Serial No.01
Supplementary List

HIGHCOURTOFMEGHALAYAAT SHILLONG

Crl.A.No.3/2024 with
Crl.M.C.No.11/2024

Reserved on: 16.05.2024
Pronounced on: 24.05.2024

Shri Phot Khaii … Appellant

-Vs-

1. The State of Meghalaya, represented by the Secretary, Home Department, Government of Meghalaya, Shillong.

2. The Superintendent of Police, East Jaintia Hills District, Meghalaya.

3. The Officer-in charge, Khliehriat Police Station, East Jaintia Hills District, Meghalaya.

…Respondents

Coram:
Hon'ble Mr. Justice S. Vaidyanathan, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. Philemon Nongbri, Adv. with Mr. W.G.R. Mihsil, Adv

For the Respondents : Mr. N.D. Chullai, AAG with Ms. R. Colney, GA

---

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes

JUDGMENT

(Made by Hon'ble, the Chief Justice)

The Appellant, who is an accused in Sessions CaseNo.68 of 2021 on the file of the Sessions Judge/Addl DC (Judicial), East Jaintia Hills District, Khliehriat, was convicted by the Trial Court for the offence under Section 302IPC as follows:

Sl.No.	Offence	Conviction and Sentence
1.	Section 302 IPC	To undergo Rigorous Life Imprisonment with a fine of Rs.50,000/-in default to undergo Simple Imprisonment for 5 months and the fine amount shall be paid to the complainant/son of the deceased.

The Trial Court held that the convict is entitled to the benefit of Section 428 Cr.P.C. and the period already undergone in prison was ordered to be set off. Aggrieved by the order of the Sessions Judge/Addl DC (Judicial), East Jaintia Hills District, Khliehriat, dated 07.11.2023, the Appellant has preferred this Criminal Appeal before this Court.

2. The case of the prosecution in brief is that based on the complaint dated 16.05.2002 given by one Shri Pdianghun Dkhar, who is the son of the deceased, that his father Oli Siangshai was murdered by the appellant, a case in Khliehriat PS Case No.27(5) 2002 under Section 302 IPC came to be registered. According to the prosecution, the accused, on seeing the deceased, who was the ex-husband of the wife of the accused in his house

murdered him with his axe. The complainant (son of the deceased) / P.W.2 and one Shri Phulwis Siangshai (relative of the deceased) / P.W.10 were examined by the Police under Section 161 Cr.P.C. The Police conducted inquest over the body, which was lying inside the house of Smti Bles Lamo / wife of the deceased (P.W.3) in the presence of P.Ws.1 and 10 and thereafter, sent the body to SDM&HO, Jowai Civil Hospital for post mortem. The accused, after commission of the offence, surrendered himself before the Police.

3. On completion of investigation, a charge sheet in C.S.No.15 of 2003 dated 17.06.2003 was laid before ADM of Jowai Court and was subsequently, made over to the Sessions Judge/Addl DC (Judicial), East Jaintia Hills District, Khliehriat for trial. The prosecution, in order to substantiate the offences against the accused person, examined 11 witnesses and marked 10 documents. Statements under Section 164 Cr.P.C. were obtained from P.W.3 (wife of the accused), P.W.4 (younger sister of P.W.3) and P.W.11 (sister of P.W.3). The accused confessed before the Magistrate, which was marked as Ex.P7 and he was also questioned under Section 313 Cr.P.C. The Trial Court, after analyzing the evidence let in by the prosecution, found the accused guilty of the offence and convicted him as stated supra.

4. Learned counsel for the Appellant/ accused submitted that the conviction on the accused was entirely based on the statement of the wife

of the deceased (P.W.3) and the rest of the witnesses were hearsay witnesses. Even P.W.3 herself had confessed that when the accused entered her house, the deceased, who was her ex-husband was present in the house and on seeking his presence in the house with his wife, out of sudden burst, he committed the offence of murder. According to him, there was no premeditation on the part of the accused, as he lost temper on account of the act of his wife, who was seen in a compromising position with the deceased in her bedroom. He further submitted that though the occurrence had taken place as early as on 16.05.2002, the witnesses, especially P.W.3, were examined after a lapse of nearly 10 years and by that time, the memory would have faded and there was every chance to introduce new stories and intricacies. Learned counsel for the accused, in support of his submission, strongly relied upon the following judgments of the Hon'ble Supreme Court:

i) Abdul Rehman Antulay & ors vs. R.S. Nayak & anr, reported in ***(1992)1 SCC 225;***

> "86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:
>
> (1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the societal interest also, does not make it any the less the right

of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to Speedy Trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and retrial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3)The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the Right to speedy trial is alleged to have been infringed, the first question to be put and answered is – who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an

order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on – what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in Barker "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same ideal has been stated by White, J. in *U.S. v. Ewell* in the following words:

> '...the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'
>
> However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become prosecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in Barker and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors – 'balancing test' or 'balancing process' – and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order – including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded – as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too as repeatedly refused to fix any such outer time-limit inspite of the Sixth Amendment. Nor do we think that not fixing any such outer limit in effectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

ii) S.P.S. Rathore vs. Central Bureau of Investigation & anr**,**

reported in ***(2017) 5 SCC 817;***

"55. With regard to sentence of the Appellant-accused, the learned Senior Counsel on his behalf has pointed out certain mitigating factors which are – old age of the appellant-accused, health ailments, responsibility of

> looking after the unmarried daughter suffering from congenital heart disease, past meritorious service and prolonged trial. Keeping in view the aforementioned factors especially the old age and physical condition of the appellant-accused, we do not think it expedient to put him back in jail. While we uphold the findings as to the guilt of the appellant-accused, we are of the opinion that the cause of justice would be best subserved when the sentence of the appellant-accused would be altered to the period already undergone. We, therefore, reduce the sentence of the appellant to the period already undergone by him as a special case considering his very advanced age."

5. It was the case put forth by the learned counsel for the appellant that admittedly, there was a disgruntlement between the accused, wife and the deceased and even on the date of occurrence, there was an infuriation, which is evident from the reading of almost all the witnesses and therefore, the appellant had committed the offence under grave and sudden provocation. The case squarely falls under first exception to Section 300 of the Indian Penal Code and the appellant ought not to have been convicted for the offence of murder under Section 302 of the Indian Penal Code.

6. Per contra, learned Additional Advocate General appearing for the State contended that even as per the confession statement given by the accused, it is evident that due to previous enmity and to wreak vengeance, he had committed the murder of the deceased and therefore, the prosecution had clearly established the offence committed by the accused. The depositions tendered by P.W.3 and other witnesses had been duly

corroborated with other evidences. More so, as per the last seen theory, the accused was found seen with the deceased and it was for the accused to disprove the same as required under Section 160 of the Indian Evidence Act, 1872.

7. Learned Additional Advocate General appearing for the State also contended to strengthen his case that it is sufficient that if the confession statement is substantiated by other evidence, the accused can be convicted on the basis of such confession statement and the following case laws were relied upon by him:

i. ***Madi Ganga vs. State of Orissa*****,** reported in ***(1981) 2 SCC 224;***

> "6. The final submission of the learned counsel was that even if the confession to the magistrate was accepted as voluntary it had not been sufficiently corroborated to justify the conviction of the accused. It is now well settled that in order to sustain a conviction on the basis of a confessional statement it is sufficient that the general trend of the confession is substantiated by some evidence which would tally with the contents of the confession. General corroboration is sufficient – vide *Subramania Goundan v. State of Madras*. In the present case the confessional statement refers to the motive for the occurrence. This part of the confession is corroborated by the evidence of P.W. 1. The confessional statement refers to the accused having thrown a big stone on the head of the deceased. This part of the statement is corroborated by the medical evidence. We think that there was sufficient general corroboration to justify the High Court acting upon it. The appeal, is therefore, dismissed."

ii. ***Shankaria vs. State of Rajasthan***, reported in ***(1978) 3 SCC 435;***

"39.It is true that the interval between the preliminary examination of the appellant and the recording of his confessionalstatementwasabout15minutes. **But there is no statutory provision in Section 164 Cr.P.C or elsewhere, or even an executive direction issued by the High Court, that there should be an interval of 24 hours or more between the preliminary questioning of the accused and the recording of his confession.** The condition precedent for recording a confession by the Magistrate in the course of Police investigation is provided in Section 164(2) Cr.P.C. which mandates the Magistrate not to record any confession, unless upon questioning the accused person making it, he has reason to believe that it is being made voluntarily.

******

42. Although the interval between the preliminary questioning of the appellant and his confession was about 15 minutes, the appellant had no less than 38 hours at his disposal, whilst he was in judicial custody free from fear or influence of the Police, to think and decide whether or not to make a confession. As noticed already, the appellant was brought from Ganganagar to Raisingh Nagar on June 12, 1974 because on that day no Magistrate competent to record the confession of the appellant was available at Ganganagar. The appellant was admitted to the Judicial lock-up Raising Nagar under the orders of the Magistrate about orafter4 p.m. on that date. Thereafter, the appellant continuously remained in the Judicial lock-up or judicial custody till his confession wasrecordedonJune12, 1974 from 8.45 a.m. onwards. The Magistrate, Shri Bansal was aware that the appellant was continuously in judicial custody since the evening ofJune12, for about 38 or 40 hours preceding the confession.

49. A suggestion was put to Shri K. P. Srivastava in cross-examination, that after the confession had been recorded, the accused was taken to Hanumangarh and the witness had accompanied him. The witness stoutly refuted this suggestion that the custody of the accused was, after the confession, given to him or the investigating Police. He however, affirmed that the accused was sent to the judicial

> lock-up Hanumangarh. There was no good reason to disbelieve the evidence of the Magistrate (PW 6) and the Superintendent of Police (PW 22) to the effect that after recording the confession, the custody of the accused was not handed to the investigating police."

8. Learned Additional Advocate General went on to add that the prosecution had clearly established the guilt of the accused through testimonies about the overt act on the part of the accused. In sum and substance, it was his submission that since the prosecution was able to prove the guilt on the part of the accused beyond any reasonable doubt and that the accused knowing pretty well about the consequences of the attack on the deceased with axe, attacked him and hence, he is not entitled to any leniency and prayed for the dismissal of the appeal.

9. We have carefully considered the submissions made on either side and perused the materials available on record.

10. The theory of the prosecution was that the deceased, namely, Oli Siangshai was done to death by the accused with his weapon being used in the paddy field. The main argument advanced by the learned counsel for the appellant was that except the evidence of P.W.3, there were no direct eyewitnesses produced by the Police to prove that it was accused, who had done away with the life of the deceased and that he was implicated in this case based on his own confession statement. At this juncture, we feel it appropriate to refer to as to what was the confession statement of the accused and how the prosecution was able to link the accused with the

crime in corroboration with other evidence and documents. The confession statement given by the accused is extracted below:

> "I Shri Phot Khaii do hereby confess that on 14.05.02 I came to my home after doing my field (Haldi) work around 4:30 P.M. When I arrived my home, I saw Shri Oli Siangshai sleeping with my wife which made me angry. I could not tolerate my temper and picked up a dao and kill Shri Oli Siangshai who was sleeping with my wife as I am the father of five children and I do look after them and my wife. Since I am the legal husband I have got every right to (illegible) for my wife. That is why, I killed Shri. Oli Siangshai. That's all."

On the side of the prosecution, there were eleven witnesses produced to prove the guilt of the accused and as per the version of P.W.3 given before the Court in-chief, the deceased, who was her ex-husband visited her house and she offered him tea and at that time, the accused returned from the paddy field and on seeing him, there was a quarrel between the deceased and the accused, as a result of which, the deceased was attacked with axe. Subsequently, when he attempted to murder her, she ran away from the spot and had hidden in a jungle. The version of P.W.3 was fortified by the evidence of P.Ws.4 and P.W.11 (sisters of P.W.3) and P.Ws.4 and P.W.11 stated that they noticed the accused carrying *dao* (weapon) covered with blood and the following materials object was seized under Ex.P6 in the presence of two witnesses:

1) One number of Khasi dao, (wait bnoh)

   Length blade one feet (1 ft.)

   Back portion length (1ft 1 inch)

   Bamboo handle length – 9 ½ inche cover rubber tube (Blade Colour)

11. P.W.5 / Dr. E.M. Dhar had stated that she had conducted the Post Mortem on the dead body at 2:00pm on 16.05.2002 and in her opinion, the cause of death was due to shock and severe hemorrhage following the injuries caused by sharp object. P.W.5 had reiterated the same opinion in her examination in-chief. In the Post Mortem report (Ex.P4), the following injuries were found mentioned with the wounds position, size and character:

1. Cut injury on the left (illegible) region 5½ x 1½ x bone deep in size;

2. Cut injury (wound) on the left cheek extending upwards and laterally to the temporal region of the head cutlery through the middle of the left ear 5"x1½ x bone deep in size.

3. Amputation of the left hand at the level of the 1st metaphalaugeal bones. 3½ x 1 in size.

4. Amputation of the shaft of the penis at the base 1"x ½ x½ in size."

12. P.W.5 / Dr. E.M. Dhar had, who had commenced the post-mortem at about at 2:00pm on 16.05.2002, had noted in her Post Mortem Report dated 16.05.2002, which is marked as Ex.P.4 that the death would have been caused with sharp object. From the evidences of P.Ws.3, 4 and 11, it could be visualized that the deceased had died on account of several cut injuries and amputation of penis and not by any other mode and thus, their depositions coupled with the confession statement of the accused that he

attacked the deceased with dao (axe) were duly proved / corroborated with the medical evidence.

13. In all probabilities, we are of the view that the prosecution has proved its case beyond reasonable doubt that the appellant had committed the offence of murder. The only question before us was as to whether the Court below in convicting the appellant to undergo life imprisonment is justified or not.

14. At this juncture, the learned counsel for the Appellant raised the plea of culpable homicide not amounting to murder and there by attempted to bring this case under Exception1 to Section 300 IPC, so as to have the benefit of reduction of punishment under Section 304 IPC. In order to substantiate the said argument, the learned counsel brought to the notice of this Court the prolonged verbal fights between the parties and on one day, due to grave and sudden provocation, the accused had caused the death of the deceased and therefore, the appellant can be convicted for culpable homicide not amounting to murder and sentenced under Section 304 (i) of the Indian Penal Code.

15. Admittedly, except P.W.3, there was no direct eyewitness to the occurrence, purely on account of which, but at the same time, the entire case of the prosecution cannot be brushed aside. On careful scrutiny of depositions of various witnesses, the character of P.W.3 (wife of the accused) creates doubtful in the mind of this Court. There were several

contradictions between her confession statement and deposition before the Court and in her confession statement (Ex.P2), she had stated as follows:

> "On the fateful day, i.e., 15.5.02, the said victim, who used to be my ex-husband (I have no child (ren) by him) came to visit my sister's house and then came to my own house. Since it was 3'o clock in the afternoon, I offered him tea and we had it together. After an hour or so, my husband had just returned from the paddy fields, but on seeing the victim, he got very angry and asked him angrily why he kept on coming to visit my house. I tried to intervene but it was to no avail, and there itself my husband (we have 5 children together) hacked the visitor-cum-victim with the tool he used in the paddy field (i.e. wait (Khasi term). My husband after committing the misdeed, immediately took leave, and later I came to know he went to surrender himself to police. I, myself, then left the victim's body in the place where it had fallen itself, and took shelter for the night in my sister's house nearby. I locked my own house and it was only the day after that the police came to take the dead body away. That's all madam.

However, in her cross-examination before the Magistrate, she had deposed as under, which is more or less another confession statement in contravention, admitting her illegal relationship with her ex-husband:

> "18. It is a fact that on 14/04, in the year 2002 Shri Phot Khaii found me and Oliver Sianghsai naked and in compromising situation Shri Oliver Siangshai took out his pistol and pointed it towards Phot Khaii and Phot Khaii ran away however he did not shoot."

16. The above deposition of P.W.3 creates suspicion in our mind, because, as per her statement, it was the deceased, who took out pistol first in order to shoot the accused, as a result of which, the accused ran away from the shot. In that case, who was the cause for the murder of the deceased? But, from the above, one thing is clear that P.W.3 had accepted

that she maintained illicit relationship with her ex-husband / deceased and other witnesses also stated that they noticed the presence of the deceased in the house of P.W.3. In such an event, there is every possibility for a prudent man to lose his temper / self-control, when he sees his wife with some other person in a naked and compromising position, which, though morally justified, but looking at the legal perspective, is not sustained. Therefore, we are satisfied that the commission of the offence by the appellant squarely falls under the provisions of Exception 2 of Section 300, which contemplates as under:

> "Exception 2 to Section 300 IPC - 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 causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence."

17. The Apex Court in the case of ***Bhanwar Singh & ors vs. State of Madhya Pradesh,*** reported in ***(2008) 16 SCC 657*** categorically held that in order to bring the case within this ambit, there is every necessity to establish that the accused, in the garb of self-defence against the accused caused the death of the person. If we apply this proposition to the case on hand, the accused, on noticing the presence of the deceased in his house caused the death of the deceased in order to safeguard his right over person (wife) without any premeditation or intention.

18. Human life may be compared to a bicycle, which has two wheels and the front wheel is a husband and the back wheel is a wife. If there is any problem with one of the wheels, the cycle (in a sense 'family') cannot run smoothly. In this case, because of the extra marital affairs of the wife, which has been accepted by her in her evidence, the entire family, much less children got affected.

19. The Apex Court in a recent judgment in the case of ***Dolly Rani vs. Manish Kumar Chanchal***, reported in ***MANU/SC/0412/2024***, while observing about a Hindu Marriage emphasized as under:

> "26…A marriage is not an event for 'song and dance' and 'wining and dining' or an occasion to demand and exchange dowry and gifts by undue pressure leading to possible initiation of criminal proceedings thereafter. A marriage is not a commercial transaction. It is a solemn foundational event celebrated so as to establish a relationship between a man and a woman who acquire the status of a husband and wife for an evolving family in future which is a basic unit of Indian society…."

20. Even in the great epic Ramayanam, it was stated that Sita was tested by Rama to prove her chastity by jumping into the fire. In a sacred relationship, the husband is the property of the wife and vice versa and if one betrays the other, this type of incident will take place due to sudden provocation / emotion.

21. In this case, the wife had betrayed her husband, as she was in a compromising position with her ex-husband as per her own deposition in cross. Merely because the deceased is the ex-husband of the wife of the accused, it

does not give her license to maintain her relationship more so illicitly even after her separation from him and in that event, the establishment of reverential trust between the husband and wife by way of marriage would be meaningless as held by the Supreme Court (supra). Thus, we find every justification to convert the offence within the boundary of Exception. A Division Bench of Allahabad High Court (way back in the year 1959) in the case of ***Babu Lal vs. State***, reported in ***AIR 1960 All 223***, held as follows:

> "15. Where the husband is living in a fool's paradise and thinks that the illicit intimacy which might have existed earlier had ceased to exist because of the changed place of residence or other circumstances and then suddenly he finds that he was mistaken in his belief and this intimacy was continuing all the time, this in our opinion would amount to a sudden knowledge which would come as a shock to him. The appellant when he came to reside in the Government House orchard felt that he had removed his wife from the influence of the deceased and there was no more any contact between them. He had lulled himself into a false security. This belief was shattered when he found the deceased at his hut when he was absent. This would certainly give him a mental jolt and as this knowledge will come all of a sudden it should be deemed to have given him a grave and sudden provocation. The fact that he had suspected this illicit intimacy on an earlier occasion also will not alter the nature of the provocation and make it any the less sudden. We, therefore, accept the contention advanced by the counsel for the defence that the circumstances established in this case prove that the appellant when he killed the deceased had lost his self-control because of a grave and sudden provocation.
>
> 16. For the reasons given above, we think that an offence under Section 302 I. P. Code is not made out against the appellant. His conduct is protected by Exception I to Section 300 I. P. Code. His offence fells under Section 304 I. P. C. and he can be convicted only under this section."

22. For the foregoing discussions and on analysis of the entire circumstances and evidence, we are convinced that the facts of the present case falls under Exception 2 of Section 300 on the ground of "**unintentional"** and consequently, it is a culpable homicide not amounting to murder. Thus, in our considered opinion, the conviction and sentence passed by the Court below requires modification, as the facts of the present case clearly falls under Exception 2 to Section 300 of the Indian Penal Code and therefore, the appellant is convicted for "culpable homicide not amounting to murder" and he is sentenced under Section 304 of the Indian Penal code, to undergo Rigorous Imprisonment for a period of three years.

23. The Apex Court in the case of ***Ex-Ct. Mahadev vs. Director General, Border Security Force & ors,*** reported in ***(2022) 8 SCC 502***, while dealing with the provisions of Exception 2 to Section 300 held as follows:

> "21. ***To sum up, the right of private defence is necessarily a defensive right which is available only when the circumstances so justify it. The circumstances are those that have been elaborated in the IPC. Such a right would be available to the accused when he or his property is faced with a danger and there is little scope of the State machinery coming to his aid. At the same time, the courts must keep in mind that the extent of the violence used by the accused for defending himself or his property should be in proportion to the injury apprehended.*** This is not to say that a step to step analysis of the injury that was apprehended and the violence used is required to be undertaken by the court; nor is it feasible to prescribe specific parameters for determining whether the steps taken by the accused to invoke private self-defence and the extent of force used by him was proper or not. The court's assessment would be guided by several circumstances including the position on the spot at the relevant point in time,

> the nature of apprehension in the mind of the accused, the kind of situation that the accused was seeking to ward off, the confusion created by the situation that had suddenly cropped up resulting in knee-jerk reaction of the Accused, the nature of the overt acts of the party who had threatened the accused resulting in his resorting to immediate defensive action, etc. The underlying factor should be that such an act of private defence should have been done in good faith and without malice.
>
> 22. Being mindful of the afore-stated parameters, we may examine the plea of self-defence raised by the appellant in the attending facts and circumstances of the case. The factum of rampant smuggling in the area has not been disputed by either side. The records reveal that border fencing in the area in question had been erected just a few months before the incident had taken place. Prior to that, many villagers used to freely indulge in smuggling activities by crossing over to the Bangladesh side and vice versa. A couple of months after the fencing had been fixed along the International border with Bangladesh, there was an incident where smugglers had assaulted one of the members of the Battalion when he was trying to prevent them from crossing the border. That the deceased used to indulge in smuggling activities and his name was mentioned in the list of smugglers maintained by the BSF, is also a matter of record."

24. In the case on hand, the offence committed by the accused had been duly established by the prosecution, which, in our view, amounts to culpable homicide not amounting to murder, so as to convict the appellant under Exception 2 to Section 300 of the Indian Penal Code.

25. In the result, this Criminal Appeal is allowed in part and the conviction and sentence passed by the Court below dated 07.11.2023 made in Sessions CaseNo.68 of 2021 on the file of the Sessions Judge/Addl DC (Judicial), East Jaintia Hills District, Khliehriat is modified to the extent that the

Appellant is held guilty for the offence of culpable homicide, not amounting to murder as contemplated under Exception 2 to Section 300 Indian Penal Code, thereby attracting the provisions of Section 304 Indian Penal Code. The Appellant shall undergo Rigorous Imprisonment for three years and to pay a fine of Rs.50,000/- in default to undergo Simple Imprisonment for 5 months. As ordered by the Trial Court, the fine amount shall be disbursed to the complainant / son of the deceased, if already not paid. It is made clear that the appellant is entitled for set off in accordance with Section 428 of the Code of Criminal Procedure for the period of detention already undergone by him.

(W. Diengdoh)
Judge

(S. Vaidyanathan)
Chief Justice

Meghalaya
24.05.2024
"tam DR-PS"

PRE-DELIVERY JUDGMENT IN
Crl.A.No.3 of 2024 with
Crl.M.C.No.11 of 2024