

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED: 25th June, 2018

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

Crl. A. No. 28 of 2016

Appellant : Lakpa Lepcha,
Aged about 30 years,
Son of late Dawa Tshering Lepcha,
Resident Of Khesay Busty,
East Sikkim.
[At present State Central Prison, Rongyek, East Sikkim]

versus

Respondent : State of Sikkim

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

Appearance:

Mr. N.B. Khatiwada, Senior Advocate with Mrs. Gita Bista, Advocate (Legal Aid Counsel for the Appellant) 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, J.

1. Calling in question the conviction handed out to the Appellant under Section 302 of the Indian Penal Code, 1860 (hereinafter 'IPC'), in S.T. Case No. 20 of 2015 and assailing the Sentence of imprisonment for life, with fine and a

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default clause of imprisonment, the instant Appeal has found its way to this Court.

2. The facts that culminated in the aforesaid Conviction and Sentence commenced with a written report submitted by Sub Inspector Avinash Lamichaney of Singtam Police Station PW-14, on 27.04.2015 in connection with Singtam P.S., U.D. Case No. 11/2015, dated 25.04.2015, under Section 174 Cr.P.C., on account of the unnatural death of the deceased, Mingma Tshering Lepcha. The report after investigation, detailed that the cause of death was asphyxiation. Suspecting foul play, the Sub Inspector sought further necessary action. In pursuance thereto, the U.D. case was converted to Singtam P.S. Case No. 35/2015 dated 27.04.2015, under Section 302 IPC, against the Appellant Lakpa Lepcha and endorsed to the Investigating Officer (for short "I.O."). Investigation would unravel that the deceased, Mingma Tshering Lepcha, was married to Hizing Lhamu Lepcha PW-1 and they had two children from the wedlock, Lakit Lepcha, PW-2 aged about 14 years and Dawa Ongchen Lepcha, PW-10 aged about 8 years. The Appellant, Lakpa Lepcha, the younger brother of the deceased Mingma Tshering Lepcha, resided alone while Phurkit Lepcha PW-11, the sister of the deceased, lived close to the house of the deceased. On the fateful evening, the Appellant along with his friend Bal Bahadur Chettri PW-3, stopped by at the house of the

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deceased where they all drank some liquor. An argument and a physical fight thereafter ensued between the brothers on account of the deceased asking his wife, PW-1, to wash his clothes which evidently did not find favour with the Appellant on which he protested by throwing a plate of food at the deceased. On the intervention of PW-1, the fight ended with the enraged Appellant leaving the house of the deceased. He then started throwing splintered bamboo on the courtyard of the house of the deceased. On the request of PW-1 and the deceased to desist from the act, he verbally abused and threatened them with dire consequences. P.W.1, who in the meanwhile was pushed by the deceased, fell into a drain injuring her right hand. She was taken to a nearby bamboo grove by her children, who on returning to their house witnessed the Appellant physically assaulting their father, the deceased, with fists and blows in the balcony of their house. When PW-2 attempted to intervene, the Appellant threatened her as well. Consequently, PW-1, PW-2 and PW-10 ran to the house of Phurkit Lepcha PW-11. On the request of PW-1 to accompany her to the hospital to treat her injured arm, PW-11 advised her to go the next day as night had fallen. Leaving her children in the house of PW-11, she returned to her home, where *en route* at a place known as "Bhulkay forest", she saw the Appellant holding the deceased by his neck and strangulating him. When she shouted out enquiring as to what he was doing, he threatened to annihilate her and her entire

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family if she related the incident to anyone. Afraid, she returned to the house of PW-11 but did not disclose the incident to either PW-2, PW-10 or PW-11. Thereafter, she along with her children returned home via a different path. Finding the Appellant in the balcony of their house she enquired into the whereabouts of the deceased to which he feigned ignorance and returned to his home. On a search of the deceased the next morning, the children found their father lying dead at "Bhulkay forest". It emerged during investigation that the deceased used to physically assault his wife who he suspected of having illicit relations with the Appellant. Investigation thus concluded that the deceased met his fate on account of the physical assault on him due to his suspicion of illicit relations between the Appellant and PW-1. The post mortem report revealed that the death of the deceased was due to asphyxia as a result of strangulation. Hence, charge-sheet was submitted under Section 302 of the IPC against the Appellant.

3. On hearing the rival submissions of the Prosecution and the Defence, the learned Trial Court framed charge against the Appellant under Section 302 of the IPC. On his plea of "not guilty", the witnesses of the Prosecution numbering fifteen were examined, followed by the examination of the Appellant under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter 'Cr.P.C.') and

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arguments. The examination and consideration of the evidence on record, concluded in the impugned Judgment and Order on Sentence.

4. Learned Counsel for the Appellant raised the argument that the evidence of PW-1 to the extent that she told the Appellant to leave her husband alone but that he continued to throttle him and threatened to kill her and her entire family has not been supported or corroborated by her children PW-2 and PW-10. That, PW-1 also failed to explain the reason for not informing her children and PW-11 about the incident. Assuming but not admitting that the Appellant committed the murder of the deceased, the ingredient of "*intention*" which is a *sine qua non* for an offence under Section 302 of the IPC is absent in the instant case. Pointing to the evidence of PW-1, learned Counsel urged that there was no intention or premeditation on the part of the accused, and the death was the consequence of a free fight between the brothers where no weapon was wielded by the Appellant and death occurred unintentionally. That, such a circumstance would bring the offence within the parameters of Section 304 of the IPC and this Court consider it accordingly.

5. *Per contra*, learned Senior Government Counsel strenuously contended that PW-1 has with clarity deposed that she witnessed the throttling of the deceased by the Appellant who turned a deaf ear to her entreaties to forbear from the

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act. The evidence of PW-2 and PW-10 confirms the presence of the Appellant at their home and the physical fight between the brothers. The evidence of PW-9, the Doctor, lends credence to the cause of death being due to strangulation. That, although PW-1 is now re-married, it is not to the Appellant but to a person from Samdong which would establish her non-involvement with the Appellant. Thus, what emerges is that there is no doubt whatsoever as to the role of the Appellant in the death of the deceased which cannot be said to be unintentional considering the evidence on record. Hence, the impugned judgment and Order on Sentence ought not to be interfered with in view of the clinching evidence against the Appellant. His submissions were fortified with reliance on ***State of Haryana vs. Sher Singh and Others***¹ and ***Aradadi Ramudu alias Aggiramudu vs. State Through Inspector of Police, Yanam***².

6. Having heard learned Counsel for the parties at length and given due consideration to their submissions, perused the records of the case meticulously and examined all documents on record, it would be appropriate to assess whether the Judgment of Conviction and Order on Sentence of the learned Trial Court were justified. In order to reach such a conclusion, it would be essential to carefully traverse through

¹ (1981) 2 SCC 300

² (2012) 5 SCC 134

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and analyse the evidence on record. Before we embark on the above, we may extract the relevant Section under which charge was framed against the Appellant for convenient reference.

7. 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.”

8. The Section carves out five exceptions to the offence of murder and explains when culpable homicide is not murder. These exceptions are as follows;

“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.

The above exception is subject to the following provisos:

First. – That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

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Secondly. - That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. - That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation. - Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

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.

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.

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."

9. These exceptions however do not offer complete vindication to the conduct of the accused but they do reduce the impact of the gravity of the offence. Nevertheless, although the onus of proving the guilt of the accused rests with the prosecution but the burden of proving the circumstances to bring the case within the exceptions

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enumerated above, lies with the accused as would be evident from the provisions of Section 105 of the Indian Evidence Act, 1872. In the light of the evidence before us, we may now examine whether the act of the Appellant amounted to murder or to man slaughter, in other words to culpable homicide. While turning our attention to the arguments canvassed on behalf of the Appellant, the contention that PW-1 told the Appellant to leave her husband alone when he was throttling the deceased is not corroborated by PW-2 and PW-10, is to say the least, incongruous. It is clear from the evidence of PW-1 that in the first instance, PW-2 and PW-10 had been left by her in the house of PW-11, while she returned to her house. *En route* she witnessed the said incident. Besides, she has clarified that she did not disclose the incident to PW-2, PW-10 or PW-11 for fear of obliteration as per the threat held out to her by the Appellant which included her children. The further argument that PW-1 did not explain why she did not inform PW-11 either, meets the same argument as *supra*. While addressing the argument that the Appellant had no intention to cause the death of the deceased, we may revert back to the evidence of PW-1 who with no hesitation has stated that after leaving her children in the house of PW-11, where she had also spent half an hour, she returned home. While on her way back in the jungle near her house, she witnessed the Appellant strangulating her husband from behind with his arm. When she told him to leave her husband

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alone and not to hurt him, the Appellant continued throttling him and threatened her and her entire family with death. It is also apparent that she witnessed the death of her husband, as it is her specific statement that *"He killed my husband and threatened me by saying that if I disclosed this incident to anybody, he would come after me and kill me also."*

10. The evidence of PW-1 sheds no light as to what transpired inside her home and how the fight started between the Appellant and the deceased while all of them partook of food. Her narration of the incident starts with the Appellant demanding to know from her and the deceased as to why they had kept bamboo mesh (*chitra*) on his land on which a verbal discussion ensued between the brothers. Her husband pushed her at that time resulting in her sprained arm. Fearing for her life from both men she hid for some time and thereafter took her children PW-2 and PW-10, to the house of PW-11. When she returned after half an hour, leaving her children there, she witnessed the incident as already reflected hereinabove. This witness makes no mention of a physical fight between the brothers but details the act of throttling carried out by the Appellant on the deceased, painting the Appellant as the aggressor.

11. The evidence of PW-2 reveals that when she along with her parents and the Appellant were in their house, her mother served dinner to her while both the deceased and the

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Appellant refused food. The witness went on to testify that on the deceased asking her mother to wash his clothes the Appellant scolded the deceased and threw food on his face at which the deceased told him to go home. Evidently thereafter, the Appellant left threatening to kill the deceased and then started throwing pieces of splintered bamboo on their field. The evidence of PW-1 and PW-2 corroborate the fact of the deceased pushing PW-1 on which she injured her hand. The Appellant then came towards their house and started assaulting the deceased upon which PW-1, PW-2 and PW-10 escaped to the house of PW-11. Thereafter, PW-2 and PW-10 stayed in the house of PW-11 but she did not see her mother PW-1. After about half an hour, her mother came and took them back to the house. The evidence of this witness is silent about how the deceased died but reveals that the Appellant was assaulting her father, indicative once more of the fact that the Appellant was the aggressor. According to her, on the next day, on recovery of the body of the deceased, the Appellant assured them that he would take care of them including providing them with education but that they should not disclose the fact of the fight between him and the deceased on the previous night.

12. The evidence of PW-10, the nine year old son of the deceased and PW-1, reveals that on the relevant night he had seen his father scolding his mother and he too had

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witnessed the Appellant having a fight with the deceased near their house before they went to their aunt's home. When they returned back they did not see the deceased and the Appellant told them that he was unaware of their father's whereabouts.

13. The evidence of PW-11, the sister of the Appellant and the deceased, sheds light on the violent aspect of the Appellant's character when she states that her mother used to previously reside with the Appellant but on being beaten by him on several occasions, the members of their village 'Samaj' passed a resolution that thereafter her mother would reside with her. This evidence of PW-11 finds corroboration in the evidence of PW-12, the Panchayat member, according to whom the mother of the Appellant came to her and reported that she had been assaulted by the Appellant and as a Panchayat member she settled the matter. The evidence of PW-11 and PW-12 thus establishes that the Appellant was evidently a violent person, although we hasten to observe that such an opinion as can be formed by the foregoing evidence would have no bearing on the merits of the instant matter, which will obviously be considered only on the relevant evidence. Suffice it to conclude that the evidence of PW-11 is of no assistance to the prosecution case for the purposes of the matter at hand, *inasmuch* as she was at the house of the deceased and PW-1 till a little after 4:00 p.m. after which she left. Later in the night, PW-1, PW-2 and PW-10 came to her

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house. She was only told of the death of Mingma Tshering Lepcha the following morning at around 5:30 p.m. and she suspected that the Appellant may have caused his death. Her evidence would also indicate that PW-1 after bringing her children to the house of PW-11 had left her children there and disappeared for a "moment" but she was unaware as to where PW-1 had gone and after some time she also saw that both the children were also not in the house and was unaware as to who had taken them. However, it may be pointed out here that the evidence of PW-1 that she had sustained injuries on her hand due to her husband pushing her is corroborated by the evidence of PW-2 and PW-11. PW-11 testified that PW-1 came to her house along with PW-2 and PW-10, she was crying and requested PW-11 to take her to the hospital since she had broken her arm. This is being pointed out to establish that PW-1 had broken her arm prior to her having disappeared after leaving her children in the house of PW-11, thereby ruling out any suspicion that she may have sustained the injuries after she left the house of PW-11 or may have any role in the death of her husband.

14. The evidence of PW-14 reveals that he had been endorsed to investigate the U.D. Case No. 11 of 2015 dated 25.04.2015 pertaining to the death of Mingma Tshering Lepcha. On his investigation after coming to learn about the cause of death of the deceased, he suspected foul play and

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prepared the Enquiry Report and submitted it to the Station House Officer, Singtam P.S. which was then registered as Singtam P.S. Case No. 35 of 2015 dated 27.04.2015, against the Appellant under Section 302 IPC. He went on to reveal that his Enquiry Report was based on information collated from PW-1, PW-2, PW-10 and PW-12. He also found that the matrimonial relations between the deceased and PW-1 was not cordial, with the deceased suspecting her of infidelity.

15. Turning to the evidence of PW-9, the Doctor, he conducted the autopsy over the body of the deceased on 26.04.2015. He has detailed in his report, Exhibit-6, the ante mortem injuries on the person of the deceased as follows;

“ Ante mortem injuries:

1. Linear abraded contusion 2x0.8 cm placed horizontally over the right lower surface of the chin;
2. Circular shape abraded contusion 0.8x0.8 cm placed over the right upper surface of the chin over the lateral aspect;
3. Circular abraded contusion 0.6x0.6 cm placed just behind the right ear;
4. Multiple small abraded contusions with size ranging from 0.2x0.1 cm to 0.8x0.5 cm over an area extending from the right side of thyroid over the neck and measuring 3x2 cm;
5. Fine linear abrasion (two in numbers) each separated from one another by 4.5 cm and extending from the right side of the neck to the angle of mandible (left side) whereby both the ends joined; and
6. Linear abrasion (two in numbers) separated 4.5 cm from each other placed just below the right ear and moving downwards and forward and extending over till the left side of the neck.

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Head and neck: on dissection of the neck, the neck muscles showed multiple deep contusions over the lateral aspect with bleeding with clots present over the right side of neck and also the left side of the neck and the bleeding was superficial in nature. There were no fractures of the hyoid bone. The lungs were congested and oedematus."

According to the Doctor, the cause of death to the best of his knowledge and belief was due to asphyxia as a result of strangulation, homicidal in nature. This conclusion was drawn from the fact that he found severe congestion of the face of the deceased along with cyanosis of the lips, the fingers and bleeding from nose and ear and the injuries present over the neck and the findings of the injuries after dissection of the neck, mentioned in his report which he identified as Exhibit-6. The evidence of PW-9 bears a direct relevance to the evidence of PW-1 who had witnessed the strangulation of the deceased by the Appellant from behind thereby rendering him possibly immobile and helpless.

16. What can be culled out from the evidence is that the Appellant was spoiling for a fight as he threw food on the face of the deceased for the reason already set forth *supra*, and went back to his own home threatening to kill the Appellant. Thereafter, he returned and started assaulting the deceased thereby assuming the role of the aggressor. Had the Appellant physically attacked the deceased immediately after the verbal duel between them inside the house of the

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deceased then it could well be said that the fight broke out suddenly without premeditation, in the heat of passion upon a sudden quarrel. Exception 4 of Section 300 IPC applies not only to cases where the fight is unpremeditated and sudden but with the rider that the accused did not take undue advantage or act in a cruel or unusual manner. When a man is being throttled mercilessly and the entreaties of the wife to stop the act fell on the deaf ears of the Appellant, it cannot be said that there was no undue advantage. Thus, none of the exceptions to Section 300 of the IPC including Exception 4 are available to the Appellant to reduce his criminality to Section 304 of the IPC. It is also worth contemplating over the fact that the Appellant has failed to enlighten the Court as to what transpired between him and the deceased when they were left alone by PW-1, PW-2 and PW-10. Hence, the evidence of PW-1 and PW-2, indicating him to be the aggressor stands untainted. No evidence establishes that the death of the deceased was without premeditation.

17. The Hon'ble Supreme Court in **Chahat Khan v. State of Haryana**³ held: (SCC p. 410, para 9)

"9. ... When a person is causing an injury on such a vital part the intention to kill can certainly be attributed to him."

³ (1972) 3 SCC 408

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18. Further, in *Virsa Singh v. The State of Punjab*⁴, the Hon'ble Supreme Court, speaking through Vivian Bose, J., held;

"13. ... It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

19. In the light of the evidence on record, can it be concluded that the death of the deceased by the Appellant was unintentional? In our considered opinion, the response would have to be in the negative. Although, it may be accepted that the fight between the Appellant and the deceased arose initially without premeditation when he momentarily lost control upon a sudden quarrel but when he throttled the deceased it was not a continuance of the previous fight but after he had time for reason to regain dominion of his mind. Even assuming it was a continuation of the same fight as already emphasised, the Appellant took undue advantage and

⁴ AIR 1958 SC 465

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acted in an unusual manner while throttling the deceased by putting him in a physically disadvantageous position, strangulating him with his arm from behind and thereby causing his death. It cannot be said that in such a circumstance he had no intention to cause the death of the deceased.

20. On the anvil of these observations *supra* and the evidence placed before us, the impugned Judgment of the learned Trial Court as well as the impugned Order on Sentence, do not suffer from any legal infirmity which calls for interference by this Court.

21. Accordingly, Appeal is dismissed.

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

23. Records be remitted forthwith.

Sd/-
(**Bhaskar Raj Pradhan**)
Judge
25.6.2018

Sd/-
(**Meenakshi Madan Rai**)
Judge
25.6.2018

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

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