

GAHC020005272019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRAPL/11/2019

TEPUSETO SOPHIE(A-1) AND 2 ORS
S/O LT. MEDONGOZO,
R/O JAKHAMA VILLAGE, KOHIMA, N/L

2: KEHOSOL TETSO(A-2)
S/O KENEICHO

R/O JAKHAMA VILLAGE
KOHIMA
N/L

3: MENYUNGOL TASE(A-3)
S/O TEPUSEO TASE

R/O JAKHAMA VILLAGE
KOHIMA
N/

VERSUS

THE STATE OF NAGALAND
KOHIMA, N/L

Advocate for the Petitioner : V. THEYO

Advocate for the Respondent : K K WOTSA, P. P. N/L

**BEFORE
HON'BLE MR. JUSTICE BUDI HABUNG**

JUDGMENT & ORDER (CAV)

Date : 13-02-2024

Heard Ms. Neise Liegise, learned counsel for the appellants and Mr. Veto V. Zhimomi, learned Public Prosecutor, Nagaland for the State.

2. This appeal under Section 374(2) of the Code of Criminal Procedure, 1973 is filed against the impugned Judgment and Order dated 05.09.2019 passed by the learned Court of Principal District & Sessions Judge, Kohima, Nagaland, in GR No. 191/2013 in Case No. 0076/13 convicting the 3 (three) accused persons, namely, Tepuseto Sophie (A-1), Kehosol Tetso (A-2) and Menyungol Tase (A-3) and sentencing each one of them to undergo five (5) years rigorous imprisonment for the offence under Section 364 IPC and to undergo seven (7) years for offence under Section 304 Part(II) IPC and the sentence against them shall run concurrently.

3. The prosecution case in brief is that on 24.10.2013 an information was received by the OC, South Police Station, Kohima, to the effect that one unidentified body of a male was found between Khuzama and Viswema Village near Chowkhwi river bridge. On such information, the Khuzama Police Station party visited the location, had the dead body identified as one Jaimul Islam @ Ibrahim, s/o Abdul Haque of Assam, held inquest over the body and then sent the same for post-mortem

Examination at NHAK and thereafter it was handed over to the relative of the deceased. On the same day a written complaint was received from Shri R. Kire, President of ANTA, Kohima unit, and Menuovile Sohu, Action Committee Convener of ANTA. Accordingly, a case was registered as Kohima South Police Station case No. 0076/13 under Section 364/356/392/302/34 IPC.

4. During the course of investigation four (4) accused persons were arrested and after completion of investigation, the I.O. found *prima facie* case established against four accused persons, namely; (i) Puzoto@Ato, (ii) Kehosol Tetso, (iii) Menyungol Tase and (iv) Tepuseto Sophie and laid charge-sheet against them for offence under Section 364/356/392/302/34 IPC. And since the offence was exclusively triable by the Sessions judge, the case was committed to the Sessions Judge, Kohima. The learned Sessions Judge then framed charge against all the accused persons under Section 364/356/392/302/34 IPC, the charges so framed were read over and explained to all the accused persons to which all the accused persons pleaded not guilty and claimed trial.

5. To establish their case, the prosecution has produced altogether eleven (11) witnesses and examined two (2) Court witnesses. On completion of evidence, the accused persons were examined under section 313 Cr.P.C and recorded their statement whereby all the accused persons had denied the incriminating circumstances put to them. None of the accused had produced any defence evidence.

6. On conclusion of trial, the learned Sessions Court held that the charges brought against the accused persons/appellants have been proved beyond reasonable doubt and accordingly, convicted all accused persons for offence under section 364 IPC and sentenced them to undergo five (5) years of rigorous imprisonment for the offence under Section 364 IPC; the learned court found no case against them for offence under section 302 IPC; however, and 3 (three) accused /appellant were found guilty for commission of offence under section 304 part-II IPC, hence sentenced them to undergo seven (7) years of rigorous imprisonment for offence under Section 304 Part (II) IPC. Aggrieved by the said conviction and sentence, the 3 (three) appellants filed this appeal with the following two prayers: (i) to set aside the conviction under section 364 IPC, and (ii) to reduce the quantum of sentence with respect to the conviction under section 304 Part-II of IPC.

SUBMISSION OF THE LEARNED COUNSEL FOR THE APPELLANTS:

7. With regard to the first prayer to set aside the conviction under section 364 IPC, Ms. Neise Liegise, learned counsel for the appellants made the following submissions:

1. That in the instance case, the act in the incident day was committed by the appellants in an inebriated state of mind; there was no intention, motive or any purpose of their act. As such, the Trial Court came into

the conclusion and held that – *"the conclusive proof of murder is not possible in the instant case. There seems to be no motive also"*. And therefore, the appellants were acquitted from the charge of murder under section 302 IPC. However, the offence of murder was brought down and convicted for offence under section 304 part II of the Indian Penal Code.

2. That in the absence of the offence of murder, the indictment of the accused persons under Section 364 and under Section 304 Part II, IPC cannot co-exist.

3. That Section 364 IPC provides for punishment for a specific offence and is not intended as indirect method of punishing persons suspected of murder, when the offence of murder is not proved. If the case under Section 364 IPC was established, the grave case under Section 302 IPC must be established. If the case under Section 364 IPC is not established, a case under Section 364 IPC is not proved.

4. However, so far as the present case is concerned, in order to bring home the offence under Section 364 (i.e. Kidnapping or Abduction in order to murder), kidnapping is irrelevant. However, to establish the charge of abduction in order to murder, when the alleged case is one of abduction by forceful means, it is for the prosecution to successfully prove the following:

(i) The circumstances under which the deceased was

forced to go showing clearly that he was abducted with the object of being murdered or of being so disposed of as would put him in danger of being murdered.

- (ii) That the accused used force to compel the deceased to leave from a place and that particular act of force on the part of the accused to abduct him was the result of a plan to murder him.
- (iii) That murder was the result of preconceived plan. It must be proved that the accused had intention to kill the deceased at the time of abduction.

8. But in the instant case, the prosecution has failed to prove the chain of circumstances in bringing home the charge under Section 364, IPC against the accused persons. Instead, it is seen that the offence of "kidnapping" had been widely misinterpreted and misused when the question of kidnapping the Driver (deceased) does not even arise. In the instant case, none of the prosecution witnesses have seen the commission of the alleged offences of abduction by the accused persons; not a single eye witness was produced and no other corroborative evidences were adduced. Even the projected material Witnesses have stated that they have derived the information with regard to the case based only on hearsay. There is nothing on record which could show that the accused persons had kidnapped or abducted the Driver (deceased) in order to murder him. The burden lies upon the prosecution to prove that the Driver (deceased) was

taken by the accused persons forcefully in order to murder him but no such evidence has been adduced by the prosecution.

9. In the backdrop of the aforesaid legal propositions, the prosecution has to prove each of the links in the chain of circumstances and the Court must be satisfied that at the time when the accused took away the deceased, they had the intention to cause his death. However, it is not so in the instant case.

10. Thus, the Trial Court holding accused appellant guilty and convicting them under Section 364 while convicting them under Section 304 Part II is an impediment in law, hence, liable to be interfered with by this Hon'ble Court.

11. That the Trial Court has convicted the appellants under Section 364, IPC, merely by relying on the evidence of the prosecution witnesses No.2 and 11. However, the PW-1, PW-2 & PW-8 are merely hearsay witnesses which cannot be a base for conviction of the accused. They categorically stated in their deposition that they came to know about the kidnapping of the Driver (deceased) only based on information received by them.

12. That the Driver (deceased) was a bootlegger who used to transport IMFL from Dimapur and he was also known to one of the accused Kehosol (A-2), and at the time of bringing the Driver (deceased) from a garage to the booze joint at B.O.C which is a crowded area, all the accused were under drunken state; under such drunken state and circumstances as stated above, kidnapping or abducting with the object to murder the Driver

(deceased) is inconceivable.

13. That no force was used against the deceased or compelled him to leave the garage or the booze joint with a view to murder him.

14. There is no evidence to show that there are other considerations for the murder. There is no reason why the accused should murder the victim, there is no enmity between the parties, there is no business rivalry or any other grounds shown for the Court to consider it a reason for murder. It was a senseless act or an offence committed in a drunken state.

15. The learned Trial Court itself held that:
"Considering all the material facts and evidences, this Court comes to the conclusion that the murder was not pre-meditated, unless the accused are insane, they would not commit the murder without any reason or without any motive to get some monetary gain or some other advantages. It is clearly stated that the suggestion given by the accused Kehosol to ask for money was turned down hence it was only a senseless act."

16. Thus, it is clear that the offence of murder is not made out. And when the offence of murder is absent, the offence under Section 364 IPC is improbable.

17. Further, that there are also contradictions and inconsistencies in the statements and deposition of the prosecution witnesses which cannot be ignored.

18. That the Trial Court is also inconsistent in its holdings:

It held that: ***"The Court sees the participation of all the accused in the kidnapping and extortion of the victim, while the element of murder is missing in the case of accused Puzoto@Ato is missing.***

I therefore find accused Puzoto, Kehosol, Menyungol Tase and Tepusuto Sophie guilty of offences U/S 364/392/356 IPC and I find accused Kehol, Menyungol Tase and Tepusoto Sophie guilty of offence punishable U/S 304 Part II." However, later on it went and held that: ***"From all the above discussions this court has come to the conclusion that accused persons namely Kehosol, Menyungol Tase and Tepusuto Sophie are guilty of the offences U/S 364/ 304 Part II. Elements of robbery and theft are not established." There are no evidences against Puzoto @Ato U/S 304, IPC, however evidences are established against him U/S 364 IPC."*** The inconsistencies in the holdings of the Trial Court per se clearly indicate that it has failed to appreciate the evidence on record and has misled itself based on its own imagination and on weak, deficient or feeble evidence.

19. In the instant case, the question of kidnapping the Driver does not even arise. It is for the Prosecution to prove beyond reasonable doubt that the accused persons had kidnapped or abducted the Driver in order that he may be murdered or may be so disposed of as to be put in danger of being murdered. However, in the instant case, the prosecution

had neither established the commission of the offence of "murder" nor the offence of "kidnapping or abduction in order to murder" by the accused persons beyond reasonable doubt.

20. The Trial Court committed manifest error by holding that: ***"There may be slight variation in the statement, whatever be the case, the accused persons kidnapped the deceased and the victim died out of the injury caused is unquestionable."*** This holding of the Trial Court is not tenable in the eye of law for the reason that the contradictions and inconsistencies in the statements of the PWs cannot be ignored.

21. That in the instant case, from the facts and circumstances and recorded materials, nothing can print towards the Appellants under Section 364 while convicting them under Section 304 Part II instead of under Section 302. The prosecution had not disclosed the true genesis of the crime. The present case does not satisfy the above ingredients whatsoever to establish the commission of the offence under the aforesaid Section. Thus, Judgment and Order dated 05.09.2019, passed by the Trial Court is not sustainable in the eyes of law and hence require interference and is liable to be quashed and set aside by this Hon'ble Court.

22. With regard to the second prayer to reduce the sentence of 7 years to already undergone, Ms. Neise Liegise, learned counsel for the appellants made the following submissions:-

1. That the learned Trial Court has convicted all the accused

persons under Section 304 part-II basing on the confessional statement of A-2, Shri Kehosol (Naki) Tetso. However, as there was no *mens rea* for commission of the alleged offence with an intention to murder, the offence charged under Section 302 IPC against the accused persons was brought down to under Section 304 Part(II) and convicted them to undergo 7 years rigorous imprisonment.

2. In this regard, the learned counsel for the appellants fairly submitted that since the deceased is stated to have died due to the unintentional assault by the accused persons on the incident day the appellants are not challenging their conviction under Section 304 Part(II), however, considering the act having been committed in an inebriated state of mind without having any intention or knowledge, motive or purpose and in the presence of extenuating/mitigating circumstances which the Trial Court has failed to consider, the Appellants hereby pray for leniency before this Hon'ble Court to interfere upon the sentence passed against them under Section 304 Part II by reduction on the sentence from seven (7) years to the period already undergone. The mitigating factors for consideration are herein enumerated:

- (i) That all the appellants were in their prime youth at that time of committing the offence on 23.10.2013 aged about 25, 26 and 32 years respectively.

However, now they all have become matured as responsible citizen having wife and minor children with no one to look after them except the accused persons themselves.

- (ii) that all the accused persons had already spent about one and half years each inside the judicial custody during the investigation and trial period; and that they all had suffered for a considerably long period during the investigation and trial period for about ten (10) years since 2013;
- (iii) They had been abiding by the terms and conditions even while on bail during entire Trial period. They are also neither hard core criminals nor habitual offenders but are persons who have been upholding good conduct and are persons who have the potential to further improvements and progression when subjected to reformation.

23. In Mohd. Giasuddin vs. State of AP, reported in AIR 1977 SC 1926, explaining rehabilitative and reformatory aspects in sentencing it has been observed by the Supreme Court that, ***"Crime is a pathological aberration. The criminal can ordinarily be redeemed rather than avenged."*** It also held that, ***"If you are to punish a man retributively, you must improve him. If you are to reform him, you must improve him and, men are not improved by injuries."*** Further, in Kokaiyabai Yadav vs. State of Chhattisgarh, reported in (2017) 13 SCC 449, the Hon'ble Supreme Court had observed that, ***"Reforming criminals who understand their***

wrongdoing, are able to comprehend their acts, have grown and natured into citizens with a desire to live fruitful life in the outside world, have the capacity of humanizing the world."

24. And further, the learned counsel submitted that keeping in view the nature and gravity of the case and with a view to bridge the gap between the deceased and the appellants for the purpose of peaceful settlement and co-existence in the spirit of brotherhood and reconciliation for the shared future, the matter was amicably settled between the family of the accused persons and the victim by executing a "Letter of Understanding" in the presence of the members of the accused family, victim's family and the members of the Muslim Welfare Society and the Officer bearer of All Nagaland Taxi Association (ANTA) and paid a compensation amount of Rs. 1 lakh (rupees one lakh) to the family members of the deceased.

25. That in consequence of said incident of offences committed by the accused persons against the deceased, the Jakhama Village Council also ostracized the appellants from the jurisdiction of the Village for a period of seven (7) years.

26. In this regard, the learned counsel has cited the case of Murali vs. State represented by the Inspector of Police, in Criminal Appeal No. 24/2021 (Arising out of SLP(Crl.) 10813 of 2019) wherein the Hon'ble Supreme Court has held in the relevant portion at paragraphs 10, 11 & 12, which is reproduced herein below:-

"10. Notwithstanding thereto, it appears to us that the

fact of amicable settlement can be a relevant factor for the purpose of reduction in the quantum of sentence. In somewhat similar circumstances where the parties decided to forget their past and live amicably, this Court in Ram Pujan v. State of UP [(1973) 2 SCC 456], held as follows:

"6. The only question with which we are concerned, as mentioned earlier, is about the sentence. In this respect we find that an application for compromise on behalf of the injured prosecution witnesses and the appellants was filed before the High Court. It was stated in the application that the appellants and the injured persons, who belong to one family, had amicably settled their dispute and wanted to live in peace. The High Court thereupon referred the matter to the trial court for verification of the compromise. After the compromise was got verified, the High Court passed an order stating that as the offence under Section 326 of the Penal Code, 1860 was non-compoundable, permission to compound the offence could not be granted. The High Court all the same reduced the sentence for the offence under Section 326 read with Section 34 of the Penal Code, 1860 from four years to two years.

7. The appellants during the pendency of the appeal were not released on bail and are stated to have already undergone a sentence of rigorous imprisonment for a period of more than four months. As the parties who belong to one family have settled their dispute, it is, in our opinion, not necessary to keep the appellants in jail

for a longer period. The major offence for which the appellants have been convicted is no doubt non-compoundable, but the fact of compromise can be taken into account in determining the quantum of sentence. It would, in our opinion, meet the ends of justice if the sentence of imprisonment awarded to the appellants is reduced to the period already undergone provided each of the appellants pays a fine of Rs 1500 in addition to the period of imprisonment already undergone for the offence under Section 326 read with Section 34 of the of the Penal Code, 1860. In default of payment of fine, each of the appellants shall undergo rigorous imprisonment for a total period of one year for the offence under Section 326 read with Section 34 of the of the Penal Code, 1860. Out of the fine, if realised, Rs 2000 should be paid to Ram Sewak and Rs 2000 to Ram Samujh as compensation. We order accordingly.” (emphasis supplied)

11. The afore-cited view has been consistently followed by this Court including in Ishwar Singh v. State of MP [(2008) 15 SCC 667], laying down that:

"13. In Jetha Ram v. State of Rajasthan [(2006) 9 SCC 255 : (2006) 2 SCC (Cri) 561] , Murugesan v. Ganapathy Velar [(2001) 10 SCC 504 : 2003 SCC (Cri) 1032] and Ishwarlal v. State of M.P. [(2008) 15 SCC 671 : JT (1988) 3 SC 36 (1)] this Court, while taking into account the fact of compromise between the parties, reduced sentence imposed on the appellantaccused to already undergone, though the offences were not compoundable. But it was

also stated that in Mahesh Chand v. State of Rajasthan [1990 Supp SCC 681 : 1991 SCC (Cri) 159 : AIR 1988 SC 2111] such offence was ordered to be compounded.

14. In our considered opinion, it would not be appropriate to order compounding of an offence not compoundable under the Code ignoring and keeping aside statutory provisions. In our judgment, however, limited submission of the learned counsel for the appellant deserves consideration that while imposing substantive sentence, the factum of compromise between the parties is indeed a relevant circumstance which the Court may keep in mind.

15. In the instant case, the incident took place before more than fifteen years; the parties are residing in one and the same village and they are also relatives. The appellant was about 20 years of age at the time of commission of crime. It was his first offence. After conviction, the petitioner was taken into custody. During the pendency of appeal before the High Court, he was enlarged on bail but, after the decision of the High Court, he again surrendered and is in jail at present. Though he had applied for bail, the prayer was not granted and he was not released on bail. Considering the totality of facts and circumstances, in our opinion, the ends of justice would be met if the sentence of imprisonment awarded to the appellant (Accused 1) is reduced to the period already undergone.” (emphasis supplied)

12. In later decisions including in Ram Lal v. State of J&K, [(1999) 2 SCC 213], Bankat v. State of Maharashtra, [(2005) 1 SCC 343], Mohar Singh v. State of Rajasthan [(2015) 11 SCC 226], Nanda Gopalan v. State of Kerala [(2015) 11 SCC 137], Shankar v. State of Maharashtra, [(2019) 5 SCC 166], this Court has taken note of the compromise between parties to reduce the sentence of the convicts even in serious non compoundable offences."

27. The learned counsel for the appellants also cited a case reported in (2012) 2 SCC 648 (Alister Anthony Pareira vs. State of Maharashtra) wherein the Hon'ble Supreme Court has held in the relevant portion at paragraph at 77, which is reproduced herein below:-

"77. In Manish Jalan¹², this Court considered Section 357 of the Code in a case where the accused was found guilty of the offences punishable under Sections 279 and 304A IPC. After noticing Section 357, the Court considered earlier decision of this Court in Hari Singh v. Sukhbir Singh & Ors.²³ wherein it was observed, 'it may be noted that this power of courts to award compensation 22 (2005) 2 SCC 710 23 (1988) 4 SCC 551 is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some

extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system". Then the court noticed another decision of this Court in Sarwan Singh & Ors. v. State of Punjab²⁴ in which it was observed that in awarding compensation, it was necessary for the court to decide if the case was a fit one in which compensation deserved to be granted. Then the court considered another decision of this Court in Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd. & Anr.²⁵ wherein the court held at Page 545 of the Report as under:

"38. The purpose of imposition of fine and/or grant of compensation to a great extent must be considered having the relevant factors therefor in mind. It may be compensating the person in one way or the other. The amount of 24 (1978) 4 SCC 111 25 (2007) 6 SCC 528 compensation sought to be imposed, thus, must be reasonable and not arbitrary. Before issuing a direction to pay compensation, the capacity of the accused to pay the same must be judged. A fortiori, an enquiry in this behalf even in a summary way, may be necessary. Some reasons, which may not be very elaborate, may also have to be assigned; the purpose being that whereas the power to impose fine is limited and direction to pay compensation can be made for one or the other factors enumerated out of the same; but sub-section (3) of Section 357 does not impose any such limitation and thus, power thereunder should be exercised only in appropriate cases. Such a jurisdiction cannot be exercised at the whims and caprice of a Judge."

Having regard to the above legal position and the fact that the mother of the victim had no grievance against the appellant therein and she prayed for some compensation, this Court held that a lenient view could be taken in the matter and the sentence of imprisonment could be reduced and, accordingly, reduced the sentence to the period already undergone and directed the appellant to pay compensation of Rs. One lakh to the mother of the victim.”

28. The learned counsel for the appellants submitted that considering above grounds a lenient view may be taken against the accused persons and a conviction of seven (7) years may be reduced to a sentence already undergone by the accused persons.

ARGUMENT OF THE LEARNED PUBLIC PROSECUTOR

29. Mr. Veto V. Zhimomi, the learned Public Prosecutor for the State submits that there is no infirmity in the conviction and the sentence passed by the learned Sessions Judge against the accused persons and since the accused persons had been found to be guilty of the alleged offence and sentenced them for undergoing five (5) years rigorous imprisonment under Section 364 IPC and seven (7) years rigorous imprisonment for offence under Section 304 Part (II) IPC, the same may be upheld.

POINT FOR DETERMINATION

30. In view of the above rival contention made by the learned counsel for the parties, two points arise for determination in

the present appeal. They are:

- (i) ***Whether the learned Sessions Judge, Kohima, is justified in convicting the accused/appellants for the offence punishable under Section 364 IPC and sentencing them to undergo imprisonment for 5 (five) years***
- (ii) ***Whether the sentence passed against the accused person to undergo imprisonment for 7 (seven) years for offence under section 304 part II IPC can be reduced to the sentence already undergone?***

FINDING AND REASONS

31. Heard both the learned counsel for the appellants as well as the learned Public Prosecutor.

32. I have also given my thoughts and consideration to the argument advanced by the learned counsel for the parties and perused the entire materials on record including the LCR. Since this Court being the first appellate court and it is a fact-finding court, in order to find out the truth it has to appreciate the evidences. For the proper appreciation let me now briefly examine the evidence adduced by the prosecution witnesses in respect of the accused/appellants. And as the appellant is not challenging the conviction under section 304 part II, the examination of the evidence would be confined to conviction of the accused under section 364 IPC.

- (i) **PW-1, R. Kire,** is the informant who has lodged the

complaint. He was the President of All Nagaland Taxi Association (ANTA) Kohima Unit. He stated that on 23.10.2013 their office received information that one of their *bonafide* member, Joinul Islam was kidnapped by some persons along with the taxi. They tried to find out the kidnappers but to their utter shock, the victim was killed and his dead body was recovered between Viswema and Khuzhama.

In cross PW-1 stated that he informed the police about the incident based on telephonic information received by him from an unknown person and he had never been to the place of occurrence. In cross examination, he clarified that whatever he was deposing in the court was only hearsay.

- (ii) PW-2, Menuovilie is the action committee convener of ANTA, Kohima Unit and other complainant of the case. He deposed that on 23.10.2013 information was received about the kidnapping of one of their members. So, he lodged FIR. While enquiry was being carried out, it was learned that a dead body was found on the next day from the place unknown to him as he had never visited the PO. He only went to the Police Station and saw the body and beyond that he does not know anything about the case.
- (iii) PW-4, Medose Richa, who is the Chairman, Jakhama Village Council, along with GBs seizure witness of the taxi bearing registration No. NL01T-8245 which was found abandoned on the road side.
- (iv) PW-6, T. Sale deposed that on 24.10.2013 and 25.10.2013 as

directed by O.C., Khuzama Police Station, he went to the place of occurrence along with some police personnel and found a dead body and after observing necessary formalities handed over the dead body to the South Police Station, Kohima.

- (v) PW-8, Jai Prakash Gupta is the owner of the Taxi bearing registration No. NL01T-8254. He deposed that on the day of occurrence his driver took the vehicle for repair. He was informed that two unidentified persons came and took away the taxi along with the driver. He stated that the next day, the dead body of his driver and his vehicle was also recovered.
- (vi) PW-9, Atsu deposed that the accused persons are known to her as they used to visit her house. On one occasion, the accused persons came drunk to her house so she did not allow them to come inside the house.
- (vii) PW-10, Anthono is the sister of Puzoto (A-3). She stated that on 23.10.2013 her elder brother, Puzoto, along with two of his friends, Tepuseto and Menyungol came to her place at around 7:00 PM and sat for about 5 minutes. She came to know about the case only after 2 to 3 days of the incident.
- (viii) PW-11, UBI K.G. Ngullie is the I.O. of the case. He deposed that during interrogation of the accused persons it came to light that on 23.10.2013 accused persons namely, Puzoto@Ato, Menyugol and Tepuseto while having liquor at BOC area accused Kehosol joined them and he told the co-accused persons that he knew one taxi driver who used to transport liquor. Accused Kehosol suggested that he will bring

the driver along with the taxi to which all accused agreed. Accordingly accused Tepuseto and Kehosol went to the CRPF Camp area and brought the taxi along with the driver. Thereafter the accused persons took the taxi and the driver towards Jakhama. On reaching St. Joseph College gate they took the vehicle towards Agri-link road below the National Highway. Before reaching the bridge they took out the driver and started to assault him without assigning any reason. Due to assault by the accused persons the taxi driver became unconscious and thereafter the accused persons decided to murder the deceased. They killed him and threw the dead body below the road.

- (ix) CW-1, Inalo Zhimomi appears as Court witness to testify that he recorded the confessional statement of the accused and that he explained the right of the accused and also gave 24 hours for cool reflection prior to recording the confessional statement.
- (x) CW-2 is Dr.Rupert Peseyie, who conducted Post-Mortem over the dead body of the deceased deposed that The cause of the death deceased was due to the blunt forced injury to the head resulting in injury to the brain and fracture of the base of the skull and Homicidal in nature.

DECISION & OBSERVATION

33. From the above evidence adduced by the prosecution witnesses following points can be deduced:

- (1) The Trial Court has convicted the appellants under Section 364 IPC relying on the deposition made by the prosecution witness, PW-1(R. Kire), PW-2 (Menuovile) and PW-8 (Jai Prakash Gupta). However, on examination, the PW-1, R. Kire, has not implicated any of the accused persons for commission of the offence under Section 364 IPC and in his cross-examination PW-1, who is the informant of the case, stated that what he was stating before the Court was only hearsay. Likewise, PW-2, Menuovile, also deposed that he only received the information that one of their *bonafide* member was kidnapped alongwith his taxi by some unknown miscreants and on receipt of the information they made an enquiry but while enquiring the matter on 24.10.2013; they received an information that a dead body was found from a place which he did not know exactly as he did not go there. During the cross examination, this witness stated that he simply heard and went to see the dead body at Police *thana* and beyond that he did not know anything about the case. PW-8, Shri jai Prakash Gupta, is the owner of the vehicle driven by the deceased. He deposed that on the day of occurrence, his driver took the Zonal Taxi (Maruti Alto) to the garage for repair and he was informed that two (2) unidentified persons came and took away his taxi along with the driver and on the next date the dead body of the driver and the vehicle was also recovered. However, he stated that he did not know the details of the

case. During cross examination this witness stated that he did not know who took away his vehicle as he was not present at the time of occurrence of the incident. PW-11, UBI K.C. Ngullie, is the I.O. of the case and is not an eyewitness to the incident.

- (2) That the deceased was a driver and a bootlegger who used to transport IMFL and he was known to one of the accused persons. On the incident day the accused called the deceased and they all went to the booze joint at BOC area and as there was an altercation, the booze joint owner chased them away and thereafter, all of them went out of the booze joint and together they went towards the Village and while going towards the Village inside the vehicle, the accused persons took drinks and some of the accused persons had assaulted the deceased and when the vehicle stopped, the deceased was thrown away from the vehicle and later on, they found that the deceased was unconscious. The above incident clearly shows that on the day of the incident the accused persons were drunk and brought the deceased as he was known to one of them. The evidence only reveals that the deceased was brought to the booze joint only because he used to transport liquor from Assam. But the evidence does not show that the accused person had any pre-plan to abduct the deceased; much less with an intention to murder him. There is no evidence showing the accused having used any force

against the deceased while bringing him from garage to the booze joint. The alleged incident took place in the Booze joint located in BOC area which is a crowded area. And although they were together in the booze joint at BOC area, none of the witness had seen any force having applied against the deceased for going with them nor any one had seen the deceased being physically assaulted by the accused persons while being chased away by the owner of the booze joint. Under the circumstances, commission of offence of kidnapping or abduction with an intention to murder is not possible.

34. Section 364 IPC provides that, "*whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.*"

This Section provides two kinds of kidnapping and abduction which exposes the kidnapped or abducted person to the danger of losing his life viz:-

- (a) Kidnapping or abducting any person in order that such person may be murdered or;
- (b) Kidnapping or abducting any person in order that such person may be so disposed of as to be put in danger of being murdered.

35. This section is a substantive and distinct offence which provides punishment specifically for the offences namely, kidnapping or abduction with the object of murder.

Section 359 IPC. Kidnapping: provides that- Kidnapping is of two kinds: kidnapping from India and kidnapping from lawful guardianship.

Section 362 IPC. Abduction: provides that- Whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person.

36. The case of the appellants is that no ingredient has been made out for offence under Section 359 IPC. And since the deceased was matured and was residing at Kohima, as such, the offence under Section 364 IPC does not attract against the accused persons, however, at best, the offence can be termed as an abduction under Section 362 IPC which provides that whoever by force compels, or by any deceitful means induces any person to go from any place, is said to abduct that person.

37. So far as the present case is concerned, in order to establish that under Section 364 IPC (i.e. kidnapping or abduction in order to murder), kidnapping is irrelevant as the deceased was a major and was residing in Kohima. However, to establish the charge of abduction in order to murder, when the alleged case is one of abduction or forceful means, it is for the prosecution to successfully prove the following circumstances:

- (i) the circumstances under which the deceased was forced to go showing clearly that he was abducted with the object of being murdered or of being so disposed of as would put him in danger of being murdered.
- (ii) That the accused used force to compel the deceased to

leave from a place and that particular act of force on the part of the accused to abduct him was the result of a plan to murder him.

- (iii) That the murder of the deceased was the result of preconceived plan. It must be proved that the accused 9had intention to kill the deceased at the time of abduction.

38. Thus, the burden lies upon the prosecution to prove that the deceased was taken by the accused persons forcefully in order to murder him. But in the instant case, there is absolutely nothing on record which go to show that the accused persons had kidnapped or abducted the deceased in order to murder him. None of the prosecution witnesses have seen the commission of the alleged offence by the accused persons, no eyewitnesses were produced and no other corroborative evidences were adduced. The prosecution witnesses have deposed that they have derived the information with regards to the case based only on hearsay. In fact, the prosecution has miserably failed to establish that the accused persons had kidnapped or abducted the deceased in order to murder him on the day of the incident. The learned Trial Court had also come into the conclusion that there was no intentional murder of the deceased. Further, there is also no any evidence to show that the death of the deceased was the result of preconceived plan. The prosecution has failed to prove the chain of circumstances in bringing home the charge under Section 364 IPC against the accused persons.

39. Therefore, the appellants succeeded in disproving that there was any kidnapping/abduction of the deceased with an intention to commit murder on the incident day. As a result, the point No.1 is decided in negative. Accordingly, the conviction and sentence against all the accused persons for offence under Section 364 IPC is hereby set aside and quashed.

40. With regard to the point No. 2, since the deceased had admittedly died as a result of the assault by the accused persons causing him multiple injuries on his body, and the accused persons have been convicted by bringing down the charged section of offence from 302 IPC to under section 304 part-II of IPC, I am not inclined to interfere with the said conviction and sentence against the accused persons for offence under Section 304 part II IPC.

41. However, considering the entirety of the case, this Court is of the view that the prayer for reduction of the sentence on the accused persons can be considered on the following mitigating factors:

- (i) that, all the appellants/accused persons were in their prime youth and drunk at the time of committing the offence with no intention to murder the deceased, and now they all have become matured and living as a responsible citizen having wife and minor children with no one to look after them;
- (ii) that, all the accused persons had already spent about one and half year each inside the police/judicial custody during the investigation and after their conviction;

- (iii) that they all have already suffered for a long 10 years during investigation and trial period since 2013;
- (iv) that they have also been abiding by the terms and conditions while on bail during entire trial period and further considering that they are neither hard core criminals nor habitual offenders;
- (v) that, there was a compromise between the family of the deceased and the accused persons and entered into an amicable agreement with a view to live in peaceful co-existence in the society; and
- (vi) that the accused persons had already paid Rs.1 lakh (rupees one lakh) to the family members of the deceased.

42. Considering the above enumerated mitigating factors and also considering that the Hon'ble Supreme Court in the above cited cases has accepted the compromise agreement in the criminal cases, I am of the view that the end of justice will be achieved if the sentences against the accused persons can be reduced from 7 years to 3 years. Accordingly, the sentence to undergo rigorous imprisonment for 7 years each for offence under Section 304 part-II IPC is hereby reduced to sentence to undergo 3 (three) years rigorous imprisonment. The appellants shall undergo imprisonment for the remaining period of sentence.

43. With the above mentioned modification, the appeal is partly allowed and stands disposed of.

JUDGE