THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED: 1st August, 2018

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, ACTING CHIEF JUSTICE

Crl. A. No. 24 of 2016

Appellant : Phurba Tenzing Bhutia,
Son of late Thendup Bhutia,
Resident of Sribadam,
West Sikkim.
[At present State Central Prison, Rongyek, East Sikkim]

versus

Respondent : State of Sikkim

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

Appearance:

Mrs. Laxmi Chakraborty, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Karma Thinlay, Additional Public Prosecutor and Mr. Thinlay Dorjee, Additional Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, ACJ

1. Dissatisfied with the impugned Judgment dated 26.05.2016 in Sessions Trial Case No. 12 of 2014 of the Sessions Judge, West Sikkim, at Gyalshing, and the Order on Sentence dated 30.05.2016, the Appellant has preferred this Appeal.

2. On Conviction under Section 304-Part I, Section 324 and Section 323 of the Indian Penal Code, 1860 (for short 'the IPC'), the impugned Sentence was as follows;

(i) Rigorous imprisonment of 10(ten) years and fine of Rs.30,000/- (Rupees thirty thousand) only, under Section 304 Part-I of the IPC, with a default stipulation.

(ii) Simple imprisonment of 2(two) years under Section 324 of the IPC.

(iii) Simple imprisonment of 6(six) months under Section 323 of the IPC.

The Sentences were ordered to run concurrently setting off the period of detention already undergone. The fine amount if recovered was to be handed over to the family members of the deceased as compensation under Section 357 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.').

3. Learned Counsel for the Appellant, before this Court contended that the impugned Judgment and Order on Sentence were flawed as no materials existed for convicting the Appellant, a supporter of the opposition political party Sikkim Krantikari Morcha (for short 'SKM party') under any of the Sections charged. Raising contradictory arguments, learned Counsel then submitted on the one hand that there were no independent witnesses as PW-1 to PW-14 were interested witnesses being supporters of the ruling Sikkim

Democratic Front political party (for short 'SDF party'), while PW-17 is the sister of the deceased and PW-18 his Uncle, their evidence therefore ought to be considered with circumspection. In the same breath, it was expostulated that despite the availability of independent witnesses at the place of occurrence, viz; the local residents and one Duryo Dhan Pradhan, Head Constable, they remained unexamined as Prosecution witnesses. That Pema Choda Lepcha PW-30, a Constable of the Indian Reserve Battalion, was declared hostile as he testified that neither could he witness the incident due to darkness nor he did see any one picking up any person lying on the ground or hear any man or woman crying out that a person had been killed. It is also the next contention of learned Counsel that the assigning of the case to the Criminal Investigation Department police (for short 'CID') from the Kaluk Police Station for investigation, reveals the unwarranted interest of the State in the matter, leading to a bias against the Appellant.

4. In the second leg of her arguments, learned Counsel for the Appellant contended that there are serious discrepancies in the medical reports of the victim/deceased, as PW-22, Dr. A.S. Subba, found only a single haematoma of 4 x 4 inches over occipital region, while Exhibit-21, the report from Dr. Chhang's Super Speciality Hospital Pvt. Ltd. prepared by Dr. S. Bol PW-26, indicated that the patient was admitted

with multiple injuries due to physical assault. PW-29 Dr. Rumi Maitra, who conducted the autopsy, also found several injuries on the deceased, while PW-28, the Sub-Inspector of Police who conducted inquest on the dead body, found an injury on the right side of the head but not on the left side. The anomalies raise serious reservations about the Prosecution case. That, one of the weapons of offence allegedly a 'khukuri' was never recovered, while MO-II, the wooden beam alleged to have been used for assaulting the Victim, was not forwarded for forensic evaluation. That in fact, the case is one of medical negligence on the part of PW-22 Dr. A.S. Subba, Medical Officer at Rinchenpong Primary Health Centre, who first attended to and examined the deceased. It was strenuously contended that despite learning that the patient was in a critical condition, he advised the patient to be moved for higher medical facilities in a private vehicle leading to contributory negligence.

5. In the third leg of her arguments, it was canvassed that the Appellant neither had the intention nor the knowledge that the injury inflicted would cause death. In fact, even assuming but not admitting that the Appellant had struck the deceased, it was in a sudden fight in the heat of passion and at the spur of the moment to save himself from being assaulted by a mob consisting of more than 18(eighteen) people. The act of the Appellant was merely a rash and

negligent act falling within Exception 4 of Section 300 and thereby under Section 304A of the IPC, which was overlooked by the learned Trial Court.

6. The final argument raised was that contradictions existed in the FIR lodged by PW-1 Sangay Chopel Bhutia with his Statement under Section 161 Cr.P.C. as well as his testimony in the Court. As per his Section 161 Cr.P.C. Statement, he had gone to Jorethang to attend the SDF Foundation Day programme, contrary to which in his evidence before the Court he has stated that in fact he had gone for medical treatment and stayed on at Jorethang to hear the Chief Minister's speech. Exhibit-1 too does not reveal that he had gone for medical treatment. The Court should thus be circumspect while accepting the evidence of this witness. That, the evidence of PW-17 the sister of the deceased, is contrary to the evidence of PW-30, *inasmuch* as according to PW-17, when the Appellant came from behind the victim and hit him on the head with the wooden beam, she cried out that her brother was killed but PW-30 present at the place of occurrence heard no such cry. That in fact, even the Appellant was subjected to assaults as evident from Exhibit-12, his medical report. The evidence on records fail to inspire confidence and the Judgment of the learned Trial Court is based on surmises and hypothesis which deserves to be set aside.

7. Repelling the arguments of learned Counsel for the Appellant, learned Additional Public Prosecutor would canvass that the evidence of PW-20 and PW-21 establishes the seizure of MO-II (wooden beam) by the Investigating Officer (for short 'the I.O.'). That, in fact, nine Prosecution witnesses have deposed that when the deceased turned his back to the Appellant he was assaulted on his head by the Appellant with MO-II, which is duly substantiated by the medical evidence of PW-22, PW-26 and PW-29, who on examining the Victim opined that the cause of death was the injuries found on the deceased. That, although the Prosecution opted not to examine Duryo Dhan Pradhan, Head Constable, on account of the witness being unreliable, departmental proceedings having been initiated against him, the Appellant too failed to examine him despite citing him as a witness which thereby leads to an adverse inference. Although, the Appellant has contended that according to PW-30 there was no light at the place of occurrence, the evidence of PW-2, PW-3 and PW-13 would indicate that the street lights at the spot sufficiently lit the area and the Appellant having been identified was rightly convicted. Attention of this Court on this count was drawn to ***Gurmeet Singh vs. State of U.P.***[1]. Refuting the arguments of learned Counsel for the Appellant, it was contended that merely because the witnesses comprised of SDF supporters and kin of the deceased, would not make them unreliable

[1] (2005) 12 SCC 107

witnesses. This argument was fortified with reliance on ***State of Haryana vs. Shakuntla and Others***[2] and ***Govindaraju alias Govinda vs. State by Srirampuram Police Station and Another***[3]**,**

8. Rebutting the contention that the statement of PW-1 Sangay Chopel Bhutia, in the FIR Exhibit-1 is contrary to his deposition in Court, it was pointed out that FIR cannot be deemed to be an encyclopaedia, duly buttressing his argument with the ratio in ***Mahesh and Another vs. State of Madhya Pradesh***[4]. Further, while submitting that evidence before the Court being substantive evidence is to be considered and not the statement under Section 161 Cr.P.C., attention was drawn to the decision in ***R. Shaji vs. State of Kerala***[5]. That, the Prosecution evidence being cogent and consistent clearly establishes that the Appellant had chosen an opportune moment to assault the Victim from behind, on his head intentionally to cause death. The question of the incident arising out of the heat of passion and the spur of the moment is devoid of merit. Thus, no infirmity accrues in the impugned Judgment and Order on Sentence of the learned Trial Court and a dismissal befits the Appeal.

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[2] (2012)5 SCC 171

[3] (2012) 4 SCC 722

[4] (2011) 9 SCC 626

[5] (2013) 14 SCC 266

9. The rival submissions made at the Bar were heard at length and given careful consideration. The evidence and documents on record have been meticulously examined by me. Would the impugned Conviction and Order on Sentence warrant any interference, is the question that falls for consideration herein.

10. To gauge this, it would be appropriate to briefly walk through the facts of the case. On 04.03.2014 at around 2100 hours, PW-1 lodged Exhibit-1, the FIR, at the Kaluk Police Station informing therein that the Complainant along with party workers of the SDF party arrived at Sribadam (West Sikkim) at 8 p.m. after attending the party meeting at Jorethang (South Sikkim). When they were parting company to return home, a discussion ensued between the Appellant, a supporter of the SKM party and one Dawa Gyatso Bhutia, SDF supporter, during which the Appellant's younger brother, Jigmee Dorjee Bhutia, interfered and started attacking the SDF supporters. On the advice of the Victim/deceased, Narendra Kumar Gurung, who was the Vice-President, Constituency Level Committee (CLC) of the SDF party, not to quarrel, they started dispersing when suddenly the Appellant struck the deceased on his head from behind and injured him. Pursuant thereto, the deceased was evacuated to the Rinchenpong Primary Health Centre, on his condition being serious, he was referred to Siliguri thereafter. Hence, strict

legal action was sought against the Appellant and his younger brother, Jigmee Dorjee Bhutia. The FIR was duly registered as Kaluk Police Station Case being FIR No. 06/2014 dated 04.03.2014, under Section 307/34 of the IPC, against the duo and endorsed for investigation to PW-31, Police Inspector Kesang D. Bhutia. On receiving information that the patient had succumbed to his injuries at Siliguri, the case was converted to one under Section 302/34 IPC. After investigation commenced, the matter was transferred to the CID, Gangtok, on 11.03.2014 and endorsed to PW-32, Dy.S.P. K.B. Gadaily, for investigation. The formalities of investigation, such as arrest, interrogation and medical examination were carried out, the weapons of offence were recovered from the place of occurrence and seized, all relevant witnesses examined and their statements recorded. The inquest and post mortem report of the deceased were also obtained from the concerned police station at Siliguri. It transpired on investigation that on 04.03.2014 at around 7:30 p.m. about 20(twenty) people, including the deceased, returned to Sribadam via Soreng after observing the SDF Foundation Day at Jorethang. *En route*, they were obstructed by SKM party activists at Singling where the Soreng Police however intervened. On arriving at Sribadam, the SDF supporters reprimanded the Appellant who was loitering there, regarding the said obstruction. The Appellant retaliated leading to a scuffle between him, one Dawa Gyatso Bhutia and Phurba

Bhutia. On the intervention of police patrolling party, the Appellant was sent home but soon returned to the spot swinging a 'khukuri' threatening to kill everyone and was joined by his younger brother. On being over powered by the police, the 'khukuri' was disengaged from the Appellant. As the crowd started dispersing, the Appellant picked up a wooden beam from a pile of building materials lying nearby and attacked the Victim fatally on his head from behind, causing him to fall on the ground. He was evacuated to the Rinchenpong Primary Health Centre and thereafter to Dr. Chhang's Super Speciality Hospital, Matigara, Siliguri, where he was declared "brought dead". Hence, Charge-Sheet was submitted under Section 302/324 IPC against the Appellant while his brother, Jigmee Dorjee Bhutia and another suspect, Kharga Bahadur Gurung, were discharged on account of insufficient evidence. Later the Court would implead them as accused but vide the impugned Judgment acquit them on evidence lacking of their involvement.

11. The learned Trial Court framed Charge against the Appellant under Sections 302/34, 307 and 323 of the IPC and against Jigmee Dorjee Bhutia and Kharga Bahadur Gurung under Section 302/24 of the IPC. On their plea of "not guilty", the Prosecution examined 32 witnesses. The Appellant was examined under Section 313 of the Cr.P.C. thereafter and on his plea afforded an opportunity to examine one Duryo Dhan

Pradhan, who he however failed to produce before the Court. On arguments being heard and the evidence being considered, the impugned Judgment and Order on Sentence were pronounced.

12. While addressing the argument of learned Counsel for the Appellant that the FIR, the Section 161 Cr.P.C. statement of PW-1 and his evidence before the Court were inconsistent, we may briefly consider the provisions of Section 154 of the Cr.P.C. which deals with information in cognizable cases. The first information of the commission of a cognizable offence is sufficient to constitute the first information report. The object of the FIR is to set the criminal law in motion and it nowhere envisages a narration of the entire details of the offence. In ***Mahesh and another*** (*supra*), while considering the arguments of the Appellant therein, that, when the first information report which was filed by PW-1 after the incident, the role attributed to the Appellants was not mentioned at all, the Hon'ble Supreme Court observed that

> "**10.** ..... Besides, it is an established law that so far as the first information report is concerned, it is only a report submitted informing the police about the commission of the crime. It is not required that the said first information report should contain a detailed and vivid description of the entire incident. Further, it cannot be expected from the informant, especially, when the informant is a relative of the injured/deceased to give each and every minute detail of the incident in the first information report. ....."
>
> [emphasis supplied]

It emanates therefore that the FIR is for the purpose of promptly reporting an incident to set into motion the criminal

justice system, it does not necessarily have to be an encyclopaedia of the events that unfolded.

13. That having been said, we may now consider what Section 161 Cr.P.C. statement pertains to. Under this Section, the police investigating the matter can examine witnesses acquainted with the facts of the case and reduce them to writing without oath or affirmation. However, merely because a particular statement made by the witness before the Court does not find place in the statement recorded under Section 161 Cr.P.C., does not merit the evidence being thrown out. [See ***Alamgir vs. State (NCT, Delhi)***[6]***].*** Later in time, the Hon'ble Supreme Court in ***A. Shankar vs. State of Karnataka***[7], held that;

> "**17.** In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness

[6] AIR 2003 SC 282

[7] AIR 2011 SC 2302

> earlier. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. ....."

14. In ***R. Shaji vs. State of Kerala***[8]***,*** the Hon'ble Supreme Court would hold that;

> "**61.** ..... when the statement is recorded in Court and the witness speaks under oath after he understands the sanctity of the oath taken by him either in the name of God or religion, it is thus left to the Court to appreciate the evidence under Section 3 of the Evidence Act, 1872. The Judge must consider whether a prudent man would appreciate evidence and not appreciate the same in accordance with his own perception. ....."
>
> [emphasis supplied]

15. On careful perusal of Exhibit-1, it is seen that PW-1 has given information with regard to what transpired between the SDF party workers, the Appellant and his brother at Sribadam Bazaar leading to the assault on the deceased by the Appellant. Thereafter, on meticulous examination of Section 161 Cr.P.C. Statement of PW-1 as well as his deposition before the Court, admittedly he has not witnessed the assault on the Victim. Merely because he has not elaborated his activities in Exhibit 1 and his Section 161 Cr.P.C. Statement, viz; that he had gone for medical treatment and on not meeting the concerned doctor, attended the Foundation Day programme of the SDF party, does not render the evidence given by him unreliable. In any event, these facts are not intrinsic or germane to the matter at hand

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[8] (2013) 14 SCC 266

and do not cause any prejudice to the Prosecution case. There are no major contradictions in the FIR, the Section 161 Cr.P.C. Statement and the statement of PW-1 before the Court to raise any suspicion about the witness or the Prosecution case. Hence, the above discussions answers the doubts raised by learned Counsel for the Appellant.

16. So far as the credibility of the testimony of the witnesses furnished by the Prosecution goes merely because they owe allegiance to a particular party while the Appellant belongs to another party would not render the evidence unreliable. The Hon'ble Supreme Court while dealing with this issue in ***Mano Dutt vs. State of U.P.***[9]**,** held as follows;

> "**24.** Another contention raised on behalf of the appellant-accused is that only family members of the deceased were examined as witnesses and they being interested witnesses cannot be relied upon. Furthermore, the prosecution did not examine any independent witnesses and, therefore, the prosecution has failed to establish its case beyond reasonable doubt. This argument is without much substance. Firstly, there is no bar in law in examining family members, or any other person, as witnesses. More often than not, in such cases involving family members of both sides, it is a member of the family or a friend who comes to rescue the injured. Those alone are the people who take the risk of sustaining injuries by jumping into such a quarrel and trying to defuse the crisis. Besides, when the statement of witnesses, who are relatives, or are parties known to the affected party, is credible, reliable, trustworthy, admissible in accordance with the law and corroborated by other witnesses or documentary evidence of the prosecution, there would hardly be any reason for the court to reject such evidence merely on the ground that witness was a family member or an interested witness or a person known to the affected party."
>
> [emphasis supplied]

[9] (2012) 4SCC 79

17. In ***Balraje vs. State of Maharashtra***[10], the Hon'ble Supreme Court stated that;

> "**30.** ..... When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The Court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appear to be clear, cogent and credible there is no reason to discard the same. ....."
>
> [emphasis supplied]

18. On the bed rock of the principles so enunciated, the testimony of the Prosecution witnesses may be examined to test their credibility or otherwise. PW-2 to PW-7, PW-9, PW-11, PW-13, PW-14 and PW-17 were privy to the incident which unfolded before them at the relevant time. PW-8, PW-10, PW-12, PW-15 and PW-16 were tendered by the Prosecution being repetitive witnesses. PW-19 to PW-32 was witnesses who were not present at the spot, comprising of police personnel, doctors and I.Os. PW-1 who lodged Exhibit-1, the FIR, did not witness the incident as on being attacked by Jigmee Dorjee Bhutia, he fled to his house and stayed inside until the Police Inspector of Kaluk Police Station came and took him to the Police Station. Further, it is his evidence that from inside his house he heard people shouting that Narendra Kumar Gurung was killed. The statements of PW-3, PW-4, PW-5, PW-6, PW-7, PW-9, PW-11, PW-13, PW-14 and PW-17, is categorical that

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[10] (2010) 6 SCC 673

they witnessed the Appellant striking the deceased from behind. It also emerges unequivocally from the evidence of these witnesses that in fact, the deceased was trying to pacify the disputing factions and advising them to disperse. At that very moment, PW-17 called out to the deceased who turned to go home from the place of occurrence. Evidently, finding the moment to be propitious, the Appellant took the wooden beam when the deceased turned his back and struck him on the head leading him to falling on the ground. The evidence of PW-17, that she was calling out to her brother, the deceased, who then made to return home is firstly supported by the evidence of PW-5 Suk Man Subba, according to whom PW-17 came from the other side calling out to her brother. His evidence also finds support in the evidence of PW-6 Suren Subba, who also deposed that the deceased was trying to pacify the accused persons and requesting them to restrain from such activities. He then saw PW-17 coming from the opposite side calling out to the deceased. This fact was also witnessed by PW-7 Dew Bahadur Subba. The fact that PW-17 was present at the spot is also substantiated by the evidence of PW-9, PW-11 and PW-13. Evidence establishes the fact of a fight between the supporters of SDF and SKM parties during which time PW-1 was assaulted by Jigmee Dorjee Bhutia, the brother of the Appellant leading to PW-1 hiding in the safety of his home. PW-2 went to the house of PW-1 and telephoned the police, on returning to the spot, he saw the Appellant and

the others shouting therein. According to PW-7, when PW-17 was calling out to her brother, he directed her to where the deceased was. PW-17 also witnessed the Victim pacifying the crowd. The deceased evidently was not an assailant. The evidence so furnished and discussed *supra* was not decimated under cross-examination. Merely because the Prosecution witnesses belong to one political party does not relegate their evidence to unreliability neither can the truth be attenuated. Furthermore, the Court is vested with the task of separating the chaff from the grain and only on such exercise can the evidence be considered trustworthy or otherwise. The evidence furnished is cohesive, consistent, inspires confidence and is therefore reliable and trustworthy.

19. So far as anomalies on the examination of the Victim by the doctors is concerned, in the first instance the argument that the death of the deceased due to the medical negligence of PW-22 and not on account of the act of the Appellant is to say the least appalling and incongruous and merits no consideration. It is clear that PW-22, the Medical Officer at Rinchenpong Primary Health Centre, examined the deceased at around 8:40 p.m. After such examination, he found a single hematoma about size 4 x 4 inches over the occipital region. The finding of this doctor is supported by the evidence of PW-29 Dr. Rumi Maitra. She has found the following injuries on the person of the deceased;

> "1. Two liner abrasions 1" each, placed parallel to each other separately by 1.25 cm, over dorsum(back) of right hand.
>
> 2. Abrasion 1 cm x 1cm over lateral surface (side part) of right forearm 4" below the elbow joint.
>
> 3. Abrasion 1cm x 1cm over lateral side of left knee.
>
> 4. Bruise 1" x 1" at the inner aspect of left arm near axilla.
>
> The said injuries are bright red in colour and looked fresh and ante mortem in nature.
>
> In the Cranium and spinal region, the following injuries were found;-
> Hematoma over both parietal and left occipital region region. U-shaped depressed fractures 2" x 1" over left side of occipital bone just above the left occipital condyle.
>
> Subdural hematoma found over both occipital lobe and base of brain. The brain and Spinal Cord were found – Congested.
>
> .....
>
> All injuries noted above are bright red in colour, fresh and ante mortem in nature. No other injuries could be detected over body after careful examination and dissection.
>
> On examination of the dead body I found that the dead (*sic* 'death') was due to the effects above noted head injury which is anti-mortem (*sic* 'ante') and homicidal in nature. Exhibit-24 already marked is the post-mortem report prepared by me and Exhibit-24(a) is my signature on it.
>
> On being shown MO-II, I can say that the type of injury found on the occipital region of the deceased could be caused by MO-II."

20. PW-22 and PW-29, both doctors have found injuries over the occipital region. Minor variance in the measurement of the injuries or the number of injuries detected or undetected cannot be said to be fatal to the Prosecution case. Contrary to the submission of learned Counsel for the Appellant that Exhibit-21 shows several injuries, the document records no details of injuries save a

head injury. PW-29 has opined that the death was due to the effects of the head injury. Hence, the collated evidence of the doctors points to the fact of death due to the head injury on the Victim. The argument that locus criminus was not sufficiently lit is belied by the evidence of PW-2, PW-3 and PW-13. In ***Gurmit Singh vs. State of U.P.*** (*supra*), the Hon'ble Supreme Court while upholding the conviction of the appellant observed that it was a moonlit night and the accused were known persons being family members, their identification was upheld. Similarly, the parties herein belonged to the same village and were familiar with each other. The evidence undoubtedly leads one to the conclusion that the street lights provided sufficient illumination to identify the assailant and the Victim. Even if the evidence of PW-30 is disregarded, the corroborative evidence of the other PWs with regard to the adequacy of illumination cannot be wished away.

21. On the question of the material objects, it is evident that PW-20 and PW-21 were seizure witnesses to MO-I and MO-II, iron rods seized from the place of occurrence and the wooden beam, respectively. It is also evident that these objects were used at the time of the incident since the seizures were made by the I.O. at around 10 p.m., the same evening from the place of occurrence i.e. in front of the house of PW-1 by PW-31, the first I.O. of the case. The fact of seizure has not been contradicted. It is no one's case that the

deceased was struck repeatedly at the same spot on his head in which event it could be likely that the wooden beam would contain hair and blood of the deceased but the assault was a single assault. In the said circumstance, it is possible that no blood would be found on MO-II, in any event the ocular evidence has withstood the cross-examination and the witnesses have in unfailing terms and corroborative evidence stated that the assailant used the wooden beam. In this context, we may beneficially turn to ***R. Shaji vs. State of Kerala*** (*supra*);

> "**30** It has been argued by the Learned Counsel for the Appellant, that as the blood group of the blood stains found on the chopper could not be ascertained, the recovery of the said chopper cannot be relied upon.
>
> **31.** A failure by the serologist to detect the origin of the blood due to dis-integration of the serum, does not mean that the blood stuck on the axe could not have been human blood at all. Sometimes it is possible, either because the stain is insufficient in itself, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood in question. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard. ....."
>
> [emphasis supplied]

It would conclude that forensic evidence would not necessarily be the penultimate to reach a conclusion of the offence. Even if MO-II was forwarded for forensic analysis, it cannot be ruled out that the expert could have failed to detect blood due to several intervening factors.

22. The argument that the Appellant was unarmed does not appear to be truthful as PW-1 has stated that he was armed, firstly with a 'khukuri' and divested of it by the police at the spot. Although, a din was raised about the failure of the Prosecution to examine Duryo Dhan Pradhan, Head Constable, thereby leading to adverse inference, Section 114(g) of the Evidence Act, 1872, would apply with equal rigour to the Appellant. Having sought to examine Duryo Dhan Pradhan as his defence witness, he failed to furnish him before the Court in support of his case with no reason furnished for non-examination.

23. The argument that the State Government exhibited an exceptional interest while allocating the investigation to the CID is bereft of merit as undisputedly a precious young life has been lost and the State is duty bound to ensure that the best investigative efforts are made to bring the culprits to book.

24. The next argument that needs to be addressed is that the matter at hand would fall under Section 304A of the IPC. It would be essential at this juncture to refer to Section 300 of the IPC.

25. Section 300 of the IPC reads as follows;

> **"300. Murder. -** Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-

> *Secondly*- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-
>
> *Thirdly*- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-
>
> *Fourthly*- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

26. Five Exceptions are provided in the Section which provides that culpable homicide would not be murder if the offence is committed under the following;

> "**Exception 1.** – Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.
>
> .....
> *First.* ....
>
> *Secondly.* ....
> *Thirdly.* ....
>
> ***Exception 2.*** - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and cause the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm that is necessary for the purpose of such defence.
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> ***Exception 3.*** – Culpable homicide is not murder if the offender being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.
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> ***Exception 4.*** – Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.
>
> *Explanation.* – It is immaterial in such cases which party offers the provocation or commits the first assault.
>
> ***Exception 5.*** – Culpable homicide is not murder when the person whose death is caused, being above the

> age of eighteen years, suffers death or takes the risk of death with his own consent."

27. In the instant case, it is evident that the Appellant was in the midst of a crowd of persons where the altercation was ensuing. Although, the Victim was pacifying the crowd the perception of the Appellant evidently was that the Victim was also an aggressor. It is not denied that he had been waylaid by the SDF supporters with regard to the obstruction at Singling. It is in these circumstances and the ensuing fracas that the Appellant has raised MO-II and assaulted the Victim. The act was committed indubitably without premeditation, in a sudden fight, in the heat of passion upon a sudden quarrel and without the Appellant having taken undue advantage or acted in a cruel or an unusual manner. This assumption arises from the circumstance that he struck the Victim only once on his head and did not repeat the act. It cannot be denied that the act of the Appellant was an instinct for self preservation. Clearly, the offence would fall under Exception-4 of Section 300 of the IPC. The learned Trial Court in the impugned Judgment has failed to explain in detail her reasons for arriving at the conclusion that the offence fell under Section 304-Part I of the IPC, however from the circumstances discussed hereinabove, it is clear that the offence falls under Exception 4 of Section 300 of the IPC. The Appellant is guilty of the offence under Section 304-Part II of the IPC as against the finding of the learned Trial Court that it was under Section

304-Part I. It surely does not fall under Section 304A of the IPC as learned counsel for the Appellant would have this Court believe. The impugned Judgment thus stands modified to the above extent.

28. Considering the entirety of the foregoing discussions, this Court is of the considered opinion that no infirmity arises in the conclusion of the learned Trial Court save to the extent mentioned hereinabove.

29. The impugned Judgment and Order on Sentence thereby brooks no interference.

30. Accordingly, Appeal is dismissed.

31. Copy of this Judgment be transmitted to the learned Trial Court for information.

32. Records be remitted forthwith.

33. No order as to costs.

Sd/-
(Meenakshi Madan Rai)
Acting Chief Justice
01.08.2018

Index : Yes / ~~No~~
Internet : Yes / ~~No~~
bp