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**(2023) 08 GAU CK 0033**

**Gauhati High Court**

**Case No:** Criminal Appeal (J) No. 55 Of 2019

Bijoy Gowala

APPELLANT

Vs

State Of Assam

RESPONDENT

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**Date of Decision:** Aug. 9, 2023

**Acts Referred:**

- Indian Penal Code, 1860 - Section 201, 302, 379
- Code Of Criminal Procedure, 1973 - Section 164, 374(2)
- Evidence Act, 1872 - Section 32, 33

**Citation:** (2023) 08 GAU CK 0033

**Hon'ble Judges:** Sandeep Mehta, CJ; Susmita Phukan Khaund, J

**Bench:** Division Bench

**Final Decision:** Allowed

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### **Judgement**

1. The instant criminal appeal under Section 374(2) of the Cr.PC has been received from jail on behalf of the accused/appellant Bijoy Gowala for

assailing the judgment dated 05.03.2019 rendered by the learned Sessions Judge, Tinsukia in Sessions Case No.213(T)/2015, whereby the

accused/appellant herein was convicted for the offence punishable under Section 302 IPC and was sentenced to undergo rigorous imprisonment for

life with a fine of Rs.50,000/- (Rupees Fifty Thousand) and in default of payment of fine, further undergo imprisonment for a period of 6(six) months.

2. Facts in nutshell relevant and essential for the disposal of the appeal are noted herein below.

On 19.03.2015, one Smti. Kamini Buragohain lodged a written ejahar (Exhibit-1) to the Officer-in-Charge of Gellapukhuri Police Out Post alleging

inter alia that on the previous day, i.e. on 18.03.2015, her husband Deben Buragohain had gone to attend his duties at Gellapukhuri Tea Estate but did

not return back till the morning of 19.03.2015. The family members made a search for Deben Buragohain and found the pool of blood and marks of

dragging on the road of Gellapukhuri Tea Estate. It was suspected that certain miscreants had attacked and killed Deben Buragohain by using sharp

weapons while he was returning to his home. His dead body was taken away along with the scooter and had been hidden somewhere. The number of

the scooter was mentioned as AS-23/L-6366.

On the basis of this report, formal FIR No.380/2015 dated 19.03.2015 came to be registered at the Tinsukia Police Station for the offences punishable

under Sections 302/201/379 IPC and investigation was commenced.

3. The Investigation was assigned to Pratap Gogoi, Sub-Inspector of Police (PW-20). The witness undertook initial steps of investigation; visited the

Tea Estate and prepared a sketch map. He then went to the house of the informant and recorded her statement and the statements of some other

witnesses. On 20.03.2015, he claims to have engaged sources to find out about the culprits. On the same day, he visited the line No.7 of Gellapukhuri

Tea Estate, where he met a person named Kalia @ Ajit Kharia and recorded his statement, who allegedly divulged before the Investigating Officer

that Bijoy Gowala (appellant herein) was involved in the case and that he was targeting the scooty belonging Gohain Babu (the deceased) since a long

time. Steps were taken by the Investigating Officer to get the statement of Ajit Kharia recorded under Section 164 Cr.PC. He then discovered the

dead body of the deceased (Deben Buragohain) on 20.03.2015 concealed in the drain of the garden. An Executive Magistrate was summoned to

conduct the inquest upon the dead body and the inquest report (Exhibit-A) was prepared. The dead body was then forwarded to the concerned

hospital for conducting autopsy. It may be stated here that autopsy was conducted on the dead body of Deben Buragohain by Dr. Biswajit Saikia

(PW-5), who took note of numerous blunt whereupon injuries on the forehead and other body parts of the deceased and a fracture was also noted on

the frontal bone. The Doctor opined that cause of death of the deceased was coma as a result of injuries to the cranium and the injury to the brain

was individually sufficient to cause the death in the ordinary course of nature. He prepared the post mortem report (Exhibit-2). The Investigating

Officer claims to have recovered the scooty of the deceased at Barekuri Digalsaku area. After being informed by the Officer-in-Charge of the

Barekuri Police Station, the scooty was seized vide seizure list (Exhibit-4).

On the same day, the Investigating Officer claims to have arrested the accused Bijoy Gowala with the help of the public. He was produced in the

Court on 24.03.2015 and was remanded to two days police custody. The Investigating Officer further claims that Bijoy Gowala led the police team to

the recovery of 3(three) sticks made of Sewa Tamul from the Gellapukhuri Tea Estate. The measurements of the three pieces of sticks were 1 Ft. 4

Inches, 1 Ft. 3 Inches and 9 Inches, respectively. The thickness of each of the sticks was 10 Inches. The Officer-in-Charge claims to have seized the

sticks in presence of the witnesses, Sanjib Moran, Sachin Sonowal, Manoranjan Chawrak, Lobon Gohain and Gaonbura Gajendra Nath Bora. The

seizure list (Exhibit-5) was prepared in respect to the said procedure of seizure, which was video graphed by one Raja Mahato and the video footage

was seized vide seizure list (Exhibit-6). The accused was then sent to judicial custody. The details of the recovered scooty were collected from the

Office of the District Transport Officer, Tinsukia and it came to light that it was owned by the deceased who was the Factory Manager of

Gellapukhuri Tea Estate.

4. After concluding investigation, charge-sheet came to be filed against the accused/appellant for the offences punishable under Sections 302/201 IPC.

Since the offence punishable under Section 302 IPC was sessions triable, the case was committed to the Court of the learned Sessions Judge,

Tinsukia for trial. Charges were framed against the accused for the offences punishable under Sections 302/201 IPC. He pleaded not guilty and claimed trial.

5. The prosecution examined as many as 20 witnesses and exhibited 10 documents and 3 articles to prove its case. The accused was confronted with the allegations as appearing against him in the prosecution evidence which he denied and claimed to be innocent.

6. Upon appreciating the arguments advanced by the prosecution and the defence counsel and also appreciating the evidence available on record, the

learned trial Judge found the following circumstances as having been proved beyond doubt so as to hold the accused guilty of the charges:-

51. In the instant case, the following circumstances have been proved beyond doubt:-

- (i) On the day of occurrence, Deben Buragohain was riding a red colour scooty.
- (ii) Next day, the dead body of Deben Buragohain was recovered with 7 nos. of lacerated wounds.
- (iii) The accused had come to the house of Akhim Chetia in a red colour scooty and stayed for the night in his house and when police came to the house of Akhim Chetia next morning, the accused was arrested and the scooty was seized.
- (iv) The accused led police to the recovery of a stick, which was broken into several pieces.
- (v) The witness Angshuman Bhattacharjee has proved the statement of Ajit Kharia, who stated before him on oath that the accused Bijoy Gowala had come to his house and told him that he had killed a person and wanted his help to dispose of the dead body. Ajit Kharia stated before the Magistrate that the accused Bijoy Gowala had told Ajit Kharia that the deceased had a scooty also.
- (vi) The accused has given a false statement, while he was examined u/s 313 Cr.PC.

The judgment dated 05.03.2019 is assailed in this jail appeal.

7. Mr. P. Mahanta, learned Amicus Curiae representing the appellant, vehemently and fervently contended that there is no evidence worth the name

on the record of the case so as to connect the appellant with the alleged crime. The prosecution could not attribute any motive for the murder against

the accused/appellant. The remote theory projected in the charge-sheet that the accused wanted to loot the scooter of the deceased could not

established by reliable evidence because the scooter was recovered lying abandoned. The sticks allegedly recovered at the instance of the accused do

not constitute incriminating material because they were not sent for forensic/serological examination. The Investigating Officer during his examination

admitted that he did not find any blood stains upon the seized sticks nor did he send the same to the Forensic Science Laboratory. The extra judicial

confession allegedly made by the accused before Ajit Kharia could not have been utilized in evidence because the witness was not examined during

trial and hence, his previous statement recorded under Section 164 Cr.PC cannot be read in evidence for any purpose whatsoever.

He further submitted that the circumstance used against the accused that he had gone to the house of Akhim Chetia on a red colour scooter and that

he was apprehended from the house of the said witness is also not established by even a semblance of evidence because the witness (Akhim Chetia)

did not support the prosecution case. He further submitted that had there been an iota of truth in the prosecution case regarding the scooter of the

deceased having been seized from the house of Akhim Chetia then the seizure list (Exhibit-4) would bear his (Akhim Chetia's) affirmation

regarding the seizure. He submitted that the prosecution made no attempt to prove that the scooter was seized from the house of Akhim Chetia. He

thus urged that conviction of the accused/appellant in this case is totally unjustified as the prosecution could not lead any evidence whatsoever so as to

establish that the accused/appellant was responsible for the murder of Deben Buragohain.

8. Ms. S. Jahan, learned Additional Public Prosecutor, Assam, on the other hand, vehemently and fervently opposed the submissions advanced by the

learned Amicus Curiae. She urged that the fact that the scooter of the deceased was recovered from the house of Akhim Chetia, where the accused

abandoned the same, is a highly incriminating piece of evidence which connects the accused with the offence. She further submitted that the accused

gave information to the Investigating Officer leading to the recovery of the broken pieces of stick, which was used to murder the deceased. She

further submitted that the statement of witness Ajit Kharia before whom the accused had made an extra judicial confession was recorded under

Section 164 Cr.PC by the Magistrate Angshuman Bhattacharjee, who appeared in the witness box as PW-19 and proved the statement (Exhibit-7).

As per Ms. Jahan, the statement of Ajit Kharia recorded under Section 164 Cr.PC can be treated to be relevant and admissible in evidence by virtue

of Section 33 of the Evidence Act as the witness himself passed away before his evidence could be recorded on oath. She thus submitted that

conviction of the accused/appellant as recorded by the trial Court is based on apropos appreciation of evidence available on record and does not

warrant any interference. On these grounds, she implored the Court to dismiss the appeal and affirm the conviction of the accused as recorded by the

learned trial Court.

9. We have given our thoughtful consideration to the submissions advanced at bar and have carefully and minutely re-appreciated the evidence

available on record. We have also gone through the impugned judgment.

10. Manifestly, the prosecution has not projected direct evidence so as to seek conviction of the accused and the entire case is based on circumstantial

evidence only. Law is well settled that in a case based on purely a circumstantial evidence, the incriminating evidence should be proved beyond all

manner of doubt and should constitute a complete chain of incriminating circumstances so as to conclusively establish that the accused had committed

the crime and should be inconsistent with his innocence or the guilt of anyone else. Keeping the above principles in mind, we now proceed to

appreciate the prosecution evidence.

11. At the outset, we may note that the case at hand is yet another example of gross negligence and indifference in the manner of conducting

investigation and trial of a murder case based purely on circumstantial evidence. The prosecution projected the circumstance of discoveries made in

furtherance of the information given by the accused as an important link in the chain of circumstantial evidence but neither the Public Prosecutor nor

the trial Judge, made any effort whatsoever to bring on record the arrest memo of the accused, which would be essential before any disclosure

statement can be considered. Be that as it may. Referring to the findings recorded in Paragraph 51 of the impugned judgment (supra), it is reflected

that the trial Court relied upon the factum of recovery of a stick broken into several pieces as a piece of incriminating evidence against the accused.

However, as neither the arrest memo of the accused was proved nor did the Investigating Officer prepare any disclosure statement of the accused

leading to the said discovery, the discovery/recovery is absolutely worthless.

Another important fact which requires to be highlighted is that the Investigating Officer Pratap Gogoi (PW-20) did not prove the signature/thumb

impression of the accused, if any, appended on the seizure list and hence, the seizure can otherwise also not be attributed to the accused. The sticks so

seized were not subjected to serological examination and hence, they would otherwise also be of no incriminating character.

12. The witness Akhim Chetia (PW-12) stated that he knew the accused Bijoy Gowala, who came to his house about 1½ years back with a red

coloured scooty and stayed in his house in the night. On the next day at about 11:00 AM, the police came to his house and on seeing the police, Bijoy

Gowala fled away. The police pursued him and arrested him. However, in cross-examination, the witness (Akhim Chetia) admitted that the accused is

not related to him in any manner. Thus, there was no reason as to why the witness gave shelter to the accused. That apart, the fact that the arrest

memo of the accused was never proved by the prosecution, leads to a situation wherein, the evidence of Akhim Chetia on the aspect of apprehension

of the accused could not be corroborated.

13. The prosecution has claimed that the accused murdered the deceased Deben Buragohain with the intention of looting his scooty which was of red

colour but when we go through the evidence of all the material prosecution witnesses, including PW-1 Smti. Kamini Buragohain (wife of the

deceased); PW-2 Korbit Buragohain (son of the deceased); PW-3 Smti. Lipika Buragohain (daughter of the deceased) and PW-6 Puranjit Phukan

(brother-in-law of the deceased), we find that none of the witnesses neither disclosed the registration number of the scooty of Deben Buragohain nor

did they state that the scooty was of red colour. Even in the written ejahar, the colour of the scooty was not mentioned. The seizure list (Exhibit-4),

whereby the scooty was seized, also does not refer to the registration number thereof or that the Investigating Officer (Pratap Gogoi) stated in his

evidence that he recovered the scooty of the deceased at Barekuri Digalsaku area after being informed by the Officer-in-Charge of the Barekuri

Police Station.

14. Apparently thus, the scooty must have been seized by the officers of the Barekuri Police Station before it was taken into possession in the present

case. The said material was not brought on record in the present case. The Investigating Officer Pratap Gogoi (PW-20) stated that he collected the

details of the recovered scooty from the Office of the District Transport Officer, Tinsukia. However, these details were not placed on record of the

present case. The Investigating Officer admitted that in the seizure list pertaining to the seizure of the scooty, he did not mention the colour and the

registration number thereof. Thus, there is no tangible evidence on the record of the case to show that the scooty recovered/seized vide seizure list



(Exhibit-4) was that of the deceased Deben Buragohain or that the accused was ever seen with the scooty.

15. The last circumstance relied upon by the learned trial Court so as to convict the accused was the so called extra judicial confession made by the

accused in presence of a person named Ajit Kharia. It is noteworthy that Ajit Kharia was not examined in evidence because he passed away before

his evidence could be recorded in the present case. The learned trial Court placed reliance on the 164 Cr.PC statement of Ajit Kharia as proved by

the Magistrate Angshuman Bhattacharjee (PW-19) so as to hold that the extra judicial confession made by the accused was proved in this manner.

We are constrained to record that this approach of the learned trial Judge was absolutely illegal because previous statement of a witness can never be

read in evidence except in the circumstances indicated in Section 32 of the Evidence Act. The previous statement can only be used to contradict or

confront the maker thereof. Since Ajit Kharia could not be examined in the present case, his statement recorded under Section 164 Cr.PC could not

have been exhibited and read in evidence. The argument of Ms. Jahan, learned Additional Public Prosecutor, Assam that the statement of Ajit Kharia

recorded under Section 164 Cr.PC can be treated to be a relevant piece of evidence by virtue of Section 33 of the Evidence Act, is noted just to be

rejected. Section 33 of the Evidence Act reads as below:-

“33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. Evidence given by a

witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent

judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or

cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained

without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided-

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Apparently, the said provision refers to a previous statement of a witness recorded in a judicial proceeding where the other side has had the

opportunity to cross-examine the witness. The statement of Ajit Kharia recorded under Section 164 Cr.PC was not a statement recorded during

judicial proceeding but was simply a statement recorded during investigation and hence, the same could not be brought within the purview of the

previous statement referred to in Section 33 of the Evidence Act. Furthermore, the mandatory requirements of the three stipulations under the proviso

were also not satisfied. Hence, the reliance placed by the learned trial Judge on the evidence of Angshuman Bhattacharjee (PW-19) for treating the

statement of Ajit Kharia recorded under Section 164 Cr.PC, wherein the witness allegedly spoke about the extra judicial confession of the accused to

be admissible in evidence, is grossly illegal.

16. As a consequence of the above discussion, we are of the firm view that there is no evidence worth the name on the record of the case what to

say of a complete chain of incriminating circumstances proved beyond all manner of doubt so as to connect the accused/appellant with the alleged

crime. The impugned judgment dated 5.03.2019 has been rendered sheerly on conjectures, surmises and by placing reliance on inadmissible pieces of

evidence as has been discussed above and hence, the same cannot be sustained. As a consequence, the judgment dated 05.03.2019 rendered by the

learned Sessions Judge, Tinsukia in Sessions Case No.213(T)/2015 convicting and sentencing the accused/ appellant for the offence punishable under

Section 302 IPC is quashed and set aside. The accused/appellant Bijoy Gowala is acquitted of the charges. The accused is in custody and shall be

released from prison forthwith, if not wanted in any other case.

The appeal is allowed accordingly.

17. Registry is directed to send back the LCR to the learned trial Court forthwith.