon the judgment of the Apex Court in re: ***Laxmichand alias Balbutya v. State of Maharashtra***[16] in support of his finding that death caused due to one blow alone without pre meditation and in a sudden fight/quarrel the case would fall under Part II of section 304 IPC, 1860. This was a case in

[16] **(2011) 2 SCC 128**

which the ingredients of section 304 Part II, IPC, 1860 had been conclusively established by the prosecution. It was not a case in which private defence was pleaded, argued or decided.

Consideration

9. This is an appeal against conviction. The Apex Court in re: ***K. Pandurangan v. S.S.R. Velusamy***[17] would hold:-

> ***"8.*** *..... Apart from the fact that right of appeal is statutorily provided by the Code, a Constitution Bench of this Court in the case of A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] has held that deprivation of one's statutory right of appeal would amount to denial of procedure established by law under Article 21, and further, such denial violates the guarantee of equal protection of law under Article 14 of the Constitution. Placing reliance on the said judgment of this Court, we are of the opinion that since the lower appellate court, which was the first court of appeal, has not considered the factual aspect of the case while considering the appeal, we think the appellants have been denied an opportunity of agitating their case on facts against the judgment of the trial court. ....."*

10. The Apex Court in re:- ***Banwari Ram v. State of U.P.***[18] would hold:-

> ***"5.*** *..... It is now too well settled that under the Criminal Procedure Code there is no difference so far as the power of the appellate court is concerned to deal with an appeal from a conviction and that from an appeal against an order of acquittal excepting that an appeal against a conviction is as of right and lies to courts of different jurisdictions depending on the nature of sentence and kind of trial and the court in which the trial was held, whereas an appeal against an order of acquittal can be made only to the High Court with the leave of the court. The procedure for dealing with two kinds of appeals is identical and the powers of the appellate court in disposing of the appeals are in essence the same. ....."*

11. In re: ***State of Rajasthan v. Raja Ram (supra)*** the Apex Court would hold that generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden threat which runs through the web of administration of justice in criminal cases is that if two views are

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[17] **(2003) 8 SCC 625**
[18] **(1998) 9 SCC 3**

possible on the evidence adduced in the case, one pointing to the guilt of accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is caste upon the appellate Court to re-appreciate the evidence in a case where the accused had been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not.

12. Thus, it is clear that this Court, as the first Appellate Court, while hearing an appeal against conviction must consider the factual aspects of the case. It is also clear that the power of the Appellate Court dealing with an appeal from conviction is the same as the power of the Appellate Court while dealing with an appeal against acquittal. The appeal against conviction is as of right. The procedure to deal with appeal against conviction and appeal against acquittal is identical and the power of this Court, as the first Appellate Court, in essence is the same.

13. Chandra Subba (PW 1), the solitary eye witness would depose that in the cold winter night of February in the year 2016, at Faka, Lachung, North Sikkim, the Appellant was at the kitchen of her residence. It was between 8 to 9 pm. An unknown person came inside the kitchen and started abusing the Appellant in filthy language. The deceased was drunk and he caught hold of the Appellant on his chest. The Appellant then suddenly picked up a half burnt firewood from the oven of Chandra Subba's kitchen and hit the deceased on the head, once. Chandra Subba got afraid and went to the house of Sukh Maya Sherpa (P.W.3), the aunt

of the Appellant and called her. Chandra Maya Subba and Sukh Maya Sherpa went back to the place of occurrence and found the deceased sitting in the courtyard of their house along with the Appellant. Suk Maya Sherpa slapped the Appellant who went towards his room and the deceased his way. Chandra Subba, thereafter, went back to her room. On the next day, while going to work, Chandra Subba saw the deceased lying unconscious on the road side. She informed the Appellant about the condition of the deceased and left for work. When she returned at around 02 pm, Chandra Subba saw that the Police had already arrived at the place of occurrence and were enquiring about the matter. The deceased was lying dead on the courtyard of the house of the Appellant. Chandra Subba during her examination in Court, identified the half burnt firewood which the Appellant had used to assault the deceased the night before as (MO-I). She identified the accused in the dock.

14. In cross-examination, Chandra Subba admitted that it was raining on the night of the incident which was a cold month of February at Faka, Lachung, North Sikkim. She admitted, also, that when the deceased abused the Appellant he got angry and in a fit of rage assaulted the deceased at once. Chandra Subba also admitted the suggestion of the Defence that it was true during the scuffle the Appellant did not have the intention to assault the deceased on the head but the half burnt firewood accidently landed on the head of the deceased. She also admitted that when the scuffle was going on, she had gone out to call the aunt of the accused and at the relevant time the deceased and the Appellant were inside the kitchen, conscious and normal. Chandra Subba had never seen the deceased prior to the incident.

15. The learned Sessions Judge would hold that the Court had no reason to doubt her evidence. However, with regard to the cross examination the learned Sessions Judge would hold:-

> *"It may be mentioned here that though during her cross examination by the accused P.W. 1 showed the propensity to help the accused by admitting the suggestion put to her by him that M.O. I had accidentally landed on the head of the deceased during this scuffle, the accused has himself categorically stated before this Court that he has assaulted the deceased with M.O.I. Therefore the question of M.O. I accidentally landing on the head of the deceased does not arise."*

16. It is seen that although Chandra Subba categorically stated that during the scuffle the Appellant did not have the intention to assault the deceased on the head but the half burnt firewood accidentally landed on the head of the deceased, she was not declared hostile and cross examined by the prosecution.

17. In re: ***Jagan M. Seshadri v. State of T.N.***[19]; the Apex Court would examine the evidentiary value of testimony of a prosecution witness not declared hostile and hold:

> ***"9****.....We are unable to appreciate the submission of learned Counsel for the State, that P.W.31, being the mother-in-law of the appellant who had supported the explanation offered by the appellant regarding receipt of Rs.50,000 and Rs.40,000 by him from her should not be believed. She is a prosecution witness. She was never declared hostile. The prosecution cannot wriggle out of her statement.***"**

18. In re: ***Raja Ram v. State of Rajasthan***[20] the Apex Court would hold:

> *"**9.** But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much*

[19] **(2002) 9 SCC 639**
[20] **(2005) 5 SCC 272**

*less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined.**"***

19. In re: ***Mukhtiar Ahmed Ansari v. State (NCT of Delhi)***[21] the Apex Court would rely upon the judgment in re: ***Raja Ram (supra)*** and hold:

*"**29.** The learned counsel for the appellant also urged that it was the case of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW 1 "hostile". His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.*

***30.** A similar question came up for consideration before this Court in Raja Ram v. State of Rajasthan [(2005) 5 SCC 272: JT (2000) 7 SC 549]. In that case, the evidence of the doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the doctor and it was binding on the prosecution.*

31.** In the present case, evidence of PW 1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to the police in which the police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, the accused can rely on that evidence.**"

20. In re: ***Javed Masood & Anr. v. State of Rajasthan***[22] the Apex Court would hold:

*"**13.** PW 6 also stated in his evidence that he has not given the names of any individuals to the police inasmuch as he had not seen the actual occurrence of the incident. It is also in his evidence that immediately after the incident he telephoned to one Habib with a request to communicate the message to Chuttu about the occurrence. He repeatedly stated that Chuttu (PW 5), Noor (PW 13), Saleem (PW 7) and Rayees (PW 14) were not present when the police kept the dead body of Mullaji (the deceased) in gypsy. He also explained that there was no need for him to send any telephonic message had they been present at the scene of occurrence. This witness did not support the prosecution case. He was not subjected to any cross-examination by the prosecution. His evidence remained unimpeached.''*

[21] **(2005) 5 SCC 258**
[22] **(2010) 3 SCC 538**

21. In re: ***Assoo v. State of Madhya Pradesh***[23] the Apex Court would hold:

> ***"10.*** *We have also perused the evidence of PW 3 None Lal, a neighbour, and one of the first to arrive at the spot. He gave a story which completely dislodges the statements of PWs 1 and 2. He deposed in his cross-examination that Shri Bai, a neighbour of the appellant, had made allegations against the deceased in the presence of Ghaffoor and Ishaq that she was involved in illicit activities while her husband was away and that she would reveal all to her husband when he returned home and that immediately after these remarks the appellant had returned home on which the deceased had gone inside and set herself ablaze. We take it, therefore, as if the prosecution had accepted the statement of PW 3 as true, as the witness had not been declared hostile."*

22. In view of the clear and cogent pronouncements of the Apex Court in the afore-quoted judgments, it is difficult, nay, impossible to uphold the view taken by the learned Sessions Judge as above. Out of the three persons in the kitchen that night one is dead, the other is the accused i.e. the Appellant and the third - the solitary prosecution eye witness. Chandra Subba was the solitary eye witness and therefore the most crucial witness. When Chandra Subba admitted to the suggestion of the Defence that the assault on the head of the deceased was unintentional and accidental it was incumbent upon the prosecution to declare Chandra Subba hostile and cross examine the said witness to extract the truth. Having failed to do so, it is quite evident that the prosecution has accepted the statement made by Chandra Subba in cross examination. The said statement of Chandra Subba in examination-in-chief thus, stands impeached in the cross examination without any explanation. Furthermore, Chandra Subba in examination-in-chief states that on the next day of the incident she had seen the deceased lying unconscious on the road. It is the cardinal principle of criminal jurisprudence that the burden of proof always rest on prosecution to establish the guilt of the accused beyond all reasonable doubt to enable the Court to come to a conclusion that it was the accused and the accused

[23] **(2011) 14 SCC 448**

alone who was guilty of the crime alleged. The failure of the prosecution to declare Chandra Subba hostile will definitely permit the Appellant to rely upon the evidence of Chandra Subba in cross examination in his favour. The said evidence of Chandra Subba in cross examination would also be binding on the prosecution and it could not wriggle out of the said statement. While disbelieving the cross examination testimony of Chandra Subba, the learned Sessions Judge has failed to appreciate that Chandra Subba, was a prosecution witness and the burden of proof being on the prosecution it was incumbent upon it to explain the discrepancy in the evidence of Chandra Subba. As a general rule it is no doubt true the Court can act on the testimony of a solitary witness provided she is wholly reliable. There cannot be any legal impairment in convicting a person on the sole testimony of a single witness as clear from Section 134 of the Evidence Act, 1872. However, the learned Sessions Judge himself holds that the said Chandra Subba, the solitary witness, had showed *"the propensity to help the accused by admitting the suggestion put to her by him that MOI had accidentally landed on the head of the deceased during the scuffle, the accused has himself categorically stated before this Court that he had assaulted the deceased with MOI. Therefore the question of MOI accidentally landing on the head of the deceased does not arise."* Firstly, the very fact that the learned Sessions Judge finds propensity on the part of Chandra Subba to help the Appellant diminishes the authenticity and truthfulness and therefore the evidentiary value of the solitary witness. Secondly, the learned Sessions Judge has failed to reflect as to where the accused had "categorically" stated before the learned Sessions Judge that he had assaulted the deceased. A perusal of the records however reveals that the FIR (exhibit-11), records that the Appellant had reported having assaulted one person. However, the FIR is not a substantive piece of

evidence. In the statement of the accused recorded under Section 164 Cr.P.C. which was, however, not considered by the learned Sessions Judge on the ground that the said statement was recorded on oath, at the relevant portion, it is recorded thus: *"I do not remember the name of the deceased as I had seen him for the first time in the house of Bhauju. That very evening that deceased had come drunk in Bhauju's place and had started abusing me for no reason and also caught me by my collar and almost hit me. I saw wooden log lying in that place and I picked it to hit him on his body and I did try hitting on his body but instead I hit him right on the middle scalp of the head after that he left the place and I went back home too."* The learned Sessions Judge, relying upon the judgment of this Court in re: ***Arjun Rai v. State of Sikkim***[24] would hold that: ***"****In view of oath having been administered the purported confessional statement is clearly inadmissible and cannot be considered by this Court."* The State-Respondent has not assailed the said finding of the learned Sessions Judge. Thus the alleged confessional statement of the Appellant also cannot be pressed into service to impose a verdict of guilt upon the Appellant. However, on examining the said statement of the Appellant recorded under Section 164 Cr.P.C. it is quite evident that the said statement is not a confessional statement at all. Confession has either to be an express acknowledgement of guilt of the offence charged or it must admit substantially all the facts which constitute the offence. The statement of the Appellant recorded under Section 164 Cr.P.C. makes it evident that the said statement is exculpatory rather than being inculpatory. The afore-quoted statement clearly implies that the act of hitting the deceased on the head was accidental as the Appellant had tried to hit the body instead. The said statement also indicates a clear plea of self defence. Further, in the

[24] **2004 Crl J 4747 (Sikkim)**

statement of the accused recorded under Section 313 Cr.P.C. the Appellant has stated that he had assaulted the deceased in order to escape from him and without any intention to kill him in exercise of his right to private defence. Thus, it is evident that the finding of the learned Sessions Judge that the Appellant has himself "categorically" stated before the learned Sessions Judge that he had assaulted the deceased with MOI is subject to the various qualifications or rather exceptions as enumerated above. Equally, the learned Sessions Judges finding that therefore the question of MOI accidentally landing on the head of the deceased does not arise is also not correct in view of the evidence of the solitary eye witness, Chandra Subba, categorically stating on oath before the learned Sessions Judge that the said act of the Appellant was accidental.

23. In view of the nature of evidence that has come on record from the testimony of the solitary eye witness, Chandra Subba it is necessary to challenge the other evidences. Lakpa Sherpa (P.W.2) is a friend of the Appellant. He also identified the accused in the dock. He turned hostile. Permission being granted Lakpa Sherpa was crossed examined by the Prosecution. Lakpa Sherpa admitted that he had given his statement to the police. He also admitted that he had signed on the disclosure statement on the same date. He admitted that the contents of disclosure statement is the statement given by the Appellant in his presence. Lakpa Sherpa also identified the half burnt firewood which was seized by the police as per the disclosure statement. He also identified property seizure memo and his right thumb impression on it as the document prepared while seizing the half burnt firewood in his presence on which he had also signed. He had also stated that he had affixed his thumb impression on a paper which was

wrapped with half burnt firewood at the time of seizure. He also stated that he came to know that the Appellant had assaulted the deceased.

24. In cross examination by the Defence, Lakpa Sherpa would state that as it was the first time that he was standing as a witness in any Court he was a bit nervous and scared. He admitted that whatever he had stated in his examination-in-chief and the cross examination by the Learned Prosecutor which related as to how the Appellant assaulted the deceased and how the deceased died are all hearsay which he came to know after visiting the place of occurrence. More significantly, Lakpa Sherpa admitted that he was not present when the disclosure statement of the Appellant was recorded by the police. He admitted that he was asked to sign on one paper of which he did not know its contents. He admitted that the police had never read the contents of the disclosure statement nor explained it to him and that his admission about it at the time of cross examination by the Learned State Prosecutor was only because of the thumb impression appearing on the said exhibit and on assumption. He also admitted that the half burnt firewood was not seized in his presence or that it contained his signature. He admitted that he saw the half burnt firewood first time in Court. He also admitted that he fears police personnel and it is because of that fear that he signed the disclosure statement and the property seizure memo.

25. Lakpa Sherpa had turned hostile. The prosecution cross examined and did manage to extract from him that the disclosure statement was made by the Appellant in his presence and he had signed on it. However, in cross-examination by the Defence he stated that he was nervous and scared and that he was not present when the disclosure statement of the Appellant was recorded by the Police. He also admitted that the contents of

the disclosure statement was never read to him and that his admission during the cross-examination by the learned State Prosecutor was due to the fact that the said document had his thumb impression. He also stated that he had signed on the disclosure statement because he feared the Police.

26. Lakpa Sherpa was also a witness to the seizure of the half burnt firewood which was seized according to the Prosecution as per the disclosure statement. He is also a signatory to the property seizure memo. In cross examination, he admitted that he did not know the contents of the document on which he was asked to sign by the Police. He stated that the half burnt firewood did not contain his signature and that it was not seized in his presence. He also stated that he was seeing the half burnt firewood for the first time in Court on the day of his deposition and that it was due to his fear of the Police that he signed on the property seizure memo.

27. Lakpa Sherpa is a friend of the Appellant. He had turned hostile. During the cross-examination by the Defence he resiled from his earlier statement about the disclosure statement made during the cross examination by the Prosecution. He also did not support the Prosecution version regarding the seizure of the half burnt firewood. Lakpa Sherpa cannot be trusted. Lakpa Sherpa is a cited witness to the disclosure statement. His evidence regarding the circumstances in which the disclosure statement was recorded cannot help the Prosecution.

28. One Sukmaya Rai (P.W. 3), wife of Ongchen Dukpa Sherpa, the aunt of the Appellant was also examined. She identified the accused in the dock. She states that on 26.02.2016 at around 08 to 09 pm one Chandra Kala Subba came to her house and told her that the Appellant and one unknown person was fighting with each other in her house. Accordingly,

she and Chandra Kala Subba proceeded to the house. On reaching the place of occurrence, Sukmaya Rai saw the Appellant was standing outside the courtyard and the unknown person standing nearby. She then slapped the Appellant twice and rebuked him for fighting. The unknown person went his way towards the road side. Sukmaya Rai wouldn't know why they were fighting with each other. As she was not feeling well she returned to her house and also asked the Appellant to return to his home. On the following day, Sukmaya Rai came to know that the Appellant was arrested.

29. In cross-examination, Sukmaya Rai admitted to the suggestion of the Defence that she did not notice any injury on both the Appellant and the unknown person when she reached the place of occurrence. Sukmaya Rai also admitted that the month of February is cold at Lachung where she was residing for more than 15 years. She admitted that on the relevant day of the incident it was raining and it was also time for snowfall. She also admitted to the suggestion of the Defence that on reaching the place of occurrence she saw the unknown person walking out by himself in a normal way.

30. Sukmaya Rai's evidence establishes the immediate facts after the alleged assault as per a statement when she reached the place of occurrence the unknown person was standing nearby. She did not notice any injury on the unknown person. She also noticed the unknown person walking by himself in a normal manner. The Prosecution failed to have the deceased identified by Sukmaya Rai who had seen him.

31. Passang Sherpa (PW 4) was called to be examined on 23.06.2016. He was not feeling well, the learned Additional Public Prosecutor sought adjournment which was granted. Passang Sherpa was examined the next day. He identified the accused person in Court. Passang Sherpa on reaching

the place of occurrence came to know from the police that the Appellant had murdered a person. He would not know the name of the deceased. At the place of occurrence the Police would prepare a document i.e. disclosure statement in his presence and read the contents but he would not remember the contents thereof, on the day of his deposition. Disclosure statement was identified and his signature thereon too.

32. Passang Sherpa would also identify another documents i.e. the property seizure memo by which the Police had seized the half burnt firewood. Passang Sherpa would also identify his signature thereon. He came to know that the half burnt firewood was seized by the Police as the Appellant had used it to assault the deceased, who died, consequently. Passang Sherpa would also sign on a paper used to wrap the half burnt firewood by the Police on the relevant day. He would identify the said paper used to wrap the half burnt firewood by the Police as MO –IV and his signature thereon.

33. In cross-examination, Passang Sherpa admitted that he was appointed as 'Gyapon' (head of Nepali Community). As he was the 'Gyapon' of Lachung he was called by the Police to the place of occurrence. Passang Sherpa admitted to the suggestion of the Defence and stated that he did not know from where the disclosure statement was prepared and that it was not prepared before him. He also admitted that the disclosure statement was not read over to him but he was told by the Police that the Appellant was accused of having murdered one person and as he was the 'Gyapon' he was required to sign on a paper marked as disclosure statement. Passang Sherpa also admitted that he does not know how to read or write. He admitted that the property seizure memo was also prepared by the Police on his reaching the Lachung Police Station (PS), on

which he signed. Passang Sherpa admitted that he had not been to the Lachung PS on the day of the incident i.e. 27.02.2016 and had gone to Lachung PS only on 28.02.2016. He also admitted to the suggestion that his signature thereon was made only on 28.02.2016. Passang Sherpa admitted that the half burnt firewood was already present at Lachung PS and he did not know from where and by whom it was brought there. He admitted that he has stated that the half burnt firewood was the weapon of offence only because he was told by the Police at the Lachung PS that it was used by the accused.

34. Passang Sherpa was also a prosecution witness to the disclosure statement whose evidence regarding preparation of the disclosure statement at the place of occurrence by the Police was completely demolished in cross-examination where he said that he did not know where it was prepared and that it was not prepared before him. He also, in cross examination, admitted that the disclosure statement was not read over to him and the police merely made him sign on it. Passang Sherpa was not declared hostile. His evidence regarding the making of the disclosure statement being completely demolished would not come to the aid of the Prosecution.

35. Pasang Sherpa is also witness to the seizure of the half burnt firewood vide the property seizure memo. He identified the property seizure memo. He identified his signature which was used to wrap the half burnt firewood but he did not identify the half burnt firewood. In cross examination by the Defence, Passang Sherpa's evidence on the seizure of the half burnt firewood was also demolished. He states that property seizure memo had already been prepared by the police when he reached the Lachung PS on 28.02.2016 and not on the date of the incident i.e.

27.02.2016. Contrary to the oral evidence the property seizure memo shows that half burnt firewood to have been seized at 1800 hrs on 27.02.2016 and signed by the said witness on 27.02.2016 itself. Passang Sherpa states that he signed the property seizure memo only on 28.02.2016 and that the half burnt firewood was already there at the Lachung PS when he reached and he had no idea from where or by whom it was brought to the Lachung PS There is no explanation from the prosecution on these vital contradictory assertions made by Passang Sherpa. His evidence would also not help the Prosecution to prove the seizure of the half burnt firewood vide the property seizure memo.

36. Suresh Subba (P.W.15), a distant relative of the Appellant stated that on 27.02.2016 Police personnel came to the house of one Chung Norbu Lama inquiring about the incident and prepared a document at the place of occurrence after which he was asked to sign on it he was not shown any seized article but merely asked to sign on the property seizure memo. In cross-examination Suresh Subba admitted that he did not know the contents of the said property seizure memo and that he was an illiterate person. He also admitted that at the time of the incident he was not present at the place of occurrence. He admitted that the Police Personnel were already present at the place of occurrence when he reached. Suresh Subba stated that he was asked to sign on the property seizure memo on the pretext that he also resided in the same vicinity of the place of occurrence. He also stated that apart from signing on the property seizure memo he did not know anything else.

37. Unfortunately even Suresh Subba could not prove the seizure of the half burnt firewood vide the property seizure memo.

38. Palzor Lachungpa (P.W.5), a resident of Singring, Lachung, North Sikkim identified the Appellant in the dock. He had identified the deceased at the place of occurrence as a person whose name he did not know but someone who had worked under him to collect firewood. Palzor Lachungpa was present when the police inspected the dead body at Faka, Lachung. He also saw the dead body of the deceased at the place of occurrence and signed on inquest form (exhibit-4) prepared by the police and identified his signature thereon. He did not notice any injury on the dead body of the deceased on the relevant day as he was not close to it. He then accompanied the police to Gangtok for the post-mortem of the said dead body of the deceased at Gangtok, Government Hospital.

39. In cross examination, Palzor Lachungpa (P.W.5) admitted that he was not an eye witness and whatever he stated with regard to the incident was on the basis of what he had heard. He also admitted that February was a cold month at Lachung and at the relevant day of the incident he was at his house at Singring.

40. Palzor Lachungpa is not a witness to the alleged assault. He was a witness who knew the deceased and had identified him at the place of occurrence and accompanied the Police with the dead body for Post-mortem to Gangtok. He did not notice any injury on the dead body. Palzor Lachungpa however, was not asked to identify the photograph of the deceased in Court. No document except the inquest report (exhibit -4) was put to him. His evidence also would not come to aid of the Prosecution except to the limited extent of corroborating the death of the deceased and proving the making of the inquest report.

41. Jigmee Lachungpa (P.W.6) recognised the Appellant as he had seen him in Lachung, North Sikkim. He remembered that sometime in the

year 2016 police personnel had come to his house and informed him that a person had died at Faka, Lachung. He had, accordingly gone there and seen a dead body of the person at the place of occurrence but he did not know the name of the deceased. Later he had come to know that the Appellant had assaulted the deceased with the fire wood and he had died. However, he did not notice any injury on the dead body.

42. In cross examination, Jigmee Lachungpa admitted that he was not an eye witness and had only heard from the local people that the Appellant had assaulted the deceased with the fire wood. He also admitted that in the month of February, it is very cold at Lachung and on the relevant night it was raining and there was slight snow fall too.

43. The evidence of Jigmee Lachungpa is admissible only to the extent that he recognise the Appellant, had seen a dead body of a person at some place of occurrence and that February is very cold month at Lachung and on the relevant night it was raining and there was snowfall. The rest is hearsay. There is nothing in the evidence of Jigmee Lachunga which would help the Prosecution to establish the guilt of the Appellant.

44. Thung Norbu Lachungpa, (P.W.7) identified the Appellant in the dock as he had seen him at Lachung, North Sikkim. About 3–4 months after the incident he had been called by the Officer in-charge of Lachung PS to ascertain whether the place of occurrence belonged to him. Thung Norbu Lachungpa informed the O.C. that the said house belonged to him. He also came to know that there was a fight in the said house between the Appellant and the deceased and the deceased had died.

45. In cross examination, Thung Norbu Lachungpa admitted that whatever he had stated with regard to the alleged incident was as narrated

to him by the Investigating Officer when he was called to the Thana after 3-4 months of the incident.

46. The evidence of Thung Norbu Lachungpa is admissible only to the extent of identification of the place of occurrence as his house. The evidence of Thung Norbu Lachungpa is also of no substantial aid to the Prosecution.

47. Chatur Kumari Rai, (P.W. 8) also recognised the Appellant on the dock as her only son. On 28.02.2016 she was informed by the Lachung O.C. that her son, the Appellant, had got involved in a fight with a brother of one Nirmal at Lachung, North Sikkim. Chatur Kumari Rai, came to know that the Appellant and the deceased had a fight on 27.02.2016 and due to the said fight a person had died the following day. She then went to Lachung Police Station on 29.02.2016 and met the Appellant who told her that there was a fight between the Appellant and the deceased and as a result the deceased died. Chatur Kumari Rai, did not know how the deceased had died.

48. In cross examination, Chatur Kumari Rai, would admit that she was present at Lachung during the relevant time of the incident. She also admitted that whatever she narrated about the incident was on the basis of what the Investigating Officer had narrated to her. Chatur Kumari Rai, also admitted that according to the Appellant the deceased had walked away after the fight on the relevant night.

49. The evidence of Chatur Kumari Rai, the mother of the Appellant, regarding what the Appellant told her on 29.02.2016 at the Lachung Police Station where the Appellant was in custody that there was fight between him and the deceased and as a result the deceased died is inadmissible in

view of Section 26 of the Indian Evidence Act, 1872. Rest of her evidence is hearsay.

50. Bhim Bahadur Chettri, (P.W. 9) could not recognise the Appellant standing in the dock. The deceased, Mahesh Chettri, was his third son. In the year 2016, he was informed through telephone by his younger brother, Purna Bahadur Chettri, that the dead body of his son had been brought to STNM Hospital, as the deceased was involved in a fight with an unknown person. Bhim Bahadur Chettri, then went to the STNM Hospital where he saw the dead body of the deceased. The post mortem of the deceased was conducted at the said hospital after which the dead body of his son was handed over vide the handing/ taking memo (exhibit-5) prepared by the police at the hospital wherein he also identified the signature. At the time of cremation he noticed blood on the back side on the head of the deceased.

51. In cross examination, Bhim Bahadur Chettri, admitted that he did not know anything about the alleged incident and that his son used to consume alcohol and that, further, whatever he stated in his examination-in-chief with regard to the incident was based on the information received from his brother Purna Bahadur Chettri.

52. The evidence of Bhim Bahadur Chettri, the father of the deceased establishes the death of the deceased and the post-mortem being conducted at the STNM hospital and thereafter, the handing over of the dead body of the deceased to him. Bhim Bahadur Chettri's evidence would also show that the deceased used to consume alcohol. Bhim Bahadur Chettri noticing the blood on the backside of the head of the deceased during cremation also would not help the Prosecution because it was post the post-mortem.

53. Nirmal Chettri, (P.W.10) identified the Appellant standing in the dock, as he had seen him at Faka Lachung during the time of the incident. In the year 2015 he was at Lachung along with his brother Mahesh. He did not remember the date but one day his deceased brother had gone to Singring, Lachung to collect the ration but did not return. On the following day some Police personnel from the Lachung Police Station along with his employer Palzor Lama came to the jungle where they were working and his employer told him that police had assaulted his brother Mahesh. The police then immediately took Nirmal Chettri (P.W. 10) to Faka Lachung. When he reached there he saw the dead body of his deceased brother and he came to know that he was killed by the Appellant who was standing in the dock. He had noticed bleeding from the nose of the deceased brother and a scratch on his forehead. Later on the dead body of his deceased brother was taken to the STNM Hospital, for post mortem after which the dead body was handed over to them. At the place of occurrence the police prepared a document and asked him to sign on it. The inquest form (exhibit-4) was identified as the said document in which he had put his signature.

54. In cross examination, Nirmal Chettri, admitted that the deceased used to consume alcohol. He also admitted that at the relevant time there was snow fall. He further admitted that he was not an eye witness and whatever he stated in his examination-in-chief was based on information received from other persons.

55. Nirmal Chettri is the brother of the deceased, his evidence in examination-in-chief that on the day after his deceased brother had gone to Singring, Lachung and had not returned, the Police along with his employer, Palzor Lama, had come to the Jungle where the said Palzor Lama

told him that his deceased brother had been assaulted by the Police was left un-assailed. The Prosecution did not deem it fit to declare him hostile and cross examine him. His evidence was accepted by the Prosecution. Although, the truth about what Palzor Lama had told Nirmal Chettri at the jungle regarding the assault by the Police on the deceased is inadmissible as Palzor Lama was not brought to the witness box but what Nirmal Chettri heard, in view of Section 60 of the Evidence Act, 1872 is admissible. The Prosecution has failed to explain the circumstance. Consequently, it would go to the benefit of the Appellant.

56. The learned Sessions Judge recorded a finding that the evidence of Nirmal Chettri apart from proving the identity of the deceased proves that the dead body of the deceased was handed over to them by the Police after the autopsy. The learned Sessions Judge has not considered the testimony of Nirmal Chettri to the effect that he was told by Palzor Lama that his brother was assaulted by the Police although the prosecution had failed to declare the said witness hostile. The law regarding evidence of prosecution witness in favour of an accused which remains un-impeached and not declared hostile is clear. The accused can rely on that evidence.

57. Dr. O.T. Lepcha, (P.W.11) is the Medico Legal Consultant at the STNM Hospital, Gangtok who conducted the autopsy of the deceased on 27.02.2016 at 10.a.m. which was concluded at 11.30 a.m. On examination it was found that Rigor Mortis, Cyanosis was present, with bleeding and congested face. The ante mortem injuries were noted as under:-

> *"Ante mortem injuries:*
>
> *1. Scalp haematoma (4 x 3 cms) over the left frontal bone. The haematoma was distributed over an area of 8 x 4 cms with underline comminuted fracture of the left frontal bone extending upto left side parietal bone measuring 15 cms in length.*

2. *Two linear fracture over the right side of the skull placed over the right fronto temporal bone and extending towards the vertex measuring 18 cms and 16 cms, respectively.*

3. *Extra dural haematoma (6 x 5.4 x 2 cms) placed over the left frontal lobe with diffused subarachnoid haematoma was present."*

58. Dr. O.T. Lepcha, found that the stomach was empty and no injury was seen over the chest. The approximate time since death was noted as more than 24 hours and the cause of death as a result of intra cranial haemorrhage with fracture of skull which was as a result of blunt force trauma to the skull.

59. Dr. O.T. Lepcha, opined that the injuries mentioned in his medical report in sl. No. 1 to 3 were sufficient to cause death of a person in a ordinary cause of nature. He would identify the autopsy report (exhibit-6) and his signature thereon.

60. Dr. O.T. Lepcha, had also verified on the photograph and signature on the blood sample authentication form (exhibit-7) whereby the blood of deceased was obtained and identified his signature thereon.

61. In cross examination, Dr. O.T. Lepcha, admitted that such injuries mentioned in his report can be caused as a result of fall, though the pattern of the injury would be different. He also admitted that at the time of conducting autopsy he was not shown the weapon of offence i.e. the half burnt firewood. Dr. O.T. Lepcha, admitted that the autopsy was done on 29.02.2016 and that there was a strong possibility that a drunk person lying in the open would die as a result of hypothermia.

62. The evidence of Dr. O.T Lepcha clearly establishes the death of the deceased. It also establishes the nature of injuries sustained by the deceased. It also proves that autopsy report. The only question which requires examination is the point of law raised by Mr. Udai P. Sharma,

that the weapon of offence i.e. the half burnt firewood ought to have been shown to Dr. O.T Lepcha who had conducted the post-mortem to establish whether it was possible that the injuries sustained by the deceased could have been caused by it. Mr. Udai P. Sharma would rely upon the judgment of the Apex Court in re: ***Mohinder Singh v. The State***[25]. This was a case of conviction of the accused therein under Section 302 and 307 read with Section 34 of the IPC. He would rely upon para 10, 11 and 12 thereof which reads as follows:-

> ***"10****..... it seems to us that the evidence which has been adduced falls short of proof in regard to a very material part of the prosecution case. In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case. ....."*

63. In the present case, it is alleged that the assault on the head of the deceased by the Appellant was with half burnt firewood. As per the autopsy report and the evidence of Dr. O.T Lepcha, it is clear that there were multiple injuries on the skull of the deceased both on the left and the right side. It was not a case of a single injury. The oral evidence produced by the Prosecution establishes only a singular assault on the head of the deceased with the half burnt firewood. The oral evidence produced by the Prosecution including the evidence of the Investigating Officer also proves that there was no visible injury on the deceased at the time of the incident. Immediately thereafter Dr. O.T Lepcha, opines that the cause of death "*is due to intracranial haemorrhage and fracture skull as a result of blunt force trauma to skull".* There is no expert evidence as to whether the multiple injuries recorded by Dr. O.T Lepcha in the autopsy report could have been caused by a singular assault on the head by the half burnt

[25] AIR 1953 SC 415

firewood, which according to the Investigating Officer weighed about 500 grams. Sans the expert opinion, this Court would not venture its opinion on the possibilities, for it is always for the Prosecution to establish by cogent evidence all the ingredients of the offence alleged and to prove that it was surely due to the singular blow with the half burnt firewood which resulted in the multiple injuries both on the left as well as the right side of the skull of the deceased leading to the death of the deceased.

64. In the impugned judgment the learned Sessions Judge has recorded findings to the following effect:-

> ***"17.*** *..... Pausing here of a moment, it is worthwhile to mention that though on going through the evidence of PW 11 there seem to be multiple injuries on the head/skull of the deceased, it is the claim of PW1 (sole eye-witness) as well as that of the accused that the deceased was struck only once on the head. Strangely, while subjecting PW 11 to cross-examination nothing inthat regard is seen to have been pointed out by the Counsel for the accused. Be that as it may, there is nothing in PW 11's evidence or the case records to even faintly suggest that there could have been more than one strike on the head of the deceased which could have caused the concerned injuries.''*
>
> Then again
>
> ***"18.*** *..... On the contrary, the evidence/materials that have come forward clearly establish that the injuries (which later proved fatal) were sustained as a result of the assault by the accused with MOI.''*

65. The learned Sessions Judge while recording the above findings should have considered that P.W.1 i.e. Chandra Subba was not only the sole eye witness but also a prosecution witness. The learned Sessions Judge has also erred in shifting the burden of proving the guilt of the accused from the prosecution to the Defence putting the onus on them and holding their failure to cross examine P.W.11 i.e. Dr. O.T. Lepcha, against the Appellant. Dr. O. T. Lepcha not being shown the half burnt firewood i.e. the alleged weapon of offence, the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused was not fulfilled. It

is true that the evidence of Chandra Subba clearly proves that the Appellant had struck the deceased on the head but contrary to the finding of the learned Sessions Judge as above there is no evidence to suggest that the multiple injuries sustained by the deceased was caused by the single strike. Consequently the benefit must accrue in favour of the Appellant. More so where one reads this evidence with the evidence of Nirmal Chettri.

66. Bebika Chettri (P.W. 12) is the learned Judicial Magistrate, Chungthang Sub-Division, stationed at Mangan. On 02.03.2016 she had received a requisition from the Investigating Officer of the case for examination of the Appellant under Section 164 Cr.P.C. Accordingly she directed the concerned I.O. to produce the accused on 03.03.2016. On 03.03.2016 the I.O. brought the accused and produced him before the learned Judicial Magistrate when the preliminary examination of the Appellant was done. Thereafter ten days reflection time was given to the Appellant. On 14.03.2016 the Appellant was produced before the learned Judicial Magistrate and she recorded the statement of the Appellant under Section 164 Cr.P.C. On 15.03.2016 she prepared the forwarding letter to the learned Sessions Judge, North Sikkim along with the statement of the Appellant recorded under Section 164 Cr.P.C. requisition of the Investigating Officer and the preliminary questionnaires. She identified the statement recorded under Section 164 Cr.P.C. (exhibit-8) produced in Court and her signature thereon, the forwarding letter (exhibit-9) and her signature thereon and the preliminary questions (exhibit-10) and her signature thereon.

67. In cross examination, the learned Judicial Magistrate admitted that in the preliminary questionnaires in the answer to question no. 2 where

302 IPC is mentioned was not the language which was used by the Appellant but it was her language. She also admitted that during the confession which the Appellant made before her, he never confessed that the deceased had died on being beaten by him.

68. The learned Sessions Judge has held the confessional statement recorded by the learned Judicial Magistrate to be inadmissible in evidence due to the fact that oath has been administered on the accused. A perusal of the said "confessional statement'' (exhibit 8) reflects that the learned Judicial Magistrate had recorded on top of the said document the following words:- *"statement recorded on oath under Section 164 of the Code of Criminal Procedure, 1973".*

69. Section 6 of the Oaths Act, 1969 reads thus:-

> "*Section 6 : Forms of oaths and affirmations*
> *(1) All oaths and affirmations made under section 4 shall be administered according to such one of the forms given in the Schedule as may be appropriate to the circumstances of the case:*
>
> *Provided that if a witness in any judicial proceeding desires to give evidence on oath or solemn affirmation in any form common amongst or held binding by persons of the class to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the court may, if it thinks fit, notwithstanding anything hereinbefore contained, allow him to give evidence on such oath or affirmation.*
>
> *(2) All such oaths and affirmations shall, in the case of all courts than the Supreme Court and the High Courts, be administered by the presiding officer of the court himself, or, in the case of a Bench of Judges or Magistrates, by any one of the Judges or Magistrates, as the case may be."*

70. The schedule to the Oaths Act, 1969 provides four different forms for administering oath or affirmation. The "confessional statement'' does not reflect compliance of Section 6 of the Oaths Act, 1969 read with the schedule. The testimony of the learned Judicial Magistrate also does not

reflect that there was compliance of Section 6 of the Oaths Act, 1969 read with the schedule. That leaves only the aforequoted statement in the said "confessional statement" which states that the statement was recorded under oath. This however, must be taken as the statement of the learned Judicial Magistrate while doing a judicial act and therefore true and correct. There is no requirement under Section 164 Cr.P.C to record a "confessional statement" under oath. In fact it is prohibited. It is hoped that Judicial Magistrates while recording the confessional statements keep themselves alive to the law and the procedure prescribed for recording such statements. Confession is an admission of guilt. If the Appellant had not confessed that the deceased had died on being beaten by the Appellant, as admitted by the Learned Judicial Magistrate in her cross examination what was the reason to record the said "confessional statement"?

71. Rinzing Wangdi Bhutia (P.W.13) was the Head Constable of Lachung PS who prepared the handing and taking memo (exhibit-5) of the deceased in the presence of two witnesses Purna Bahadur Chettri (P.W.14) and Nirmal Chettri (P.W.10). He handed over the dead body of the deceased to the father of the deceased Bhim Bahadur Chettri. According to Rinzing Wangdi Bhutia, the said handing and taking memo was prepared after the post mortem. He identified the handing and taking memo as well as his signature and the signature of the witnesses thereon.

72. Purna Bahadur Chettri (P.W.14) was a witness to the said handing and taking memo (exhibit-5) in which he had also signed.

73. Rinzing Wangdi Bhutia, Nirmal Chettri and Purna Bahadur Chettri have proved the preparation of the handing and taking memo of the dead

body of the deceased as well as the handing and taking over of the dead body of the deceased.

74. Kaziman Pradhan (P.W.16) is the Investigating Officer who registered the FIR (exhibit-11) on 27.02.2016 at around 13:50 hrs. on the basis of a verbal information of assault on one person by the informant i.e. the Appellant as a result of a fight between them. The Investigating Officer visited the place of occurrence and conducted the preliminary inquiry where he saw a person lying in the courtyard of the rented house of the Appellant. Thereafter on returning to the Police Station he registered a suo moto case against the Appellant under Section 302 IPC, 1860 and undertook the investigation. On completion of the investigation the Investigating Officer filed the charge sheet.

75. In cross-examination, the Investigating Officer admitted that at the time of seizing the half burnt firewood he did not find any blood stain on it or at the place of occurrence. He admitted that none of the witnesses had stated that the deceased died due to assault by the Appellant with the weapon of offence. He further admitted that during investigation he did not find any blood on the upper wearing apparels of the deceased. He admitted that Lachung is a cold area and on the relevant night of the incident it was drizzling. The Investigating Officer admitted that he had visited the spot where the deceased was lying unconscious, which fact is however, not mentioned in the charge sheet. He admitted that he did not find any injury on the deceased when he conducted the inquest. He stated that during investigation he did not come across any concrete evidence that due to the assault made by the accused upon the deceased the deceased died. He admitted that the sole reason for charging the Appellant under Section 302 IPC, 1860 was the fact that the Appellant

himself had informed that he had hit the deceased on the previous night. The Investigating Officer admitted that he had not measured the half burnt firewood and when asked to weigh the same he stated that it was about 500 gms.

76. Sans the testimony of the solitary eye witness account of Chandra Subba, the prosecution has failed to even connect the Appellant to the incident. The disclosure statement and the property seizure memo by which the prosecution seeks to prove the discovery of the half burnt firewood have not been proved. The statement recorded by the learned Judicial Magistrate under Section 164 Cr.P.C. of the Appellant, as seen above was not a confessional statement. In the said statement the Appellant had clearly pleaded private defence as well as the fact that the assault on the head of the deceased was accidental. In any event, the learned Sessions Judge would not rely upon the same as it was admittedly recorded under oath. The Investigating Officer also candidly admits in cross examination that he did not come across any concrete evidence to establish that the assault made by the Appellant caused the death of the deceased and the sole reason for charging the Appellant under Section 302 IPC, 1860 was due to the fact that the Appellant himself had informed the Police that he had assaulted the deceased. The Investigating Officer's admission that he did not find any injury on the deceased when he conducted the inquest fails to explain the multiple injuries as reflected in the autopsy report. There is no evidence brought forth by the prosecution as to whether a singular strike with a half burnt firewood weighing about 500 gms could cause multiple injuries on the skull. However the learned Sessions Judge has, relying upon the testimony of the solitary eye

witness, Chandra Subba convicted the Appellant under Section 304 Part II, IPC, 1860.

77. Section 304 relates to punishment for culpable homicide not amounting to murder. The said Section reads thus:-

> ***"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."*

78. Section 299, IPC, 1860 defines culpable homicide. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

79. To fall within the definition of Section 304 IPC the accused must be shown to have committed culpable homicide not amounting to murder. The learned Sessions judge has attributed knowledge to the Appellant that he was likely by such act to cause death to hold the Appellant guilty of the crime of culpable homicide not amounting to murder punishable under Section 304 Part II of IPC.

80. The Appellant had raised the plea of private defence in his statement recorded under Section 164 Cr.P.C. for the first time. Thereafter, the Appellant raised the plea of private defence during the recording of a statement under Section 313 Cr.P.C. whereby in reply to question Nos. 2, 13 and 69 he had clearly stated that he is innocent and he had assaulted the deceased on his private defence under sudden provocation without any

intention to kill. The relevant extracts from the statement of the Appellant recorded under Section 313 Cr.P.C. are reproduced herein below:-

> *"Q.No.2. As per her, deceased abused you in a filthy (vulgar) language and the deceased was also drunk at that moment and he caught hold of you on your chest. As per her, you then suddenly picked up a half burnt firewood from the oven of her kitchen and hit the deceased on his head once. What do you have to say?*
>
> *Ans: Yes he had caught hold my chest and used filthy language. I had assaulted him with the said half burnt firewood in order to escape from him and without any intention to kill him."*
>
> *"Q.No.13. As per him, the deceased had come in the house of one Chadra Maya Subba at Faka, Lachung and there was a fight in between you and the deceased. What do you have to say?*
>
> *Ans. It is true but he had abused me with filthy language and caught hold of me that is why in order to escape from him I had assaulted him."*
>
> *"Q.No.69. Do you have any statement to make in your defence?*
>
> *Ans. I am innocent, I have assaulted the deceased on my private defence under the sudden provocation without any intention to kill him."*

81. Mr. Udai P. Sharma, learned Counsel has raised the plea of private defence during the hearing of this appeal. Since the memo of appeal filed did not contain any grounds the Appellant has filed an application for urging additional ground of appeal which is resisted by the State-Respondent.

82. In re: ***Munshi Ram & Ors. vs. Delhi Administration[26],*** the Apex Court would examine whether an accused who had not taken the plea of private defence but the necessary basis for that plea had been laid in the cross examination of prosecution witness, was entitled to do so. The Apex Court would hold:-

> ***"5.*** *It is true that appellants in their statement under Section 342 CrPC had not taken the plea of private defence, but necessary basis for that plea had been laid in the cross-examination of the prosecution witnesses as well as by adducing defence evidence. It is well settled that even if an accused does not plead self defence, it is open to the court to consider such a plea if the same arises from the material on record*

[26] **AIR 1968 SC 702**

— see In re Jogali Bhaigo Naiks [AIR 1927 Mad 97] . The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.''

83. In re: ***Mohinder Pal Jolly v. State of Punjab***[27] the Apex Court would hold:-

*"**10.** The law regarding the right of private defence of property or person is well-settled and may be briefly recapitulated here. The onus is on the accused to establish this right not on the basis of the standard of proving it beyond doubt but on the theory of preponderance of probability. He might or might not take this plea explicitly or might or might not adduce any evidence in support of it but he can succeed in his plea if he is able to bring out materials in the records of the case on the basis of the evidence of the prosecution witnesses or on other pieces of evidence to show that the apparently criminal act which he committed was justified in exercise of his right of private defence of property or person or both. But the exercise of this right is subject to the limitations and exceptions provided in Section 99 of the Penal Code — the last one being — "The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. .....''*

84. In re: ***Natvarsingh Bhalsingh Bhabhor (supra)*** the Apex Court would examine a plea of private defence which was not taken in the statement of the accused under section 313 of Cr.P.C. or in the cross examination of any witness and would hold that therefore at the stage of appeal the accused cannot take such a plea of self defence.

85. Since the Appellant had during the investigation of the case as well as during trial raised the plea of private defence the application filed by the Appellant to urge the ground of private defence is permitted.

86. Section 96 IPC, 1860 provides:-

***"96. Things done in private defence**. – Nothing is an offence which is done in the exercise of the right of private defence.''*

87. Section 97 IPC, 1860 provides:-

***"97. Right of private defence of the body and of property**.- Every person has a right, subject to the restrictions contained in section 99, to defend-*

[27] **(1979) 3 SCC 30**

First.- His own body, and the body of any other person, against any offence affecting the human body;

Secondly.-The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.''

88. Section 99 IPC, 1860 provides:-

***"99. Acts against which there is no right of private defence**.-There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law.*

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

There is not right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Extent to which the right may be exercised.- The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1.- A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, so such, unless he knows or has reason to believe, that the person doing the act is such public servant.

Explanation 2.- A person is not deprived of the right or private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.''

89. Section 100 IPC, 1860 provides:-

***"100. When the right of private defence of the body extends to causing death**.-The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:--*

First.--Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

Secondly.--Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

Thirdly.--An assault with the intention of committing rape;

Fourthly.--An assault with the intention of gratifying unnatural lust;

Fifthly.--An assault with the intention of kidnapping or abducting;

Sixthly.-- An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

[Seventhly.--An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.]''

90. Section 102 IPC, 1860 provides:-

***"102. Commencement and continuance of the right of private defence of the body**.- The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.''*

91. The right of private defence would find its roots in the law of nature itself as it is the natural instinct in a man to defend himself against unlawful aggression. In fact, it is an animal instinct of self preservation. Self preservation is engrained naturally in both humans as well as other animals. It is a law of necessity. The concept of self defence, over the years, seems to have undergone various changes. Since defence is not limited to self defence only, the words "private defence'' has been aptly used. The Law relating to private defence falls under Chapter IV under the head "General Exceptions'' of the IPC, 1860. Section 96 to 106 IPC, 1860 deals with it. Today, a perusal of the afore-quoted sections makes it evident that it is not an offence if the act is done in the exercise of the right of private defence. Every person has a right to defend his own body, and also the body of any other person, against any offence affecting the human body. Every person also has a right, to defend the property; whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass or which is an attempt to commit theft, robbery, mischief or criminal trespass. Under Section 98 IPC, 1860 even when an act, which would otherwise be a certain offence, is not that

offence, by reason of intoxication of the person doing the act, like in the present case, every person has the same right of private defence against that act which he would have if the act were that offence. Even though the aggressor against whom the right of private defence has been exercised is not liable for any punishment by reason of his personal incapacity to commit the crime or because he acts without the necessary *mens rea*, the defenders right to private defence is not affected thereby. The exercise of the right of private defence is subject to the limitations and exceptions provided in Section 99 IPC, 1860. The right of private defence in no case extends to inflicting of more harm than it is necessary to inflict for the purpose of defence. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. The right of private defence of the body, thus, in view of Section 100, IPC, 1860 extends to the voluntary causing of death or of any harm to the assailant, if the offence which occasions the exercise of the right be of any of the description as enumerated in the seven clauses of Section 100 IPC, 1860. The apprehension that the assault would cause grievous hurt would give a legitimate right to the defendant under Section 100 IPC, 1860 and in such circumstances the right of private defence of the body would extend to causing death. Section 102 IPC, 1860 fixes the time when the right of private defence of the body commences and the time during which it continues. The right of private defence of the body commences as soon as reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

92. In the "Principles of Law of Crimes'' by Shamsul Huda, the author in "Lecture XII'' on the "right of private defence'' quotes from instructive passages from Halsbury IX, p.587, judgment of the Madras High Court and Mayne which reads respectively as under:-

> ***""****A person lawfully defending himself or his habitation is not bound to retreat or to give way to the aggressor before killing; but if the aggressor is captured or is retreating without offering resistance and is then killed, the person killing him is guilty of murder.'' (Halsbury IX, p. 587). The law is the same in India – "The learned Judge suggests that the first accused could have escaped further injury by resorting to less violence or running away. But this is placing a greater restriction on the right of private defence than the law requires.'' (Alingale v. Emperor 28 Mad. 454).*
>
> ***"****But a man,'' says Mayne, "is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is not obliged to retreat but may pursue his adversary till he finds himself out of danger, and if in the conflict between them he happens to kill, such killing is justifiable.''''*

93. In re: ***James Martin v. State of Kerala***[28] the Apex Court would hold:-

> *"**13.** The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression "right of private defence". It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the*

[28] **(2004) 2 SCC 203**

right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. [AIR 1968 SC 702 : 1968 Cri LJ 806] , State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478] , State of U.P. v. Mohd. Musheer Khan [(1977) 3 SCC 562 : 1977 SCC (Cri) 565 : AIR 1977 SC 2226] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri) 635 : AIR 1979 SC 577] .) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is a reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391] runs as follows: (SCC p. 654, para 9)

> *"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence."*

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.

14. *..... A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject-matter of right of private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101 IPC define the limit and extent of right of private defence.*

Then again

16. *In order to find whether right of private defence is available or not, the injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered. Similar view was expressed by this Court in Biran Singh v. State of Bihar [(1975) 4 SCC 161 : 1975 SCC*

(Cri) 454 : AIR 1975 SC 87] . (See Wassan Singh v. State of Punjab [(1996) 1 SCC 458 : 1996 SCC (Cri) 119] and Sekar v. State [(2002) 8 SCC 354 : 2003 SCC (Cri) 16] .)"

94. In re: ***Dharam & Ors. v. State of Haryana***[29] the Apex Court would hold:-

*"**15.** Section 96 IPC provides that nothing is an offence which is done in exercise of the right of private defence. The expression "right of private defence" is not defined in the section. The section merely indicates that nothing is an offence which is done in the exercise of such right. Similarly, Section 97 IPC recognises the right of a person not only to defend his own or another's body, it also embraces the protection of property, whether one's own or another person's against certain specified offences, namely, theft, robbery, mischief and criminal trespass. Section 99 IPC lays down exceptions to which rule of self-defence is subject. Section 100 IPC provides, inter alia, that the right of private defence of the body extends, under the restrictions mentioned in Section 99 IPC, to the voluntary causing of death, if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face the assailant, who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.*

***16.** The scope of right of private defence is further explained in Sections 102 and 105 IPC, which deal with commencement and continuance of the right of private defence of body and property respectively. According to these provisions the right commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat, to commit offence, although the offence may not have been committed but not until there is that reasonable apprehension. The right lasts so long as reasonable apprehension of the danger to the body continues (see Jai Dev v. State of Punjab [AIR 1963 SC 612 : (1963) 1 Cri LJ 495]).*

***17.** To put it pithily, the right of private defence is a defensive right. It is neither a right of aggression nor of reprisal. There is no right of private defence where there is no apprehension of danger. The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger not of self-creation. Necessity must be present, real or apparent (see Laxman Sahu v. State of Orissa [1986 Supp SCC 555 : 1987 SCC (Cri) 173 : AIR 1988 SC 83]).*

***18.** Thus, the basic principle underlying the doctrine of the right of private defence is that when an individual or his property is faced with a danger and immediate aid from the State machinery is not readily available, that individual is entitled to protect himself and his property. That being so, the necessary corollary is that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is sought to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. We may, however, hasten to add that the means and the force a threatened person adopts at the spur of the moment to ward off the danger and to save himself or his property cannot be weighed in golden scales. It is neither possible nor prudent to lay down abstract parameters which can be applied to determine as to whether the means and force adopted by the threatened person was proper or not. Answer to such a question*

[29] **(2007) 15 SCC 241**

depends upon a host of factors like the prevailing circumstances at the spot, his feelings at the relevant time, the confusion and the excitement depending on the nature of assault on him, etc. Nonetheless, the exercise of the right of private defence can never be vindictive or malicious. It would be repugnant to the very concept of private defence.

19. *It is trite that the burden of establishing the plea of self-defence is on the accused but it is not as onerous as the one that lies on the prosecution. While the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea of self-defence to the hilt and may discharge the onus by showing preponderance of probabilities in favour of that plea on the basis of the material on record (see Munshi Ram v. Delhi Admn. [AIR 1968 SC 702 : 1968 Cri LJ 806] , State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384 : AIR 1975 SC 1478] and Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568 : AIR 1979 SC 391]).*

20. *In order to find out whether right of private defence is available or not, the injuries received by an accused, the imminence of threat to his safety, the injuries caused by the accused and circumstances whether the accused had time to have recourse to public authorities are relevant factors, yet the number of injuries is not always considered to be a safe criterion for determining who the aggressor was. It can also not be laid down as an abstract proposition of law that whenever injuries are on the body of the accused person, the presumption must necessarily be raised that the accused person had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases (see Sekar v. State [(2002) 8 SCC 354 : 2003 SCC (Cri) 16] and V. Subramani v. State of T.N. [(2005) 10 SCC 358 : 2005 SCC (Cri) 1521]).''*

95. In re: ***Gopal & Anr. v. State of Rajasthan***[30] the Apex Court would hold:-

"17. *Regarding the plea of private defence, it is useful to refer to a decision of this Court in V. Subramani v. State of T.N. [(2005) 10 SCC 358 : 2005 SCC (Cri) 1521] The following principles and conclusion are relevant: (SCC pp. 364-66, para 11)*

> ***"11****. The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression 'right of private defence'. It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even*

[30] **(2013) 2 SCC 188**

if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Evidence Act, 1872 (in short 'the Evidence Act'), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See Munshi Ram v. Delhi Admn. [AIR 1968 SC 702 : 1968 Cri LJ 806 : (1968) 2 SCR 455] , State of Gujarat v. Bai Fatima [(1975) 2 SCC 7 : 1975 SCC (Cri) 384] , State of U.P. v. Mohd. Musheer Khan [(1977) 3 SCC 562 : 1977 SCC (Cri) 565] and Mohinder Pal Jolly v. State of Punjab [(1979) 3 SCC 30 : 1979 SCC (Cri) 635] .) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft quoted observation of this Court in Salim Zia v. State of U.P. [(1979) 2 SCC 648 : 1979 SCC (Cri) 568] runs as follows: (SCC p. 654, para 9)

> ***'9**. … It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence.'*

*The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea.**"***

96. In re: ***Prakash Subba v. State of Sikkim***[31] this Court after analysing various judgments of the Apex Court on the law of private defence, would hold:-

***"56.** In common thread running through the cases cited hereinabove, the principles of applicability of law to right of private defence as contemplated under Sections 96 to 99 IPC is well settled. The right to private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation. Though it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bona fide defender if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack. Pleading in so many words is not necessary. No aggressor can claim right to*

[31] **2017 CRI. L.J. 2713**

private defence on his life and property on the ground that the life and property is a natural right.

57. *A person who is born in the civilized world has to adopt a method to survive and preserve his life and property. Applying this principle to the fact of the case, the appellant/convict being father did not like certain actions of his son. He asked articles like mattresses and TV, to be removed and placed in the room upstairs, the son, who was, as reported by the witnesses, arrogant, assaulted him and held his neck firstly on the ground floor. On intervention, the father leaves the place and goes to his room upstairs. The deceased followed him and again started squeezing his neck hard with hands leading to strangulation, which may cause death, in such a situation the appellant/convict has every right to exercise private defence and in such an unexpected situation, he hit the deceased with a weapon which caused fatal injuries. It cannot be held that he exceeded his right of private defence and he ought to have modulated his assault in composed mind.*

58. *It is well settled that in case of strangulation, it is unrealistic to expect of the appellant/convict to modulate his defence step by step with any arithmetical exactitude. The appellant/convict exercised his right to preserve his life and limb and exercised his right to defence, inflicted injuries on the deceased son. It has come on record that the appellant was a doting father and used to take care of his family members and also has a reputation in the society. In such a background, I am of the firm opinion that the assault made by the appellant/convict with a Khukuri on his deceased son was in exercise of his right of private defence and it is within the scope and ambit of Section 96 IPC, and as such the act was no offence."*

97. In view of the aforesaid law of private defence it is important to appreciate the admitted and proved facts which would entitle the Appellant to claim a right of private defence. Chandra Subba, the solitary eye witness testified that at around 8 to 9 pm in the cold winter night of 26.02.2016 the deceased intruded into her house and came inside her kitchen where she and the Appellant were sitting. The deceased was drunk and without any provocation started abusing the Appellant in (filthy) vulgar language. Bhim Bahadur Chettri, the father of the deceased and Nirmal Chettri the brother of the deceased corroborates the fact that the deceased used to consume alcohol. The deceased did not stop there. The deceased caught hold of the chest of the accused and in the fight that ensued the Appellant picked up a half burnt firewood from the oven and hit the deceased on his head. If the evidence were to end only in the examination-in-chief of Chandra Subba, the 'Proportionality Rule' would come in the way of the Appellant *"for every assault it is not reasonable a man should be banged with a cudgel."* ***(Holt***

C.J.) in re: ***Cockcroft v. Smith***[32]. However, in cross examination, Chandra Subba would admit that when the deceased abused the accused, the accused got angry and in a fit of anger the Appellant assaulted the deceased at once. She also admitted that during the scuffle the assault on the head of the deceased by the half burnt firewood was accidental and unintentional. Chandra Subba was a prosecution witness who was not declared hostile. The Investigating Officer, on being asked to weigh the half burnt firewood in Court, did so, and stated that it was about 500 gms. The prosecution evidence leads this court to believe that the Appellant had intended to strike the body of the deceased in his right of private defence with a reasonable apprehension of grievous injury being inflicted by the accused on him. It is impossible to fathom the extent of fear which strikes a mind of a person when confronted with a sudden unprovoked attack by an unknown intruder who criminally trespasses into somebody else's house at night and physically assault the person. Even Sukmaya Rai, aunt of the Appellant testified that the deceased was an unknown person. It is definitely possible, however, to fathom that the said person could have feared grievous injury in such a situation. It is certain that the deceased was the aggressor. In such circumstances it would surely allow the Appellant to defend himself from the inevitable harm on his body. More so, when the solitary act of assault on the head of the deceased by the Appellant was unintentional and the strike was intended for the body in an act of defence. Considering the evidence of Chandra Subba in cross examination it would be a justifiable argument that a singular blow with a half burnt firewood weighing just about 500 gms on the body would not violate the 'Proportionality Rule' as embodied in Section 99 IPC, 1860. The Defence has been able to convincingly demonstrate before this Court

[32] **(1709) 91 E.R.541**

through the direct evidence of Chandra Subba, the solitary eye witness to the incident, and the statement of the Appellant given under Section 164 Cr.P.C. as well as before the learned Sessions Judge in the Section 313 Cr.P.C. proceedings that the solitary act of assault on the deceased on the head was unintentional and in the exercise of his right to private defence. The cause of death was unintentional. It is quite evident that the entire act transpired at the spur of the moment almost instinctively as soon as reasonable apprehension of danger to the body arose from the aggression of the deceased coupled with the physical attack on the Appellant. In such situation it is difficult to even attribute that the Appellant would have the knowledge that his act is likely to cause death or to cause such bodily injury as is likely to cause death. Admittedly, the deceased criminally trespassed into Chandra Subba's house at night and attacked the Appellant all of a sudden. In such circumstances it is quite evident there would be no time to have recourse to the protection of public authorities. The burden of proof on the accused under Section 105 Evidence Act, 1972 has been discharged by the Appellant on preponderance of probabilities. The necessary basis for that plea has been taken not only in the Appellant's statement recorded under Section 164 Cr.P.C. but also at the time of cross examination of prosecution witness i.e. Chandra Subba. It is being an admitted fact that the solitary assault on the head of the deceased with the half burnt firewood weighing around 500 gms being accidental the cause of death cannot be attributed to the Appellant. Thus the Appellant cannot also be set to have inflicted more harm than it is necessary to inflict for the purpose of defence. The prosecution has not led any evidence to establish the Appellant's antecedents. The evidence which has been brought on record establishes, however, that the Appellant, during the investigation as well as the trial, right from the time of reporting the incident vide the FIR

to the Police, giving his statement under Section 164 Cr.P.C. to the learned Judicial Magistrate and under Section 313 Cr.P.C. to the learned Sessions Judge has been truthful. It is quite evident therefore that this was not a case of culpable homicide not amounting to murder. The prosecution has failed to prove that the Appellant did have the knowledge that he was likely by such act to cause death. The failure of the prosecution to establish the crime against the Appellant is writ large. The Appellant is entitled to the benefit of doubt and consequently an acquittal.

98. In the facts and circumstances, this Court is of the view on preponderance of possibility that the Appellant's solitary assault on the head of the deceased was not only accidental and not intended to hit the head but was also an act of private defence within the parameters of section 96 IPC, 1860 and as such not an offence. Resultantly, the impugned judgment as well as the order on sentence both dated 27.10.2016 rendered by the learned Sessions Judge in Sessions Trial Case No. 01 of 2016 is set aside and the Appellant is acquitted of the solitary charge under Section 304 Part II IPC, 1860. The fine of ₹25,000/- imposed by the learned Sessions Judge, if paid by the Appellant shall be consequently returned.

99. The Appeal is allowed. The Appellant be set at liberty forthwith.

(Bhaskar Raj Pradhan)
Judge
27.11.2017

Approved for reporting: yes.
Internet: yes.

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