



IN THE HIGH COURT OF HIMACHAL PRADESH,SHIMLA

Cr.A.Nos.75 of 2015 and 227 of 2015.

Reserved on: 4.3.2016.

Date of Decision: April 01, 2016.

1. Cr.Appeal No.75 of 2015.

Atul Thakur

.....Appellant.

Versus

State of H.P.

...Respondent.

2. Cr.Appeal No.227 of 2015:

Rajinder Singh Thakur

... Appellant

Versus

Atul Thakur and others

...Respondents.

Coram

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

The Hon'ble Mr. Justice Sureshwar Thakur, Judge.

Whether approved for reporting? Yes.

Appearing Counsel:

1. Cr.Appeal No.75 of 2015

For the Appellant: Mr. Satyen Vaidya Sr. Advocate
with Mr.Vivek Sharma, Advocate.

For the respondent: Mr.M.A.Khan, Additional A.G.

2. Cr.Appeal No.227 of 2015

For the Appellant: Mr. Anoop Chitkara, Advocate

For the respondent: Mr.M.A.Khan, Additional A.G. for
respondent –State.

Mr. Manoj Pathak, Advocate for
respondent No.2.

...2...

Per Sureshwar Thakur, Judge

Cr.Appeal No. 75 of 2015

This appeal stands directed against the impugned judgment rendered on 31.12.2014 by the learned Sessions Judge (Forests), Shimla, District Shimla, H.P. in Sessions Trial No. 39-S/7 of 2012 whereby the learned trial Court convicted and sentenced the appellant Atul Thakur to undergo rigorous imprisonment for five years for commission of offence punishable under Section 304 Part II of the Indian Penal Code besides also sentenced him to pay a fine of Rs.10,000/- and in default of payment of fine, he was sentenced to further undergo rigorous imprisonment for one year.

Cr.Appeal No.227 of 2015

2. The instant appeal is preferred by the complainant against the impugned judgment rendered on 31.12.2014 by the learned Sessions Judge (Forests), Shimla, in Sessions Trial No. 39-S/7 of 2012 praying therein that the conviction of

...3...

accused Atul under Section 304-II IPC be modified to that of conviction under Section 302 IPC. Moreover a prayer has been ventilated therein of the order of acquittal recorded in favour of accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar being also set-aside. However, the State of Himachal Pradesh has neither preferred any appeal for reversing the findings of acquittal recorded in favour of accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar nor has preferred any appeal for enhancement of sentence imposed by the learned trial Court upon accused Atul.

Cr.A.Nos. 75 and 227 of 2015

3. The prosecution story, in brief, is that Rajinder Singh (the complainant) brought the matter to the notice of the police by recording his statement under Section 154 Cr.P.C. Ext.PW-10/A, wherein he has specifically alleged that on 27.7.2011, his son Hitesh had left the house on his motorcycle bearing registration No.HP-63-3235 for computer course. It is further alleged that he had informed his sister as

...4...

well as his mother that he is going with his friend Akhilesh to his house and will not return in the night since he had to attend a party and will not come back during the night and stayed there. At about 3⁰ Clock accused Atul son of Ram Gopal telephonically informed him that his son was brought to IGMC who was not feeling well and when he reached IGMC he found his son lying dead. It is also alleged that he noticed injuries on stomach, chest, shoulder and other parts of the body of his son with sharp edged weapon and the blood was oozing out. His son was wounded by some body with sharp edged weapon in the intervening night of 27/28.7.2011 and during that period Atul was also with his son. The information qua scuffle which allegedly took place near Tunnel was made in the daily diary and thereafter Investigating Officer along with other police officials visited IGMC. On the statement of Rajinder Singh (complainant), the father of the deceased, FIR was registered.

...5...

4. On conclusion of the investigation into the offence, allegedly committed by the accused a final report under Section 173 of the Code of Criminal Procedure stood prepared and filed in the competent Court.

5. The accused, namely, Atul Thakur and Mukesh Thakur were charged by the learned trial Court for their committing offences punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code and accused, namely, Nitish Sharma and Sandeep Kumar were charged by the learned trial Court for their committing offences punishable under Section 201 read with Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution examined as many as 25 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. On closure of proceedings under Section 313

...6...

Cr.P.C. the accused were given an opportunity to adduce evidence in defence which opportunity stood availed alone by accused Atul by examining DW-1 in his defence.

7. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction under Section 304 Part II against accused/appellant, namely, Atul Thakur whereas it acquitted accused namely, Mukesh Thakur, Nitish Sharma and Sandeep Kumar qua the offences they stood charged with.

8. Mr.Satyen Vaidya, learned Senior Counsel appearing for the appellant/accused/convict Atul Thakur, has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court in exercise of its

...7...

appellate jurisdiction and theirs standing replaced by findings of acquittal.

9. Mr.Anup Chitkara, learned counsel for the complainant, has also filed an appeal bearing Criminal Appeal No.227 of 2015 for modification of judgment of conviction rendered by the learned Trial Court qua accused Atul Thakur from Section 304 part II to one under Section 302 IPC. The learned counsel for the complainant has with considerable force and vigour contended qua the findings of acquittal, recorded by the learned trial Court in favour of Mukesh Thakur, Nitish Sharma and Sandeep Kumar standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal recorded qua them by the learned trial Court being liable for reversal by this Court, in the exercise of its appellate jurisdiction and theirs standing replaced by findings of

...8...

conviction and concomitantly an appropriate sentence being imposed upon the accused/respondents.

10. On the other hand, the learned counsel appearing for the accused has with considerable force and vigour, contended qua the findings of acquittal, recorded in their favour by the Court below, standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference, rather meriting vindication.

11. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

12. In trite, as stands unfolded by the deposition of two eye witnesses to the occurrence namely, PW-11 Himanshu and PW-12 Manoj Bansal, deceased Hitesh, accused Atul, Mukesh, Manoj alongwith Himanshu and Ashutosh had consumed liquor in a party organized by the deceased in the house of Mukesh whereat an altercation erupted inter se deceased Hitesh and accused Atul spurred by

...9...

the factum of the former smoking in the presence of the accused which invited an objection from the latter. In sequel to the altercation, which erupted inter se accused Atul and deceased Hitesh, sprouted by the factum of deceased Hitesh smoking in the presence of accused Atul which stood objected to by the latter, both PW-11 and PW-12 ocular witnesses to the occurrence unanimously depose of accused/convict Atul stabbing accused Hitesh with knife Ext.P-10 recovered under recovery memo Ext.PW-3/B. The ocular version qua the illfated incident rendered by PW-11 Himanshu vividly communicates the factum of accused convict Atul striking blows with knife Ext.P-10 on the person of deceased Hitesh sequelling his demise at IGMCC, Shimla. The deposition of PW-11 is lent amplifying corroboration by another ocular witness to the occurrence PW-12. PW-12 too has rendered a deposition qua the ill-fated occurrence bereft of any intra se contradictions viz-a-viz the deposition qua it rendered by PW-11. Moreover their respective depositions on

...10...

oath qua the ill fated occurrence are also bereft of any inter se contradictions occurring in their respective examinations—in-chief viz.a.viz their respective cross-examinations. In aftermath both the ocular accounts qua the ill-fated occurrence acquire formidable evidenciary value. The formidability of the probative worth acquired by their respective testimonies gets accentuated by theirs omitting to in their respective depositions on oath either improve or embellish upon their previous statements recorded in writing qua the preeminent fact of accused convict Atul stabbing deceased Hitesh in their respective presence sequelling his begetting injuries reflected in Ext.PW-18/A and Ext.PW-23/A. Lack of any unfoldment on an incisive reading of their respective testimonies of theirs either embellishing or improving upon the afore-stated preeminent fact viz.a.viz their previous statements recorded in writing negates any inference of their ocular version qua the ill-fated occurrence standing besmirched with any taint, for belittling their

...11...

corroborative ocular version qua the ill-fated occurrence of its creditworthiness. In aftermath, the ocular version qua the incident unfolded by the unblemished testimony of PW-11 and PW-12 fastens an inference of accused/convict Atul stabbing deceased Hitesh with knife sequelling injuries on his person reflected in Ext.PW-18/A which injuries ultimately begot his demise at IGMCH, Shimla. The medical evidence connotative of stab wounds standing perpetrated on the person of deceased Hitesh stand initially constituted in Ext.PW-18/A proven by PW-18. Therein on his examining the person of deceased Hitesh, he has recorded the hereinafter extracted observations:-

“(i) One stab/incised wound over front of chest with clear cut margin about 2x1 cm of size;

(ii) Two stab wounds present on the mid auxiliary left side of the chest with clear and clean cut margin. One of size 3x1 cm and other 2x1 cms;

(iii) One stab wound on upper abdomen of size 3x2 cm;

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(iv) One stab wound was present over the left shoulder with clear cut margins of size 2x1 cm and one small incised wound 1x1 cm present over the left side of lower chest.”

13. He has in his examination-in-chief unfolded with candor of injuries delineated in Ext.PW-18/A being sequelable by user of knife Ext.P-10. In his cross-examination he has rendered a communication of the Autopsy Surgeon being alone competent to depose whether one end of the wound carried clear margins or both the sides of the wounds carried clear margins or acute ends. He in his cross-examination has further unfolded the factum of his not standing capacitated to depose with certainty qua injuries existing on the body of Hitesh being sequelable by user of knife Ext.P-10. Now, it is imperative to advert to the testimony of PW-23, who subjected the body of deceased to postmortem and prepared Ext.PW-23/A, exhibit where stands proven by him wherein he has in extenso on his subjecting the body of

...13...

the deceased to post mortem delineated the hereinafter extracted injuries:—

- “(i) Red abrasion 1.1x.2 present over left eye-brow;
- (ii) Red abrasion .8x.2 present over left side of face;
- (iii) Circular red abrasion .15x.15 present over right side of forehead;
- (iv) Red abrasion .2x1 on right side of face;
- (v) Horizontal incised wound 2.4x.1x.1 over right anterior aspect of neck;
- (vi) Red contusion 2x1 cm lateral to injury No.5.

Chest:

- (vii) Vertical spindle shape incised wound 2x1x1.5 present over left anterior aspect of thorax;
- (viii) Stab wound 1.5x1 communicating with left side pleural cavity;
- (ix) Oblique stitched stab wound 2.5x1 cm present over left lateral aspect of chest communicating with the left pleural cavity;
- (x) Oblique incised stitched wound 2.5x1x1 cm with acute ends regular inverted clean cut;
- (xi) Incised wound 2x1x.5 was present over antero lateral aspect of left shoulder;

...14...

Abdomen:

(xii) Incised wound of size 3x2x2 with inverted regular clean cut margin;

(xiii) Horizontal incised wound with single stitch in the centre 4x1x1 cm;

Cranium and Spinal Cord:

Pale.

Thorax: Pleurae 2.5 liters clotted blood present in the left pleural cavity.

Left Lung: Incised wound 2.5x1x2 cm was present in the left lower lobe.

Abdomen: Stomach 500 CC, partially digested food, mixed with fluid, pungent odor present. Rest pale.”

14. He has ascribed irreversible hemorrhagic shock as sequelled by ante mortem injuries to the chest and lung of the deceased to beget his demise. He has also proven Ext.PW-23/B which records the factum of the injuries occurring on the body of the deceased being sequelable thereon with the user of knife Ext.P-10. However, the deposition of PW-23 constituted in his cross-examination unfolding the factum of injuries, 5,7,8 to 12 and 13 being sequelable only with user of

...15...

double edged sharp weapon arises from the factum of his deposing qua the margins of the wounds, observed by him to be existing on the body of the deceased while holding his post mortem examination, carrying acute ends and clear cut regular margins. The existence thereof on the body of the deceased subjected to post mortem examination by him constrained him to depose of their occurrence thereon ousting the user of knife Ext.P-10. He has hence in his cross-examination dispelled the factum of knife Ext.P10 standing used for infliction of injuries aforesaid noticed by him on the body of deceased while subjecting it to post mortem examination or its constituting the weapon, user whereof begot the injuries delineated by him in his post mortem report Ext.PW-23/A.

15. The aforesaid expositions by PW-23 in his deposition constituted in his cross-examination verging upon his dispelling the user of knife Ext.P-10 in the occurrence of injuries on the person of deceased Hitesh, has prompted a

...16...

submission on the part of the learned counsel for convict/accused of their hence occurring a sharp discrepancy intra se the ocular version qua the ill fated occurrence existing in the testimonies of ocular witnesses thereto viz.a.viz medical evidence manifested in the testimony constituted in the cross-examination of PW-23 wherein he has dispelled the user of knife Ext.P-10 on the person of the deceased and obviously its begetting the injuries enumerated in Ext.PW-23/A, with a concomitant effect of belittling the ocular version qua the incident enunciated by PW-11 and PW-12 besides as a corollary shaking the bed rock of the prosecution case harboured upon their respective testimonies.

16. For reasons afore-stated, the testimonies of the ocular witnesses to the ill fated occurrence comprised in the unbesmirched testimonies of PW-11 and PW-12 acquire formidable evidentiary value. The foisting of primacy to ocular evidence in the event of an ocular account qua the occurrence standing not bereft of creditworthiness cannot

...17...

stand either blunted nor would become tenuous, even in the event of medical evidence comprised in the testimony of the doctor who subjected the body of the deceased to post mortem examination overruling as deposed by PW-11 and PW-12 the user of weapon of offence i.e. knife Ext.P-10 by accused Atul on the person of the deceased and its user thereon by him begetting the injuries noticed by him to, on his conducting an autopsy on his person occurring thereat especially when the predominant reason which prevailed upon him for dispelling the user of knife Ext.P-10 for begetting the injuries noticed by him on the person of deceased on his subjecting it to autopsy, is of injuries No. 5, 7, 8 to 12 and 13 standing observed by him to carry acute ends and clear cut regular margins which special characteristics borne by them stand opined by him to be sequelable by double edged sharp weapon which Ext.P-10 is not. The opinion formed by PW-23 loses its tenacity rather its effect evanesces spurable from the factum of both eye witnesses to the occurrence deposing of

...18...

convict/accused Atul repeatedly delivering stab blows on the person of the deceased. The factum of convict/accused Atul striking repeated stab blows on the deceased stands unrepulsed as the learned defence counsel has omitted to subject both PW-11 and PW-12 to an efficacious cross-examination qua the facet aforesaid. As a corollary, with hence an inference of accused convict Atul repeatedly stabbing deceased Hitesh stands grooved in evidence of probative worth and vigour, the concomitant deduction which ensues therefrom, is of with accused convict Atul repeatedly stabbing deceased Hitesh with knife Ext.P10 as a corollary his repetitive acts of stabbing the deceased at those places where wounds were noticed by PW-23 to carry acute ends and clear cut regular margins renders the aforesaid striking features borne by the wounds occurring thereon to stand sequelled by his initially thereon stabbing deceased Hitesh with sharp end of Knife Ext.P-10, his withdrawing it there-from where-after he re-stabbed the deceased with the

...19...

like sharp end of Knife Ext.P-10 at the very same place where injuries No. 5,7,8 to 12 and 13 were noticed in Ext.PW-23/A by PW-23. Consequently, a tenable explication for the aforesaid wounds carrying acute ends and clear cut regular margins stands purveyed. In sequel, the dispelling of user of knife Ext.P-10 by PW-23 and in its begetting the injuries afore-stated loses all its formidability. As a sequitur with the aforesaid explication standing aroused for the discordance intra se the ocular version qua the ill fated occurrence viz-a-viz the medical evidence rather wanes the submission of the learned counsel for the convict/accused Atul of incompatibility intra-se both the aforesaid pieces of evidence, discounting the probative worth of the eye witness account qua the ill fated occurrence. Therefore, there is complete compatibility intra se the medical evidence vis-a-vis the ocular account qua the ill fated occurrence whereupon an invincible conclusion qua the guilt of the accused qua the commission

...20...

of the offence for which he stood charged, tried and convicted stands clinched.

17. The factum of recovery of weapon of offence i.e. Knife Ext.P-10 under recovery memo Ext.PW-3/B preceding whereat a disclosure statement Ext. PW-11/A stood recorded by the Investigating Officer in the presence of PW-11 and PW-12, both whereof stand proven by both of them to stand prepared in their presence, constitutes its efficacious recovery in the manner ordained by law. In sequel, the proven recovery of Knife Ext.P-10 at the instance of convict accused Atul by the Investigating Officer in the presence of PW-11 and PW-12 amplifyingly fastens immense tenacity to the ocular version qua the ill fated occurrence besides to the medical evidence.

18. The learned trial Court had for infirm and tenuous reasons embedded upon the factum of convict/accused Atul stabbing deceased Hitesh in a sudden fight in a heat of passion, proceeded to record findings of conviction qua him

...21...

for his committing an offence punishable under Section 304 part II of the Indian Penal Code. However, even if a physical fight had occurred between both the deceased and convict/accused Atul besides even if the duel which occurred inter se both was in a heat of passion nonetheless the factum of accused/convict Atul wielding a knife Ext.P-10 whereas deceased Hitesh standing unarmed did lend an incompatible empowerment to accused viz-a-viz deceased Hitesh rather with accused/convict Atul standing armed aborted the duel which occurred inter se him and deceased Hitesh to be either free or fair. Only when accused/convict Atul was unarmed as deceased Hitesh was and took to in a sudden fight or scuffle which occurred inter se them perpetrate fist and kick blows on the deceased, yet the fatality of such fist or kick blows may have exculpated the guilt of accused Atul qua his carrying a *mens rea* in his mind to commit murder of deceased rather would have rendered him amenable to avail the benefit of Section 304 part II IPC. However, with convict/accused Atul

...22...

standing armed with knife Ext.P-10 hence standing possessed with a lethal weapon for foisting in him an unfair leverage besides superiority vis-a-vis deceased Hitesh who stood unarmed hence rendering the scuffle which occurred inter se them to be neither equal nor fair, invites a further inference of especially when he struck repeated blows with knife Ext.P-10 on vital portions of the body of the deceased, of his carrying in his mind the requisite *mens rea* to commit the murder of deceased Hitesh, de hors the factum of a sudden scuffle standing erupted inter se both or its eruption arising in a heat of passion. In aftermath, this Court holds that the accused/convict Atul is guilty of committing an offence punishable under Section 302 IPC. In sequel, the appeal filed by the complainant bearing Criminal Appeal No.227 of 2015 is partly allowed. The judgment of the learned trial Court convicting accused Atul for committing an offence under Section 304 part II stands reversed and modified accordingly. Criminal Appeal No. 227 of 2015 is

...23...

also directed against the findings of acquittal recorded by the learned trial Court qua accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar. However, the findings of acquittal recorded by the learned trial Court qua accused aforesaid for their committing offences for which they stood respectively charged by the learned trial Court do not merit any interference as on a wholesome reading of evidence adduced on record against them, this Court is of the firm view that the appreciation of evidence qua them as done by the learned trial Court does not suffer from any perversity or absurdity nor it can be said that the learned trial Court in recording findings of acquittal in favour of the accused aforesaid has committed any legal misdemeanor, in as much, as, it having misappreciated the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court qua them merits any interference. Moreover, the prosecution stood

...24...

possessed with evidence as comprised in the testimony of PW-2 to canvass for the accused aforesaid committing offences punishable under Section 201 read with Section 34 IPC. He has in his deposition deposed of the motor cycle owned by deceased standing parked at 103 tunnel. He has also deposed of it not bearing any blood stains. It stood taken into possession under memo Ext.PW-2/A. He has also in his testimony unfolded the factum of accused/convict Atul in his presence disclosing of his alongwith accused Mukesh carrying the deceased to IGMC on Pulsar motorcycle which bore blood stains. The latter motorcycle was taken into possession vide memo Ext.PW-2/B. Even if assumingly of hence the accused concerting to skew the factum of the ill fated occurrence standing not occurred at Summer Hill, nonetheless the efficacy, if any, of the deposition of PW-2 whereupon a charge under Sections 302 and 201 IPC read with Section 34 IPC stood respectively framed against the accused, who however stood acquitted by the learned trial

...25...

Court, falters rather is blunted by PW-2 deposing in his cross-examination of his being unaware whether Ext.PW-2/B stood signed by accused Mukesh or not besides by the factum of his deposing therein of his signatures on Ext.PW-2/B standing obtained at IGMC. In sequel the factum of recovery of motor cycle owned by the deceased Hitesh purportedly from 103 tunnel and its bespeaking the factum of the ill-fated occurrence occurred thereat besides its constituting a concert on the part of the accused to negate besides skew the site of occurrence, stands denuded of its vigour especially when it was found thereat with its keys hence facilitating an inference of its standing carried thereat at the instance of the Investigating Officer for falsely arraying accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar. Accordingly, the judgment of acquittal rendered by the learned Court below qua accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar is maintained and affirmed. The appeal filed by complainant bearing Cr.Appeal No.227 of

...26...

2015 is dismissed qua accused aforesaid. The conviction of accused Atul under Section 304 Part-II IPC recorded by the learned trial Court is modified to one under Section 302 IPC.

19. Let the accused/convict Atul Thakur be heard on quantum of sentence on 20th April, 2016.

(Rajiv Sharma)
Judge

April 01, 2016
(soni/TM)

(Sureshwar Thakur)
Judge