Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CRIMINAL APPELLATE JURISDICTION

Present :
The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Reetobroto Kumar Mitra

CRA (DB) 4 of 2024

Tshering Sherpa @ Chaale
Vs.
The State of West Bengal

For the Appellant	:	Mr. Nripen Das Mr. Dibanjan Das Mr. Adhish Newan
For the State	:	Mr. Jagriti Mishra, AAAG Mr. Sanjay Mazoomdar Mr. Rajdeep Das
Heard on	:	28.09.2026 and 06.10.2026
Judgment on	:	06.10.2026

Rajasekhar Mantha, J.:

1. The subject appeal is directed against judgment and/or order of conviction dated 20th December, 2023 and 21st December, 2023 passed by the learned Sessions Judge, Kalimpong in connection with Sessions Case No.31 of 2023 and Sessions Trial No.38 (10) 2023 arising out of Lava Police Station Case No.15 of 2023 dated 1st May, 2023 under Sections 279, 337, 302 of the Indian Penal Code.

2. The appellant was sentenced to suffer rigorous imprisonment for 8 years and a fine of Rs.10,000/-, in default, to suffer further imprisonment for 1 year under Section 304 Part-II of the Indian Penal Code. The fine was directed to be paid to the wife of the victim.

THE PROSECUTION CASE:

3. The prosecution case in brief is that on 1st May, 2023 at about 8:30 pm the victim Roshan Lama was returning from Kalimpong towards his home in Burmek along with his wife and seven year old daughter. The victim, an ex-councilor with Gorkha Territorial Army and his family were in an Alto car. The appellant was driving a Royal Enfield Motorcycle. It was raining and dark. There was little or no light in the area. The terrain was hilly and the road was narrow. Somewhere at village Deorali on Bhalu Road near Burmaik, 17th Mile near Algarah, the appellant is stated to have dashed the car, in which the victim was driving, from the back. The appellant was substantially inebriated. He overtook the car after the incident and parked his motorcycle in front. He exhorted the deceased, whereupon the deceased got off his vehicle leaving it in a running condition with headlights on.

4. A scuffle ensued between the deceased and the appellant. Both of them fell down. The victim's wife and daughter, who were sitting in the car, stated that the victim was pushed by the appellant. The victim fell of the road on the side of the mountain in a ditch 80 ft. below and sustained multiple injuries. The victim's wife made frantic calls to the first wife of the victim and then to her brother and father. The brother

and father arrived at the place of occurrence, recovered the victim from the ditch, brought him to the road and took him to the hospital to a care where he declared dead.

5. Before the brother and father removed the victim from the ditch they found the appellant thereat. The appellant was identified and arrested on the next date. Inquest was conducted on the body of the victim, post mortem followed. Wearing apparel of the victim was seized and sent for FSL. Investigation was completed and charge sheet was filed. Charges were framed against the appellant under Sections 279, 337 and 302 of the Indian Penal Code.

THE TRIAL AND EVIDENCE ON RECORD:

6. **PW-1, Bhusan Lama**, was the younger brother of the deceased. He was not an eyewitness. He was informed of the incident by his brother-in-law, father-in-law and sister-in-law.

7. **PW-2, Ganesh Tamang** was a seizure witness to the helmet, pair of shoes recovered by the police.

8. **PW-3, Kishor Giri** was a seizure witness of the wearing apparel of the victim.

9. **PW-4, Sabi Thapa** and **PW-5, Drishti Lama** were the star witnesses of the prosecution.

10. **PW-4, Sabi Thapa** deposed that on 1st May, 2023 at around 8 to 8:30 pm as she, her husband and daughter were returning from Kalimpong to Burmaik, the motorcycle of the appellant dashed the Alto

800 Car, in which they were travelling, from the back. The appellant is stated to have shouted loudly asking the victim to stop his vehicle. The victim got out of the vehicle and the appellant is stated to have assaulted the victim. The victim was trying to defend himself and is stated to have told the appellant not to aggravate the situation. The appellant is stated to have pushed the victim down the mountain. She was terrified and did not leave the car as her minor daughter was sitting inside. She came to know later that the victim had fallen in a ditch 80 ft. below the mountain road. She became nervous and started calling her family and spoke to her sister and brother. Her father and brother came to the place of occurrence within 10 to 15 minutes and started to search for the victim down the cliff. She along with her daughter were sent away home in another vehicle. After recovery of the victim, her father and brother took him to the hospital where he was declared dead. She proved her statement before the Magistrate under Section 164 of the Code of Criminal Procedure.

11. She also confirmed the TI Parade report, which was exhibited in the Court. She confirmed that the motorcycle of the appellant was moving in the same direction as the car in which she was sitting. She, however, later stated that during the incident the motorcycle was standing towards Kalimpong opposite the Alto Car. She could not recollect whether it was raining or not. She deposed that the appellant pushed her husband first and thereafter the appellant fell down. She denied that her husband was inebriated.

12. **PW-5, Drishti Lama** was the seven year old daughter of the deceased. She deposed that the victim was pushed after a quarrel and she was sitting inside the car. She also stated that her mother was calling her grandfather and a maternal uncle at that point of time. The appellant was identified in Court. She confirmed that the appellant also fell down after the quarrel.

13. **PW-6** was **Tek Bahadur Mangar**, the father-in-law of the victim. He deposed that when he arrived at the P.O. after being called by his son and daughter, he arrived at the P.O. which was an isolated place. His daughter **PW-4** and **PW-5** were inside the car and were crying and screaming. He further deposed that he was informed by his daughter that the victim was pushed. The headlights of the car were on and a motorcycle was standing nearby. They went searching for the victim and found with him injuries in a ditch of the mountain road. He and his son, brought the victim somehow to the vehicle on the road from the ditch and took him to a Kalimpong hospital where the victim was declared dead. He admitted that he was not examined by the police. He further admitted that there was another by-road through which the ditch where the victim was lying, could have been accessed but they chose to take a pathway through bushes down the cliff to reach the victim. He admitted that there were no streetlights and that he was told by PW-4 that the victim was pushed.

14. **PW-7** was **A.S.I. Pankaj Thapa** who conducted the inquest of the victim.

15. **PW-8** was **Niraj Pradhan**, the S.I. of Police who seized clothes and other articles of the victim from the Kalimpong Police Station around 11 to 11.30 p.m.

16. **PW-9** was **Indira Kumar Rai**, a local resident. He deposed that the appellant gave him a lift on his motorcycle as he was returning from Jaipur from work. He did not get any transportation to Burmek and had got down at the 17th Mile on the said road. He was walking towards Burmek when the appellant offered him a lift. He deposed that the appellant was totally inebriated. PW-9 rode with the appellant for some time and was dropped home around 7.30 pm by the appellant.

17. **PW-11** was **Poonam Lama**, the first wife of the victim. She deposed that she received a phone call from some lady but only heard the words 'accident' and 'kidnap' due to poor network. On the advice of her daughter, she came to Kalimpong hospital and found out that the victim was brought dead.

18. **PW-13** was **Swapan Roy,** the Motor Vehicle Inspector, who found minor scratches on the back of the Maruti Suzuki Alto 800 car and in the front of the Enfield Motorcycle of the victim and the appellant respectively.

19. **PW-15** was **Raju Pradhan**, another seizure witness of an old black coloured half helmet used by the appellant, pair of old sports shoes as also the motorcycle and the Alto car.

20. **PW-18** was **Dr. Swarup Kumar Khan**. He proved his postmortem report and stated that the cause of the death of the victim was haematoma head injury and ante-mortem in nature.

21. **PW-21** was **Buddha Tamang**, a resident of a nearby village who knew the deceased. He received a phone call around 8.00 p.m. from the mobile phone of the deceased called by PW-4 who stated to him that the deceased was having a fight.

22. **PW-21** was **Surya Thapa,** brother-in-law of the deceased. He confirmed that he got a phone call around 7 to 8.00 p.m. from PW-4, his sister. Another sister of PW-4 also called him wherefrom he was informed that there was some quarrel between the victim and the appellant and he was pushed. The P.O. being 17th Mile near Algarah. He and his father went in his car to the P.O. and saw the headlights of the vehicle of the victim and the engine of the car was running. He was informed by PW-4 that the victim was pushed down the hill. With the help of a torch on the mobile phone of his father, they went down the cliff through a kachha road. He found the appellant at the place who ran away thereafter. He found that the victim was lying a bit further away from where they saw the appellant in a injured condition. The head of the victim was injured and his leg was broken. He and his

father brought up the victim through a better road with a lot of difficulty. The victim was admittedly stout. They took him to the hospital in another vehicle where the victim was declared dead. He confirmed that it was drizzling at the relevant point of time and he could identify the appellant.

23. This Court finds from the records that a medical treatment report of the appellant dated 2nd May, 2023 was exhibited marked "A". The medical report indicates injuries on the left hand of the victim and on index finger of the right hand. The report indicates multiple scratches found on the back, face and neck of the victim. The injuries were due to a fall the previous day. The Investigating Officer also deposed based on the aforesaid evidence, the Trial Judge convicted the appellant as indicated hereinabove only under Section 304 (Part-2) of the IPC for 8 years of R.I.

ANALYSIS OF THE COURT

24. This Court has carefully considered the evidence on record and he arguments advanced by Mr. Nripen Das, learned counsel for the appellant and Mr. Jagriti Mishra, learned AAAG for the State.

25. The facts duly proved and that have emerged from the evidence on record is that of the appellant in a substantially inebriated condition was driving a heavy duty motorcycle. The appellant was young and strong. He was, however, cautious enough to wear helmet. It was dark on a hilly road on the 17th Mile near village- Algarah on the

mountainous road from Kalimpong to Gurmaik. It is also drizzling. There were no streetlights thereat. It was completely dark at about 8.00 p.m. though there was no fog. The appellant dashed the vehicle of the victim from the back. The collision was not so serious. The appellant was enraged. He overtook the Alto 800 vehicle of the victim and stopped it. The appellant was most likely enraged as he thought that it was the fault of the vehicle in front that resulted in the minor collusion.

26. The appellant exhorted the victim out of his vehicle. The victim keeping the car engine running and headlights on came out of his vehicle. There was a scuffle between the parties. At this point of time it would be extremely relevant to refer to the answer given by the appellant in his examination under Section 313 of the Cr. P. C. which is set out herein below:

> "Q)69. Do you want to say anything regarding this case?
>
> Ans. : I am innocent. I have been falsely implicated. The actual truth is that on that particular day I was coming from Burmaik side on my bike and one vehicle was coming from Kalimpong side. Suddenly the vehicle came towards my direction due to which I lost my balance and the number plate of my bike hit his car. As a result of this the driver of stated vehicle came out. It was dark and I could not even figure out his face. That person then came to me, slapped me and started a scuffle with me. During this scuffle both of us fell down the ditch. I lost consciousness and suddenly after 15/20 minutes I regained my consciousness and then tried to remember what had happened. Then I recollected the entire incident and realised that I had hurt my hand, abdomen and spine. I then took out my mobile phone from my pocket and switched on the torch and started climbing uphill. When I reached up, I saw 6/7 boys there. I was already shaken and scared of the entire incident and at that time I thought that since I am alone, the best thing to do

> would be to try to save myself from those boys so I ran away from that spot."

27. In answers to some other circumstances against the appellant confronted to him he did not deny that he was inebriated and also admitted that there was a collision between his bike and another vehicle.

28. What however appears to be consistent with the answer to question 69, set out hereinabove, is the medical report of the appellant dated 2nd May, 2023 being Exhibit A and the evidence of PW-21, that in course of scuffle between the victim and the appellant, both of them fell off the cliff. The victim being stout and heavy sustained more grievous injury particularly on his head on the way down from the road to the ditch 80 feet below. The appellant being younger and much lesser weight than the victim, who also fell down in course of such scuffling received injuries on his back, face, neck and hands.

29. It is quite possible that both the appellant as well as the victim were pushing each other but the appellant may not have at all intended to end the life of the victim. The death of the victim from the fall occurred after a mutual pushing and scuffling. PW-4 and 5, who witnessed the scuffle and the fight between the appellant and the victim, PW-5 clearly admitted that the appellant fell down along with the victim. The appellant also woke up near the ditch where the victim fell and waited therefor some time.

30. In the light of the aforesaid evidence, this Court is of the clear view that the fall of the victim and the appellant from the road into the cliff and the ditch was completely unintentional and a case of loss of balance by both the persons. The presence of the appellant at the ditch or nearby corroborated by evidence of PW-21 leads to the aforesaid invariable conclusion. The appellant being much stronger and more aggressive by reason of his inebriation may have tried to match the weight and strength of 58 years old victim. Such strength is attributed to the mere fact that he was stout.

31. The appellant can at best be sentenced under Section 325 of the Indian Penal Code. The Court is guided by the established fact that the appellant being substantially inebriated got into a scuffle with the victim despite of minor collusion which is evidenced from minimal damage to either vehicle. Inebriation is most likely to have enrage the appellant to exist the victim into a scuffle. Such scuffle led to both the victim as well as the appellant to incidentally fall of the road into a cliff. Injuries were sustained by the appellant in such fall albeit minor due to his built and age. The victim however sustained severe injuries on his head by reason of his stout weight and age.

32. This Court is therefore of the view that the conviction of the appellant under Part II of Section 304 has been erroneous. There is no evidence on record that the appellant had knowledge of any act on his part that is likely to have cause the death of the victim.

33. The appellant has undergone five months of incarceration. He was on bail throughout the trial and was granted further bail by coordinate Bench after admission of the appeal. The appellant shall be sentenced to the extent of incarceration that he has already suffered. He shall be set at liberty forthwith if not wanted in any other case, upon execution of a bond to the satisfaction of the Trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure. The bail bonds furnished by the appellant shall be discharged or cancelled forthwith.

34. Accordingly, CRA (DB) 4 of 2024 is allowed and disposed of. Consequently, all connected pending applications, if any, are also disposed of.

35. Lower Court records along with copy of this judgment be sent down at once to the learned Trial Court for necessary compliance.

36. Urgent Photostat certified copy of this judgment, if applied for, be furnished to the parties expeditiously.

(Rajasekhar Mantha, J.)

I agree.

(Reetobroto Kumar Mitra, J.)