

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: March 24, 2018

+ **CRL.A. 272/2017**

NARI LEPCHA Appellant
Through: Mr. Ajay Verma and Ms. Sudha
Reddy, Advocates

Versus

STATE Respondent
Through: Mr. Amit Ahlawat, Additional
Public Prosecutor with Inspector Rakesh Kumar
Sharma and SI Baljinder Singh, P.S. Darya
Ganj

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR
HON'BLE MR. JUSTICE A. K. CHAWLA

JUDGMENT
(ORAL)

SUNIL GAUR, J.

1. Appellant was a Constable in IRB Sikkim Police, who was charged with murdering his five colleagues while on duty. Appellant was tried for the offence of murder and vide judgment of 24th August, 2015, he stood convicted for the offences under Sections 302/201/182 of IPC. Vide

impugned order of 23rd December, 2015, appellant has been sentenced to imprisonment for life for the offence of murder and for the offence under Section 201 of IPC, he has been sentenced to rigorous imprisonment for two years with default clause and for the offence under Section 182 of IPC, he has been sentenced to simple imprisonment for six months.

2. The facts as noted in impugned judgment are that on 11th March, 2007 at about 04:55 A.M., an information was received by local police regarding firing having taken place at Dena Bank, Golcha Cinema, Delhi and the police, on reaching the spot, had found that appellant was standing in injured condition with PCR officials outside Dena Bank Chest and appellant was having injuries on his right shoulder, head, left foot toe and right knee. Police found three dead bodies lying on a cot in the mezzanine floor and one dead body was found on the floor near the cot and another dead body was found on the floor of store room-cum-kitchen. Appellant had identified the deceased as *Ct. Santabir Tamang*, *L/N Vishal Tewari*, *Ct. Karma Bhutia* D-Coy IRB Sikkim. He had also identified the dead body, which was lying on the floor of the store room-cum-kitchen, as that of *Kumar Basneet* and the dead body, which was lying on the floor of the store room-cum-kitchen, as that of *Laxman Subba*. One axe was found lying near the toilet and three SLR Rifles without magazines were found in the rack and one *Khukhri* was found under the cover of the boiler of the store room in the kitchen. Just on the entrance of the ground floor, one SLR rifle having magazine was found near the wall which led to the carbine. One magazine was lying on the floor of the strong-room towards outside and one live cartridge was also found there. Some empty

cartridges, bullet lead, part of bullet lead and live cartridges were also found. Fired arm marks were also found on the wall and door of the bathroom and large quantity of blood was found on the floor, cots, bed and store room-cum-kitchen.

3. The initial version given by appellant to the local police, as noted in impugned judgment, is as under: -

“Nari Lepcha had apprised that in the night of 10.3.2007 at about 9.15 p.m., J.B. Subba had come here. He was earlier posted as guard. At about 12.00 p.m. all of them were slept. At about 4.00 a.m. after hearing the noise he was awakened. He had seen J.B. Subba quarrelling with L/N Vishal Tiwari. He was having an axe. He tried to intervene. J.B. Subba did not pay any heed and he embraced him. J.B. Subba had hit the axe at his shoulder. During embracement, he also sustained injuries at his head. He had snatched the axe from J.B. Subba and locked himself in the bath room. Lateron, he heard the noise of firing taken place. When the firing was stopped, he had come out from the bathroom and seen that five persons were lying dead. He had informed the police from 100 number.”

4. Appellant was tried for the offences under Sections 302/201/182 of IPC. Prosecution had relied upon evidence of 58 witnesses to prove its case. The medical evidence, comprised of *Dr. Vijay Dhankar, Dr. Bhim Singh, Dr. Sri Niwas, Dr. Anshuman and Dr. Amit Sharma*, who had

initially examined deceased and the doctors, who had conducted post-mortem on the dead body of deceased persons.

5. It is the prosecution case that appellant was not in police custody nor was suspected when he had made a disclosure statement pointing an accusing finger towards *J.B. Subba*. Prosecution had got examined *Kanhiya Lal (PW-29)*, the owner of the house where *J.B. Subba* was living on rent, to the effect that on the night of the incident, *J.B. Subba* was in his house. Prosecution had relied upon the evidence of *Tika Rai (PW-37)*, who was posted in D-Company, IRB, 1st Battalion of Sikkim Police who in his evidence had deposed that appellant and the five deceased constables were working under his control. Constable *Jai Bahadur Subba (PW-51)* in his evidence has stated that on 10th March, 2007, he was on duty from 3 P.M. to 9 P.M. at Circle Stamp Depot, Civil Lines, Delhi and after his duty was over, he alongwith Constable *Harka Bir* went to their house. ASI D.V. Chetri (*PW-31*) had also deposed that when in the night intervening 10th & 11th March, 2007, they went to the house of *J.B. Subba (PW-51)*, they found him sleeping in his house and no blood stains were found on his clothes and no injury was found on his person. The disclosure statement (*Ex.PW-22/A*) made by appellant was proved by *HC Mohd. Sajeem*. Inspector *Chholang Bhutia (PW-35)* of Sikkim Police was posted at Coy Commander, D-Coy, IRB, Sikkim Police, who had reached the spot and had identified appellant as well as the deceased and he is also a witness to appellant's disclosure statement (*Ex.PW-22/A*).

6. The investigation of this case was conducted by Inspector *Narender Singh Rana (PW-41)*, Inspector *Asha Badola (PW-49)*, Inspector *Bijender Singh (PW-54)*, ACP *Ram Kumar (PW-57)*, retired ACP *Ranbir Singh (PW-58)*. Apart from the aforesaid evidence, there is scientific evidence in the shape of FSL Report (*Ex.PW-36/A*), which is proved on record by *Sri Narain, Senior Scientific Officer (PW-32)* and the Ballistic Expert Report (*Ex.PW-36/A*), which has been proved on record by *K.C. Varshney*, Assistant Director, Ballistics Division, FSL, Rohini. Since it is the case of prosecution that words “*J.B.*” were written on the door of the toilet, therefore, the prosecution had got examined *Dr. Deepa Verma, Assistant Director Documents, FSL Rohini, Delhi (PW-30)*, who in his report has opined that the words “*J.B.*” existing on unconventional surface showed some similarity with the specimen writing of appellant.

7. The stand of appellant in his statement under Section 313 of Cr.P.C. and in his evidence before trial court is that he is innocent and has been falsely implicated in this case. The version put forth by appellant is as under: -

“I had gone to AIIMS in the morning and reached at Dena Bank Currency Chest Darya Ganj after 6.00 p.m. on 10.3.2007. When I reached there, Karma Bhutia, Kumar Basnett, Laxman Subba and Bishal Tiwari, were playing cards and Santabir Tamang was on duty at the currency chest. I do not know why Kumar Basnett and Laxman Subba were present at currency chest as they were not from my company. When I reached at Currency chest, I relieved

Santabir Tamang and took over the duty till 9.00 p.m. At 9.00 p.m. I informed Karma Bhutia to take over the duty as his duty hours were from 9.00 p.m. to 12.00 p.m. and I came back to the room which was above the currency chest. However, Karma Bhutia did not take over the duty and told me to mind my own business and continued playing cards. Then I and Santabir Tamang had our dinner. Thereafter I went to sleep while other were betting money on cards. At around 2.00-2.15 a.m. I woke up after hearing certain noise. I saw that Santabir Tamang and Laxman Subba were having heated discussions. When I went to check what was the matter, suddenly Laxman Subba picked up one gun lying over there and fired a shot at Santabir Tamang. Thereafter Vishal Tiwari tried to snatch the gun from Laxman Subba. Then kumar Basnett jumped between the quarrel and attacked Laxman Subba from the front side with the stick or an Axe, I cannot recall it properly. I also stepped in there to pacify the matter but during the quarrel, kumar Basnett attacked me with the axe on my right shoulder. At that time, Laxman Subba fired 3-4 shots from the gun. After hearing the gun shots, I ran towards the bath room and I have bolted the door of bath room from inside. I heard multiple shots being fired. After sometime gun shots had stopped and there was silence outside but I kept sitting inside the bath room for approx. one and one and half hour due to

fear. When I came out from the bath room, I saw body of Laxman Subba near the kitchen and bodies of four other were lying around the bed. Thereafter, I called at 100 number at around 4.30 or 4.45 a.m. After sometime, police official reached to the spot. I say that I did not shoot anybody and the allegations leveled against me are false.”

8. Trial court has relied upon prosecution version and had discarded appellant's version, as indicated hereinabove, and thus proceeded to convict and sentence appellant, as already noticed above.

9. In this appeal, the challenge to impugned judgment and order by learned counsel for appellant is on the ground that prosecution version regarding appellant being sodomized by deceased is false as the medical evidence does not support the prosecution version. It is submitted that as per the version of *Guddu Chaudhary (PW-53)* and *Bhajan Singh (PW-55)*, the shots were fired from a firearm two times whereas, according to prosecution case, the firing had taken place three times with intervals. It is next submitted that appellant had accused *Ct. Santabir Tamang* and *Laxman Subba* as one who had committed the offence in question and not *J.B. Subba*. The precise submission of learned counsel for appellant is that the prosecution version is not worthy of reliance and the version put forth by appellant is a natural and spontaneous version and so, it ought to be relied upon. Finally, it is submitted on behalf of appellant that true version of this incident is the one which appellant has disclosed in his evidence and so, prosecution version deserves to be discarded as

appellant's version is quite probable. Accordingly, it is submitted that impugned judgment and order deserves to be set aside and appellant be acquitted.

10. Whereas learned Additional Public Prosecutor for State submits that the prosecution version stands proved from the evidence on record and the defence version does not appeal to reason and so, it ought to be discarded and this appeal ought to be dismissed.

11. Upon considering the submissions advanced by both the sides and on scrutiny of the evidence on record, we find that the initial prosecution version is the one which appellant had put forth when he was found in injured condition at the spot. Since *J.B. Subba* was projected to be an accused by appellant, therefore, the police had interrogated him and as per evidence of *Kanhiya Lal (PW-29)* and *ASI D.V. Chettri (PW-31)*, *J.B. Subba* was sleeping in his house on the night intervening 10th & 11th March, 2007 when this incident had taken place and no injury was found on his person nor were his clothes found to be bloodstained.

12. When it became apparent that appellant's version was false, then the security guards-*Guddu Chaudhary (PW-53)* and *Bhajan Singh (PW-55)* were questioned by the investigating officer and thereafter, their evidence was recorded. Merely because *Guddu Chaudhary (PW-53)* in his evidence had asserted that the firing at the spot had taken place twice with short intervals of ten minutes and *Bhajan Singh (PW-55)* in his evidence had stated that the firing at the spot took place thrice with intervals, would not render the prosecution case as unreliable because these two witnesses have not confronted with the purported discrepancy

of firing taking place two times or three times, with intervals. So, on this ground alone, the prosecution case cannot be discarded.

13. Regarding appellant being sodomized by deceased persons, there is evidence of *Dr. Amit Sharma (PW-56)*, who has unequivocally deposed that appellant was produced before him with alleged history of sexual assault (sodomy) by five persons on 11th March, 2007 at around 4 A.M.. As per evidence of this witness (*PW-56*), upon medical examination of appellant, it was found that there is no evidence to suggest any recent anal penetration. On the strength of the aforesaid evidence, the prosecution version cannot be thrown away because this witness (*PW-56*) has stated that he had not mentioned in the MLC of appellant as to whether sodomy was attempted upon appellant or not.

14. It is not necessary that appellant would have reacted immediately after being sodomized. It is ground reality that if any person is sought to be sodomized, then he would react. In the instant case, appellant had reacted violently and it appears that when attempt was made by deceased persons to sodomize appellant, he had lost his balance of mind and in a fit of anger, had indiscriminately fired at his five colleagues, who had unfortunately died in this incident. The initial version of appellant, reiterated in his evidence by way of defence, does not inspire confidence as appellant has not disclosed as to why *J.B. Subba* quarrelled with deceased persons. So, we have no hesitation in discarding appellant's initial version and his evidence and we find no hesitation in placing implicit reliance upon the prosecution version, which unerringly proves that no other person except appellant had committed the offence in

question. Finding the prosecution version to be reliable, we outrightly discard the defence version being improbable. However, it still remains to be seen, as to what is the nature of offence which appellant had committed.

15. The circumstances leading to the incident have to be considered in a broad perspective and the right of self defence is not required to be weighed in golden scales. The parameters governing right of private defence as reiterated by Supreme Court in *Suresh Singhal v. State (Delhi Administration)* (2017) 2 SCC 737 and *Darshan Singh v. State of Punjab & Anr.* (2010) 2 SCC 333 are as under: -

“(i) Self-preservation is the basic human instinct and is duly recognized by the criminal jurisprudence of all civilized countries. All free, democratic and civilized countries recognize the right of private defence within certain reasonable limits.

(ii) The right of private defence is available only to one who is suddenly confronted with the necessity of averting an impending danger and not of self-creation.

(iii) A mere reasonable apprehension is enough to put the right of self defence into operation. In other words, it is not necessary that there should be an actual commission of the offence in order to give rise to the right of private defence. It is enough if the accused apprehended that such an offence is contemplated and it is likely to be committed if the right of private defence is not exercised.

(iv) The right of private defence commences as soon as a reasonable apprehension arises and it is co-terminus with the duration of such apprehension.

(v) It is unrealistic to expect a person under assault to modulate his defence step by step with any arithmetical exactitude.

(vi) *In private defence the force used by the accused ought not to be wholly disproportionate or much greater than necessary for protection of the person or property.*

(vii) *It is well settled that even if the accused does not plead self-defence, it is open to consider such a plea if the same arises from the material on record.*

(viii) *The accused need not prove the existence of the right of private defence beyond reasonable doubt.*

(ix) *The Indian Penal Code confers the right of private defence only when that unlawful or wrongful act is an offence.*

(x) *A person who is in imminent and reasonable danger of losing his life or limb may in exercise of self defence inflict any harm even extending to death on his assailant either when the assault is attempted or directly threatened.”*

16. In our considered opinion, when appellant was sought to be sodomized, he could have reacted in a milder way. Instead thereof, appellant had, in a fit of anger, reacted violently by indiscriminately firing at his five colleagues, who had attempted to sodomize appellant.

17. Instant case is typical one, where in a fit of anger, appellant had exceeded his right of self defence. Upon testing this case on the afore-referred parameters, we hold that the offence committed by appellant is not ‘*culpable homicide amounting to murder*’, but ‘*culpable homicide not amounting to murder*’. Appellant had the knowledge that by firing at his five colleagues, he is likely to cause their death but had not intended to cause their death. Since the incident took place on a ‘*grave and sudden provocation*’ and due to appellant losing his self-control, therefore, the

instant case is covered by the Second Exception to Section 300 of IPC. Thus, the offence committed by appellant comes within the ambit of Section 304 Part-I of IPC, which is punishable with imprisonment for life or with imprisonment for a term which may extend to ten year with fine.

18. In light of aforesaid, while holding that substratum of the prosecution case stands proved, the conviction of appellant is altered from Section 302 of IPC to Section 304 Part-I of IPC. Accordingly, while setting aside appellant's conviction under Section 302 of IPC, appellant stands convicted for committing the offence under Section 304 Part-I of IPC and the sentence awarded to him also stands altered from '*imprisonment for life*' to '*rigorous imprisonment for ten year with fine of ₹50,000/-*' and in default of payment of fine, he shall undergo simple imprisonment for six months.

19. To the aforesaid extent, this appeal is allowed.

(SUNIL GAUR)
JUDGE

(A.K. CHAWLA)
JUDGE

MARCH 24, 2018

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