IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM:NAGALAND:MEGHALAYA:MANIPUR: TRIPURA:MIZORAM AND ARUNACHAL PRADESH)

AIZAWL BENCH.

CRIMINAL APPEAL No. 4 of 2012(J)

Sh. H.V. Lalthawma .....Appellant

- versus -

State of Mizoram ..... Respondent

B E F O R E
THE HON'BLE MR. JUSTICE UJJAL BHUYAN

For the appellant	:	Mr.Michael Zothankhuma,Sr.Adv. Amicus Curiae.
For the Respondent	:	Mr. A.K. Rokhum, Public Prosecutor
Date of hearing :	:	03.07.2012
Date of Judgment & Order	:	05.07.2012

J U D G M E N T A N D O R D E R (CAV)

This appeal is directed against the judgment and order dated 12.12.2011 passed by the learned Additional District and Sessions Judge-I, Aizawl in Criminal Trial No. 1662/2010 convicting the accused appellant u/s 304 Part-I of the Indian Penal Code (IPC) and sentencing him to undergo rigorous imprisonment (RI) for a period of 5 years with fine of Rs. 5000/-, in default, to undergo further RI for 3 months.

2. The prosecution case is that one Lalawmpuii of Sihphir, Damveng lodged a first information before the Bawngkawn Police Station, Aizawl on 29.06.2010 stating that at around midnight of 28.06.2010, her son Lalruatfela (Tetea) was shot at by her husband H.V. Lalthawma with a shotgun in the frontyard of Smt. Seii of Sihphir Damveng. It was further stated that her son was taken to the Durtlang Hospital where he died. The said information was treated as FIR and on the basis of the same, Bawngkawn Police Station Case No. 260/2010 u/s 302 IPC read with section 27(1) of the Arms Act, 1959 was registered.

3. The police investigated the case and after completion of investigation, submitted charge-sheet. The case was registered in Court as Criminal Trial No. 1662/2010 and being a sessions triable case, was taken up by the Court of Additional District and Sessions Judge-I, Aizawl. On 16.09.2010, formal charge was framed against the appellant under the aforesaid sections of law. The following were the charge framed against the appellant :-

(a) that on the midnight of 28.06.2010 at around 12.00 a.m. he had shot his son with a gun (SSBL) who succumbed to his injuries at 1.15 a.m. and thereby committing an offence punishable u/s 302 IPC;

(b) that on the midnight of 28.06.2010 at around 12.00 a.m. he had used arms (gun) without having valid license and thereby committed an offence punishable u/s 27(1) of the Arms Act.

When the charge was read over and explained to the appellant, he pleaded not guilty and claimed to be tried.

4. The prosecution examined 7 witnesses while the defence examined none. However, statement of the appellant was

recorded u/s 313 of the Code of Criminal Procedure, 1973 (CrPC). On examination of the evidence adduced and upon consideration of the materials on record, the learned trial Court came to the conclusion it was not a case of murder but a case of culpable homicide not amounting to murder. Accordingly, the accused was convicted u/s 304 Part I IPC and sentenced as indicated above. As no finding was recorded as regards the charge u/s 27(1) of the Arms Act, the appellant stood acquitted of the said charge.

5. Aggrieved, the appellant had addressed a letter to this Court from jail, which has been registered as an appeal.

6. Heard Mr. M. Zothankhuma, learned senior counsel, who was appointed by this Court as Amicus Curiae to defend the case of the appellant as well as to assist this Court. Also heard Mr. A.K. Rokhum, learned Public Prosecutor for the State.

7. Learned Amicus Curiae submits that the prosecution case suffers from serious infirmities which strikes at the root of the prosecution case. He submits that the gun that was seized was seized prior to the incident which would be evident from the dates given in seizure list and the series of overwriting therein. He therefore submits that grave doubt arises as to whether the gun seized by the police was the gun allegedly used by the appellant in the incident. There is also no conclusive finding that the pellets extricated from the body of the victim were of the cartridge which was fired from the seized gun. He also submits that the confessional statement of the appellant was not recorded in accordance with law and the Magistrate who had recorded the statement of the appellant u/s 164 Cr.P.C. was not examined. According to the learned senior counsel, grave doubt arises as to the culpability of the accused and in view of the

above, benefit of doubt should be given to the appellant. He should therefore be acquitted and set at liberty, contends the learned Amicus Curiae.

8. On the other hand, learned Public Prosecutor submits that there is no reason to disbelief the evidence of the witnesses, particularly PW 1 and PW 2. According to him, PW 1 being the mother of the victim and the wife of the appellant, will not tell a lie and falsely implicate an innocent, that too, her husband. PW 2, a neighbour, is as good as an eye witness. Immediately after the incident, he came to the place of occurrence where he saw the victim lying on the floor in an injured condition and the appellant holding a gun, which he thereafter snatched from him. Therefore, no one else except the appellant could have committed the offence, contends the learned Public Prosecutor, who therefore prays for upholding of the conviction and sentence.

9. The submissions made have been considered.

10. Before proceeding further, a brief examination of the evidence adduced by the relevant witnesses is considered necessary.

11. PW 1 is the mother of the victim and the husband of the appellant. She had lodged the FIR. In her evidence she stated that sometimes the appellant used to consume liquor and misbehaved with her when her son, the deceased, used to come to her aid. According to her, on the night of the incident, the appellant had played a tape recorder in high volume and the victim switched off the same as it was disturbing the neighbourhood. When she heard the gun shot, she came out and found her son lying on the ground. After the incident, PW 2 snatched the gun from the hands of the appellant whereafter the

appellant ran away. The victim was taken to the hospital but he died within 30 minutes of reaching there. In her cross-examination, she admitted that she did not see the act of her husband shooting her son.

12. PW 2 is a neighbour. Around the time of the incident, he was watching world cup football match on television. At that time, he heard a human voice saying that he had got tired of Lalruatfel, the victim. This was followed by a sound which PW 2 thought was the sound of fire cracker. Then one Reshlaive called him from outside and told him that the appellant had opened fire on the victim. When he went out, he found some people helping the victim. On finding the appellant, he snatched the gun from him. He saw injuries on the abdomen of the victim, who succumbed to his injuries after he was taken to the hospital. He categorically stated that the police had seized the gun in his presence. Though he was cross-examined, his testimony could not be shaken or dislodged in any material manner.

13. PW 4 is the Junior Scientific Officer at the Forensic Science Laboratory. He had examined one gun, one empty cartridge and 18 numbers of pellets received from the police and his report was exhibited as exht-P8. In his said report, he stated that the seized gun though slightly damaged was still in working condition which bore signs of discharge; the empty cartridge was fired through the said gun. Though the lead pellets were found to be components of a 12 Bore cartridge which could be fired from a 12 Bore shot gun, it could not be said with certainty that those pellets were fired from the seized gun.

14. PW 5 is the doctor who had conducted post mortem examination on the dead body of the victim and submitted post mortem report. In his opinion, death was caused because of

haemorrhage shock as a result of the injury in the abdomen which was caused by a fireman. He stated that he had extricated 18 pieces of pellets and one plastic wad (of cartridge) from the dead body and those were handed over to the police.

15. PW 6 is the seizure witness. He however contradicted himself in his cross-examination by saying on the one hand that he did not know from where the police had seized the gun and on the other hand saying that when the police seized the said gun, it was not a complete gun.

16. PW 7 is the Investigating Officer (IO) who had investigated the case and filed the charge-sheet. He stated that he had made prayer for judicial custody of the appellant and also for recording of confessional statement. The Magistrate recorded the confessional statement of the appellant on 13.07.2010 while in judicial custody. He also stated that he had sent the gun, one empty cartridge and 18 numbers of pellets to the Forensic Science Laboratory. He further stated that the appellant did not have retainer license for keeping the SBBL gun.

17. Though confessional statement of the appellant was reportedly recorded on 13.07.2010 by the Judicial Magistrate 1st Class, Aizawl, no reliance can be placed on such a statement as it is evident that provisions of section 164 Cr.P.C. were not complied with while recording such a statement. The Magistrate who recorded such a statement was also not examined.

18. The examination of the appellant u/s 313 Cr.P.C. may now be looked into. He stated that at the time of the incident, he was very drunk and did not even know that there was a bullet in the shotgun. He further stated that in the morning when he came

home, the police arrested him. Only then did he realise that he had shot his son.

19. From a cumulative assessment of the evidence on record, there can be no manner of doubt that the victim had died at the hands of the appellant. This despite some discrepancies in the evidence and some overwriting and wrong mentioning of dates in the seizure memo. But the evidence adduced, particularly by PW 1, mother of the victim and wife of the appellant, and PW 2, a neighbour, who is as good as an eye witness, conclusively point towards the guilt of the appellant.

20. But the question is as to whether the death was caused deliberately by the appellant with the intention of causing death or of such bodily injury as was likely to cause death. The learned trial Judge was right in saying that there is no evidence to prove that the appellant had killed or shot the victim with pre-meditation and that the appellant had no intention to kill his own son.

21. If that be so, it would be a case covered by section 304 Part II IPC and not by section 304 Part I IPC as has been held by the learned Court below.

22. I have considered the peculiar facts and circumstances of the case and also the fact that grave personal tragedy has befallen on the informant who has not only lost her son but also finds her husband incarcerated. The fact that the appellant is in custody since 29.06.2010 is also taken note of. In his letter to the Court, the appellant has stated about the grave hardship faced by his family members. Considering all aspects of the matter, I am of the considered opinion that it would be in the interest of justice if the sentence is reduced to 3 (three) years RI

with fine of Rs. 2000/-, in default, to undergo further RI for 1 (one) month.

23. Appeal is accordingly partly allowed.

24. Appellant is convicted u/s 304 Part II IPC and sentenced to undergo RI for 3 (three) years with fine of Rs. 2000/-, in default, to undergo further RI for 1(one) month. Detention period to be set off.

25. Inform all concerned.

26. Before parting with the record, this Court would like to place on record its appreciation of the assistance rendered by the learned Amicus Curiae, whose fee is quantified at Rs. 5000/-

JUDGE

Sushil