

(2012) 03 GAU CK 0010**Gauhati High Court****Case No:** Criminal Appeal No. 38 (J) of 2009

Jiten Khodal

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: March 12, 2012**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 34, 342

Citation: (2012) 2 GLT 1095**Hon'ble Judges:** Adarsh Kumar Goel, C.J; Anima Hazarika, J**Bench:** Division Bench**Advocate:** S. Khataniar, Legal Aid, for the Appellant; K.A. Mazumdar, Addl. PP, for the Respondent**Final Decision:** Dismissed**Judgement**

Smti. Anima Hazarika, J.

Heard Ms. S. Khataniar, learned counsel for the appellant. Also heard Mr. K.A. Mazumdar, learned Additional Public Prosecutor, Assam for the State respondent. The appellant herein, described as accused, calls in question the legality of the judgment rendered by the learned Additional Sessions Judge (FTC), Biswanath Chariali, Sonitpur holding the appellant guilty for the offence punishable u/s 302 of the Indian Penal Code ("IPC" for short) thereby sentencing him to undergo rigorous imprisonment for life and a fine of Rs. 1,000/-, in default of fine, 2 (two) months simple Imprisonment.

2. Background facts which led to trial of the accused are as follows:

Rajen Khodal @ Kheru (hereinafter to be referred to as the deceased) lived with his parents Nisko Khodal and Radha Khodal and the accused who is the uncle of the deceased lives in an adjacent house of the deceased. On 22.03.2007, at about 10-30 P.M., the accused Krishna Khodal, Jiten Khodal, Hitram Khodal and Bikram Khodal

came to the house of Nisku Khodal and started arguing with the deceased Rajen over some domestic issue wherefrom the deceased went out of the house and when the deceased reached the courtyard of accused No. 1, Krishna Khodal, the accused in furtherance of common intention tied him with a rope and killed him by assaulting him with a lathi and piercing him with an arrow head whereupon the complaint was filed by Nisku Khodal before Balichang Out Post vide GDE No. 335 dated 23.03.2007 at 9:00 A.M. which was forwarded to the Officer-in-Charge, Biswanath Chariali Police Station and the same was registered as Biswanath Chariali Police Station Case No. 47/2007 under Sections 342/302/34 IPC.

3. The Investigating Agency set the law in motion by arresting Krishna Khodal and Jiten Khodal. The Police went to the place of occurrence, examined the witnesses, sent the body of deceased for postmortem examination, drew the sketch map and upon receipt of the postmortem report, submitted the charge sheet against the accused persons viz., Krishna Khodal and Jiten Khodal under Sections 342/302/34 IPC showing the accused Hitram Khodal and Bikram Khodal as absconder.

4. The case being exclusively triable by the Court of Sessions, the Committal Magistrate sent the case to the Court of Sessions for trial. On receipt of the case, the learned Sessions Judge, Sonitpur, registered the case and transferred the same to the learned Additional Sessions Judge (FTC), Biswanath Chariali for disposal.

5. Upon appearance of the accused persons, viz., Krishna Khodal and Jiten Khodal, the Court after hearing the parties formally charged the accused u/s 302/34 IPC. Charges so framed being read over and explained to the accused persons, they pleaded not guilty and claimed to be tried.

6. In order to prove the case, the prosecution has examined as many as 7 (seven) witnesses including the Informant, Doctor and Investigating Officer. The Court, however, examined 2 (two) court witnesses in order to prove the case of guilt of the accused. The said two court witnesses were cross-examined by the prosecution and the defence. The statements of the accused persons were recorded u/s 313 CrPC wherein the accused persons took the plea of total denial and they did not adduce any evidence.

7. The prosecution has examined the informant Nisku Khodal, the father of the deceased as PW 1 who has deposed that the accused persons viz., Krishna Khodal, Jiten Khodal, Bikram Khodal and Hitram Khodal had killed his son and the dead body of the deceased was found in the courtyard of the accused Krishna Khodal, whereupon the articles of assault viz., lathi, nylon rope and arrow were seized by the police. During cross examination, PW 1 has categorically stated that the dead body of the deceased was found in the courtyard of accused Krishna Khodal though the accused persons were his own brothers. The FIR was written by village headman and he put his thumb impression therein. He could not say why the accused persons killed his son. He has further stated that he himself handed over the seized articles

to police from the house of the accused Krishna Khodal but at the time of occurrence, he was in the house of his brother Arjun Khodal. Therefore, the witness PW 1 is not the eye witness of alleged occurrence.

8. The mother of the deceased Radha Khodal was examined as PW 2 who had deposed that all the accused persons including Bikram and Hitram killed her son at about 8:30 P.M. They called her son from her house and killed him in the house of accused Krishna Khodal. She and her husband were not in their house on that night. Before assaulting and killing her son the accused had dragged her son out from her house and when her son was taken away by the accused persons, she was in her kitchen preparing food. PW 2 has admitted that Krishna Khodal and Jiten Khodal are brothers of her husband. However, she had stated that on the previous day of the occurrence there was hot altercation between the deceased son and the accused persons. She had fled away from her house and stayed for the night on the bank of Ghiladhari river. She has admitted that she did not see the accused persons assaulting her son. She has further admitted that she cannot say who dragged away her son from her house. Therefore, she is not the eye witness of the assault on the person of the deceased.

9. PW 3 Amrit Khodal had stated that while he was working on the vehicle at the house of Jayanta Bora, the accused Jiten came there and told that they killed Kheru @ Rajen and asked them to go and see. They killed Kheru because he has created nuisance and accordingly PW 3 and Jayanta Bora went there and saw Kheru was tied with rope and lying in front of the house of the accused Krishna Khodal. The other accused Bikram poured water on the mouth of Kheru but Krishna Khodal asked Bikram not to give water and gave a blow on Kheru by means of his legs. Jayanta Bora asked the accused to unrope Kheru but when they suspected that Kheru died, they left the place.

During cross-examination, he admitted that he cannot say by whom and by what weapon Kheru was killed. According to him, the accused Jiten did not give any blow by means of legs on the person of the deceased. PW 3 has further stated that at the time of occurrence Krishna Khodal was absent in the house but later on he came there. Therefore, PW 3 is not the eye witness of the occurrence.

10. PW 4 Sri Jayanta Bora has stated that while he was in his house at about 10-00 P.M. Krishna Khodal came and informed him that Kheru was creating nuisance. Kheru worked in his vehicle, but he did not come on that day. PWs 3 and 4 went there and saw legs and hands of Kheru was tied by rope. He asked them as to why they had tied him and asked Hitram to give water to Kheru. When Hitram Khodal tried to give him water, the accused Krishna Khodal again kicked Kheru and said that he was still alive. Out of anger, PW 4 slapped Krishna Khodal and un-rope Kheru and he found him dead with bleeding from his back. Thereafter, PW 4 left the place and informed Balichang Out Post. Police came in the morning of the following day. The police arrested two accused persons and the other accused fled away. Police

seized one rope, one arrow and one lathi vide Ext-1 (seizure list). Material Ext. 1 is lathi, Material Ext. 2 is the rope and Material Ext. 3 is the arrow, which were seized by police on being produced by the accused persons. During cross-examination, PW 4 has stated that he had not seen the deceased being assaulted or being kept tied. But the accused themselves confessed that they had killed Kheru by fastening him. PW 4 further deposed that Krishna and others produced the seized articles from inside the stalk.

11. The prosecution examined two Investigating Officers as PW 5 and PW 6. PW 5 has stated that his predecessor had investigated the case, took evidence, seized articles used in the incident, held inquest, arrested two accused persons and committed them to the court. Two other accused were found absconding. PW 5 only collected the report of the postmortem examination and thereafter submitted the charge sheet. Ext. 2 is the charge sheet and Ext. 2(1) is his signature.

PW 6 is the another Investigating Officer who has stated that on 23.03.2007, PW 1 lodged an FIR (Ext. 3) and accordingly, he made the GD Entry, visited the place of occurrence, drew the sketch map vide Ext. 4, seized one rope, one lathi and one arrow. He had also proved the GD Entry No. 3351 dated 23.03.2007. But PW 6 did not state anything about what he had done after getting information from PW 4 in the night of occurrence.

During cross-examination, PW 6 has stated that no blood was found at the place of occurrence.

12. The prosecution had examined Dr. JC Bey as PW 7 who had performed the postmortem examination on the dead body of the deceased Rajen Khodal on 23.03.2007 and found the following:

9

External appearance

Average built, Rigor Mortis present. Eyes closed, mouth half opened. Blood clot present in the nostrils.

Injuries:

- (i) Swelling of the head with big haematoma of frontal region right side 21/2" in size.
- (ii) One penetrating wound on the left side back at 5th intercostal space 1-5 cm in diameter, round in shape penetrating the skin, superficial tissue, muscles, spleen and lower lobe of lungs.
- (iii) Bruise present on the right leg 1" X 1" in size.

Cranium & Spinal canal :

Scalp:- Huge blood clot present.

Skull :- A tissue fractured of frontal bone 21/2" in length.

Membrane:- Congested.

Brain and spinal cord:- Extradural blood clot present.

Brain:- injured.

Thorax: -

Wall :- penetrating wound as described.

Ribs/cartilage : NAD

Pleurae:- penetrating wound and cavity contain blood. Right lung:- congested.

Left Lung:- Penetrating wound at lower lobe.

Pericardium:- Congested.

Heart:-

Right chamber:- contain little blood.

Left chamber:-empty

Abdomen:- Stomach and its contents: contain little food. Other organ of this column are found NAD.

Muscles, bones and joints:-

Injury and fracture : As described. Disease or deformity and dislocation: Nil.

More detailed description:-

All the injuries were of antemortem in nature.

According to the doctor, the death was due to shock and haemorrhage as a result of injuries sustained. Ext. 3 is the post mortem report and Ext. 3(1) is his signature.

During cross examination, PW 7 categorically stated that injury Nos. 1 and 2 are sufficient to cause the death of the person. Injury Nos. 1 and 3 were caused by blunt weapon, whereas injury No. 2 was caused by pointed substance.

13. The Court examined the village head-man Thuleswar Basumatary as CW 1 who has stated that in the next day morning of the occurrence, Nisko Khodal called him and told him about the occurrence. The accused Krishna Khodal came to his house and proceeded to the police station ahead of him and reported the matter. C W 1 has deposed that he could not say whether Krishna was present at his residence at the time of occurrence or not, but he saw the house of Krishna cut to some extent. Krishna told him that he had killed Rajen. But C W 1 did not ask him why he had killed Rajen. Krishna further told him that he had tied up Rajen and killed him with

spear. The lathi, rope and spear were found lying at Krishna's house itself. Police seized the rope, an arrow like jathi and a lathi. The arrow was similar to a spear and was stained with blood. He proved Material Ext. 1 lathi, Material Ext. 2 rope and Material Ext. 3 arrow.

During cross-examination, he stated that he was present at the place of occurrence at the time of seizure of material exhibits.

14. CW 2 Suresh Khodal has deposed that he heard that the accused persons had assaulted and killed Rajen. He has further deposed that the accused persons admitted the said fact before them in presence of police. He had also proved the Material Exts. 1, 2 and 3, which were recovered from the house of the accused Krishna Khodal. He had further stated that the material exhibits were produced by accused Krishna from inside his house and handed over to police. CW 1 was present when police held inquest on the body of the deceased. He was also present at the time of seizure. He had put his signature in the inquest report as well as the seizure list.

15. After closing the prosecution witnesses, the learned trial Court recorded the statements of the accused persons u/s 313 CrPC wherein they denied the allegations made against them.

16. The learned trial Court after considering the evidence on record, including the circumstantial evidence along with the petition filed by the accused Jiten Khodal before the Court wherein he has admitted that he assaulted Rajen @ Kheru by means of lathi and in respect of penetrating injury his explanation is that Kheru after getting assault fell on pointed bamboo fencing which the Court did not believe in view of the medical evidence and accordingly convicted the accused Jiten Khodal u/s 302 IPC as indicated above thereby acquitting the accused Krishna Khodal from the charge and set at liberty holding that the prosecution has failed to prove the offence punishable u/s 302/34 IPC but successfully proved the offence punishable u/s 302 IPC against Jiten Khodal and hence, the appeal by convict Jiten Khodal before the Court.

17. Advancing the arguments on behalf of the accused Jiten Khodal, Ms. Khataniar, learned counsel appearing for the accused has taken us through the entire evidence on record and the judgment under appeal. Ms. Khataniar would contend that there is no eye witness to the alleged occurrence and the entire case rests on circumstantial evidence. The procedure prescribed under circumstantial evidence in order to sustain the conviction is missing and there is a missing link, inasmuch as, the settled position of law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be of conclusive in nature which is absent in the instant case.

18. Ms. Khataniar has further submitted that in view of the nature of evidence led by the prosecution, the judgment of conviction under appeal is required to be

interfered with and the accused appellant be acquitted from the charge. In support of her contentions, the learned counsel has referred a decision reported in [Madan Malakar Vs. The State of Tripura,](#).

19. Per contra, the learned Public Prosecutor appearing for the State, while supporting the judgment of conviction would contend that the circumstances on which reliance has been placed by the prosecution have been well established and the accused has failed to dispel or explain the circumstances appearing against him and therefore, no interference is called for in the facts and circumstances of the case.

20. Heard the arguments at length. Perused the evidence on record including the judgment rendered by the learned trial Court. Admittedly, there is no eye witness in the case in hand. The entire case rests on circumstantial evidence and the prosecution has relied on the following circumstances in support of its case. They are,

- i) Motive;
- ii) Conduct of the accused immediately before and after the incident;
- iii) Extrajudicial confession;
- iv) The dead body of Kheru @ Rajen lying on the courtyard of accused Krishna;
- v) Production of weapon of assault by the accused Krishna before the police;
- vi) Hot argument between the parties on the previous day of occurrence;
- vii) Medical evidence and
- viii) The petition submitted by the accused before the Court admitting the assault on the person of the deceased.

21. The prosecution has established the fact that the accused persons and the deceased were living in the parental property adjacent to the house of the deceased but the deceased demanded that the accused persons should leave the parental property and thus a hot altercation took place and the deceased destroyed the house of the accused Jiten Khodal. On the previous day of the day of occurrence, the deceased went to destroy the house of the accused Krishna and damaged certain portion of the house wherefor the accused Jiten Khodal came and assaulted the deceased which he has admitted save and except the statement that Kheru after the assault relating to penetrating injury fell on pointed bamboo fencing which is contrary to medical evidence and the weapon used vide Material Exts. 1 and 3 would clearly show that he may have used the said weapon to assault Kheru @ Rajen and therefore, the motive, conduct of the accused, production of articles of weapons used in the commission of crime and the medical evidence would unerringly lead to the conclusion that the appellant assaulted Rajen and he died instantaneously in

consequence of the aforesaid assault, more so, when he has admitted his guilt of assault before the court by filing a petition. 23. The other circumstantial evidence proved by the prosecution is that the dead body of the deceased Kheru @ Rajen was lying in the courtyard of the accused Krishna whereof the deceased went to damage the house of Krishna in his absence and the accused Jiten Khodal came and assaulted the deceased. There was penetrating wound found by the doctor (PW 7) and the deceased died of the assault of injury Nos. 1 and 2 which were sufficient to cause death of a person whereas injury Nos. 1 and 3 were caused by blunt weapon and injury No. 2 caused by pointed substance. The prosecution has proved the material exhibits 1, 2 and 3, the weapon used in the crime. Moreover, the extra-judicial confession by the accused Jiten Khodal before PWs 3, 4 and CW 1 amply demonstrates that it is the accused Jiten Khodal who caused the death of the deceased and the circumstantial evidence has firmly satisfied the following tests in the instant case:

- i) The circumstances from which an inference of guilt is established,
- ii) The circumstances led by the prosecution would unerringly pointing towards the guilt of the accused;
- iii) The circumstances taken cumulatively from the day prior to the date of occurrence and on the day of occurrence has formed a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- iv) The circumstantial evidence led by the prosecution is complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. 24. The decision in Madan Malakar (supra) relied on by the learned counsel for the appellant relates to a case where the weapons used in the commission of offence though seized as per alleged disclosure of the accused but the same was not sent for serological test for proving as to whether the weapon utilized in the commission of offence or not and in absence of such test it is difficult to connect the accused with the alleged offence. Moreover, in Madan Malakar (supra), the court has held that the prosecution has failed to explain whether the deceased was in a position to make any disclosure of the name of the assailants when he was found in an injured condition and whether there was any attempt from the side of the Investigating Agency for ascertaining as to who is the actual culprit for the death of the deceased and in that circumstance, the Court has held that there was a missing link and the chain was not complete as required in a case rests on circumstantial evidence only, which is not the case in hand and thus, the case cited would not be applicable in the instant case.

24. From the totality of the circumstantial evidence led by the prosecution, it has been established that the test required in case of circumstantial evidence in order to sustain the conviction as held by the Apex Court in a series of decisions right from

AIR J 952 SC 343: Hanumant Govind Nargundkar Vs. State of M.P. that where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. In the instant case, the tests for satisfying the circumstantial evidence has been proved by the prosecution and the Court has no other option but to affirm the judgment of conviction rendered by the Additional Sessions Judge (FTC), Biswanath Chariali in Sessions Case No. 150/2008.

25. In the result, we find that the appeal has no merit and it is accordingly dismissed.

26. Send down the lower court record. Before parting with the judgment, we appreciate Ms. Sangita Khataniar, learned counsel appearing for the appellant for her endeavour to assist the court and the arguments advanced in the case in support of acquittal of the accused Jiten Khodal. She is entitled to get her fees as Legal Aid Counsel and we fix her fees at Rs. 5,000/- (Rupees five thousand) only to be paid by Gauhati High Court Legal Aid Cell.