

Sikkim High Court Sonam Sherpa vs State Of Sikkim on 25 June, 2002 Equivalent citations: 2004 CriLJ 4152 Author: R Dayal Bench: R Dayal JUDGMENT Ripusudan Dayal, C.J. 1. This appeal is directed against the judgment and order dated 24-8-2001 by the learned Sessions Judge, South and West Sikkim at Namchi, whereby, the appellant was convicted under Section 302 of the Indian Penal Code for having caused the death of Khichung Bhutia on 9-4-2000 at about 9 p.m. and sentencing him to imprisonment for life and also to pay a sum of Rs. 5,000/- and in default of payment of fine to undergo further imprisonment for three months. 2. During trial, evidence of ten prosecution witnesses including the Investigating Officer was recorded by the learned Sessions Judge. Thereafter, statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure. In appeal, it was found on 24-6-2002 that some of the incriminating circumstances appearing in the evidence had not been put to the appellant by the learned Sessions Judge. Therefore, an opportunity was granted to him to explain those circumstances. Accordingly, a further statement under Section 313 of the Code of Criminal Procedure was recorded by this Court on 25-6-2002. 3. The deceased Khichung Bhutia was the elder brother of Pem Tshering Bhutia P.W. 1. Pem Tshering Bhutia had two houses. The new house was used for the purpose of residence and the old house for the purpose of keeping cattle. As per the evidence of Pem Tshering Bhutia (P.W. 1) he had been known to the appellant since childhood. But, subsequently, it appears, they lost contact. In the year 1998 the appellant was involved in a ginger theft case and had no place to stay. He was roaming in the jungle. Pem Tshering Bhutia P.W. 1, took pity on him and kept him in the old house to look after the cattle. On 10-4-2000, Nimkit Bhutia P.W. 2 the wife of P.W. 1, went as usual to her old house in the morning for milching cows. Dil Kumar Subba P.W. 4 who had earlier been a tenant under P.W. 1 and P.W. 2 accompanied her to the old house. On reaching the old house, Nimkit Bhutia, P.W. 2 found the door of the house open and that the cattle feed had not been prepared. The room was dark and so she slightly opened the window and in the light through the window, she found the deceased lying in a pool of blood. She also saw the accused sleeping nearby. Thereupon, she sent Dil Kumar Subba P.W. 4 to call her husband. Accordingly, Subba informed Pem Tshering Bhutia, P.W. 1 that his elder brother Khichung Bhutia was lying in a pool of blood in the old house. Thereupon, Pem Tshering Bhutia informed the Namchi Police Station over telephone. He also asked Dil Kumar Subba P.W. 4 to call Head Constable Dazom Bhutia P.W. 5 who was related to P.W. 1. After sometime, H/C Dazom Bhutia P.W. 5 came to the new house of Pem Tshering Bhutia and then both went to the spot. P.W. 1 peeped through the window and saw the deceased lying in a pool of blood and not moving at all. He suspected that since the deceased was a heavy drunkard he could have sustained injuries by falling on the ground and, therefore, he went around the area so as to find out whether the deceased had fallen anywhere, but he could not find any blood stain anywhere around the area. Thereupon, he asked the appellant as to whether he and the deceased had quarrelled in the night, whereupon the appellant told him that he had not quarrelled but the deceased himself had come groaning in the middle of

the night. Then P.W. 1 suspected that it was the appellant who had committed the murder of his deceased brother. Thereafter, he came down to his new house and again rang up the police requesting the police to come to the spot at the earliest. The police came and started investigation. FIR Ext. P-6 was recorded under Section 302 of Indian Penal Code at the Namchi Police Station on 10-4-2000 at 0720 hrs. on the basis of the telephonic information stating, inter alia, that a telephone call had been received from P'-m Tshering Bhutia P.W. 1 on 10-4-2000 at 6.30 a.m. to the effect that some unknown person had laid his brother at his old house in a pool of blood. Investigation was conducted by P.1., T.D. Kazi P.W. 10 who was incharge of the Namchi Police Station. On receipt of the information he proceeded to the place of occurrence and drew up a rough sketch of the place of occurrence. Exhibit P-7 is the rough sketch map of the site. He also conducted inquest on the body of the deceased and then sent the body of the deceased for postmortem examination. Post-mortem was conducted by Dr. K.B. Gurung P.W. 9 who was the Medico Legal Specialist at the STNM Hospital, Gangtok. Autopsy report prepared by him is Exhibit P-5. He started conducting the autopsy on 11-4-2000 at 10.00 a.m. and concluded it at 11.45 a.m. He found the following injuries on the body of the deceased :- "A - General :- Rigour mortis fully developed all over the body and started passing from lower part of the body. Post Mortem lividity fixed on the back, no putrefication. Ante-Mortem Injuries :- 1. Incised wound 2 x 1 x half c.m. on right ear. 2. Incised wound 2 x 1 x half c.m. on left side of the head and ear. 3. Incised wound 3 x 2 c.m. on left forehead. 4. Incised wound 2 x 1 c.m., 2 c.m. below corner left of left eye. 5. Incised wound 2 x 1 c.m., 2 c.m. below right chin. 6. Incised wound 2 x 2 c.m. below right ear lobe. 7. Right eye bluish and swelling. B-HEAD & NECK 1. Fracture of right parietal bone. 2. Extra dural and sub-dural haemorrhages present. 3. Blood discharge was present from nasal and aural cavities." According to him, death was caused due to head injury produced by a sharp cutting heavy weapon. During investigation the police seized, apart from other articles, a . Bamfok (a sharp cutting weapon), Exhibit P-XI and also sotey (G.I. pipe) Exhibit P-XII. According to the evidence of Dr. Gurung the incised injuries mentioned in the report could be produced by Bamfok Exhibit P-XI and the other injuries, that is, the fracture of right parietal bone and extra dural and sub-dural haemorrhages could be produced by sotey Exhibit P-XII. As per the evidence of Nimkit Bhutia P.W. 2 and Head Constable Dazom Bhutia P.W. 5, Nimkit Bhutia found the Bamfok, Exhibit P-11 beneath the sotar (grass kept for the cattle to sleep on) and as per the evidence of the Investigating Officer, T.D. Kazi P.W. 10 and the seizure memo witnesses, Sonam Paden Bhutia P.W. 7 and Kim Bhutia P.W. 8, the said Bamfok was seized vide seizure memo Exhibit P-1. This fact has been admitted by the appellant in his statement recorded under Section 313 of the Code of Criminal Procedure on 25-6-2002. The Bamfok was sent to the Serologist who found vide his report Exhibit P-15 to be tainted with human blood. It is in the evidence of Pem Tshering Bhutia P.W. 1 that sotay Exhibit P-XI was found in the kitchen of the old house and it is in the evidence of the Investigating Officer T.D. Kazi P.W. 10 and the seizure memo witnesses, P.W. 7 and P.W. 8 that

it was seized vide seizure memo Exhibit P-2. It is further in the evidence of T.D. Kazi P.W. 10 and seizure memo witnesses P.W. 7 and P.W. 8 that the T-shirt and gray pant of the appellant which were stained by blood were seized vide seizure memo Exhibit P-4. As per the report of the Serologist Exhibit P. 15 the pant was found to be stained with blood of group 'O'. The T-shirt of the appellant was also found stained with blood, though report about the blood group in respect thereof was inconclusive. The seizure of the T-shirt and gray pant was admitted by the appellant in his statement under Section 313 of the Code of Criminal Procedure recorded on 25-6-2002. It is further in the evidence of Pem Tshering Bhutia P.W. 1 and seizure memo witnesses P.W. 7 and P.W. 8 that quilt cover Exhibit P-5 lying near the dead body of the deceased was seized by seizure memo Exhibit P-5. This seizure has been admitted by the appellant in his statement recorded under Section 313 of the Code of Criminal Procedure. As per the report of the serologist Exhibit P-15, the quilt cover was tainted with human blood of group 'O'. Further it is in the evidence of T.D. Kazi P.W. 10 and the evidence of the seizure memo witnesses P.W. 7 and P.W. 8 that the shirt Exhibit P-III of the deceased Khichung Bhutia was seized vide seizure memo Exhibit P-3. As per the report of the serologist, the shirt was found to be tainted with blood of group 'O'. In his statement recorded under Section 313 of the Code of Criminal Procedure, the appellant admitted that he was sleeping near the deceased but stated that he did not know as to how the deceased was lying in a pool of blood. The learned Sessions Judge observed that there was no eye-witness to the commission of the crime but there was very strong circumstantial evidence against the appellant. The learned Sessions Judge enumerated four circumstances. One is that the accused was residing in the old house of Pem Tshering Bhutia P.W. 1 to look after the cattle of P.W. 1. Second is that when Nimkit Bhutia P.W. 2, accompanied by Dil Kumar Subba P.W. 4, went to milch cow in her old house, they found the deceased lying in a pool of blood and the appellant sleeping near the deceased. The third circumstance is that Nimkit Bhutia P.W. 2 found that the appellant had not performed his routine morning duty. Fourth circumstance is that when P.W. 2 went to get the calf from the small room she found the Bamfok below the soter (grass kept for cattle to sleep on). The learned Sessions Judge referred to the suggestion made by the defence counsel to P.W. 1 to the effect that the deceased was far stronger than the appellant. Dealing with this suggestion, the learned Sessions Judge held that the suggestion had been given to make out that the deceased being far stronger than the appellant, the latter could not have committed the murder of the deceased, but the fact remains that no matter how strong a person may be, if he is struck by a weapon like Bamfok that also while sleeping, strength is immaterial. The learned Sessions Judge took, in particular, note of the fact that this part of the evidence that the accused was also found sleeping near the dead body of the deceased had not been challenged in the cross-examination by the appellant and commented that when the deceased was lying in a pool of blood that also with as many as seven incised wounds the accused should have been in a position to say as to how the incised wounds came to be effected on the deceased and there is, therefore, very strong circumstantial evidence that it was the appellant who

had inflicted the seven incised wounds on the deceased. It may be noted that as per the medical evidence there were six incised wounds and not seven, but this is hardly of any material significance. The learned trial Court also took notice of the fact that Dr. Gurung P.W. 9 stated during cross-examination that the incised injuries mentioned in his report could be caused only by Bamfok, a sharp cutting weapon and that fracture could be caused by falling on a hard substance of sharp edged plank and commented that in the instant case when the other incised injuries are taken into consideration, the possibility that the fracture was caused by a fall on a hard substance is ruled out. He also took note of the fact that the appellant on being asked by P.W. 2 as to how the deceased was lying in a pool of blood replied that the deceased had come in the mid-night in a drunken condition which meant that the deceased was alive till mid-night and was in a position to walk. 4. Shri N. Rai, learned counsel appearing on behalf of the appellant, has submitted that the circumstances proved on record did not show that it was the appellant who had committed the murder of the deceased. He has, in particular, referred to the statement of Pem Tshering Bhutia P.W. 1 and Head Constable, Shri Dazom Bhutia P.W. 5 to the effect that in answer to the query as to how the deceased had received injuries, the appellant replied that the victim had returned home in the dead of night groaning. On the basis of this statement the learned counsel has submitted that the deceased might have suffered injuries by falling on some sharp edged surface or might have got injuries in any other manner not known to the appellant and, therefore, the fact that the appellant was sleeping in the same room in which the deceased was found dead is not a circumstance of determinative character that the death was caused by the appellant. However, I see no merit in the submission. If the deceased had come with the injuries as found on his person as a result of the post mortem examination, the deceased would not have slept as if nothing had happened. The injuries were such as could not have escaped the notice of the appellant. If the deceased had come with the injuries inflicted on him it would have been natural for him to ask the appellant to call P.W. 1 or anyone else for help. Furthermore, the appellant did not state in his statement under Section 313 of the Cr. P.C. that the deceased had come groaning. I have no reason to differ from the learned Sessions Judge that the appellant should have been in a position to say as to how the incised wounds came to be inflicted on the deceased and it is a very strong circumstance to show that it was the appellant who had inflicted the injuries. Furthermore, the pant and T-shirt of the appellant which were seized by the Investigating Officer P.W. 10 during investigation in the presence of the seizure memo witnesses. Smt. Sonam Paden Bhutia P.W. 7 and Shri Kinga Bhutia P.W. 8 and also the Bamfok which was found by P.W. 2 beneath the soter were found to have human blood as per the report of the serologist (Ex. P. 15). This circumstance further reinforces the inference that it was the appellant who had inflicted the injuries. The learned counsel for the appellant has submitted that there is nothing on record to show as to the quantum of blood found on the T-shirt and pant of the appellant and clothes of the appellant could have been stained because the appellant and the deceased slept in the same room. The argument though ingenious, is not

convincing. Even though the deceased and the appellant both slept in the same room, it is difficult to infer from that fact that the clothes of the appellant could, in the circumstances, be stained by human blood if he was not involved in causing injuries to the deceased. The learned counsel for the appellant has also submitted that the third circumstance mentioned by the learned Sessions Judge that P.W. 2 had found that the appellant had not performed his routine morning duty is of no significance since the appellant might have got late that day in getting up even if he had not been involved in the crime. It is true that this circumstance is not of a determinative character but it shows that the conduct of the appellant on the day of the occurrence was unusual. 5. The learned counsel for the appellant has also submitted that no motive has been proved by the prosecution which could have impelled the appellant to commit the crime. It is not necessary for the prosecution to prove motive. Motive is something known only to the accused and if the prosecution fails to prove it for that reason the prosecution case cannot be thrown away. 6. On re-appreciation of the entire evidence on record. I find that it has been established by the evidence of Pem Tshering Bhutia PW-1 that the appellant was residing in Pem Tshering Bhutia's house to look after his cattle. It is also established by the evidence of Nimkit Bhutia PW-2, the wife of Pem Tshering Bhutia PW-1 and Shri Oil Kumar Subba PW-4 that PW-2 went to the old house along with PW-4 to milch cow on 10-4-2000 in the morning and they found the deceased in a pool of blood and the appellant sleeping in the same room near the deceased. It is also established from the evidence of Nimkit Bhutia PW-2 that the appellant had not performed on that day his routine duty of preparing cattle feed which pointed towards his unusual conduct. It is also established from the evidence of PW-2, Nimkit Bhutia that she found the Bamfok beneath the sotay (grass kept for the cattle to sleep on). It is also established by the evidence of Dr. K.B. Gurung PW-9 that the incised injuries could be caused on the deceased by the same Bamfok. It is proved by the evidence of the Investigating Officer, T.D. Kazi PW-10 and the evidence of Sonam Paden Bhutia PW-7 and Kinga Bhutia PW-8 that the same Bamfok had been seized from the scene of occurrence. It is also proved from the report of the Serologist, Exhibit P-15 that the said Bamfok had stains of human blood. It is also proved from the evidence of PW-7, PW-8 and PW-10 that the pant and T-shirt of the appellant were seized and it is proved from the report of the Serologist, P-15 that the clothes of the appellant had human blood thereon. All these facts unerringly point towards the guilt of the appellant and the circumstances taken collectively are incapable of explanation on any reasonable hypothesis save that of the guilt against the appellant. It is well established that even when there is no eye-witness to support a criminal charge but the prosecution has been able to establish the chain of circumstances which is complete leading to the inference of the guilt of the appellant and the circumstances taken collectively are incapable of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him, the appellant may be convicted on the basis of circumstantial evidence. 7. At the same time, the medical or other evidence on record does not show that the injuries caused to the deceased were sufficient in the ordinary course of nature to cause death.

Therefore, the case is not covered under the Third clause of Section 300 of the Indian Penal Code. The evidence on record also falls short of proving the case under the First, Second or Fourth clause. Thus, in the circumstances, it would follow that the injuries were caused by the appellant with the knowledge that they were likely to cause death of the deceased. As such, the case would be covered under Section 304, Part II of the Indian Penal Code. 8. In the result, I allow the appeal in part and convert the conviction of the appellant from that under Section 302 to Section 304, Part II of the Indian Penal Code and in place of the sentence awarded by the learned Sessions Judge, I award the sentence of six years' rigorous imprisonment to the appellant. The period of detention undergone by him during investigation, inquiry or trial shall be set off against the term of imprisonment imposed on him.