

(2009) 11 GAU CK 0011

Gauhati High Court

Case No: Criminal Appeal No. 93 of 2006

Chakreswar Kalita @
Chakra Kalita and
Another

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: Nov. 11, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 323, 325, 326, 34

Citation: (2006) 1 GLT 575

Hon'ble Judges: C.R. Sharma, J; Amitava Roy, J

Bench: Division Bench

Advocate: J.M. Choudhury and B.M. Choudhury, for the Appellant; K.C. Mahanta, for the Respondent

Final Decision: Allowed

Judgement

Amitava Roy, J.

Being aggrieved by the judgment and order dated 07.03.2006 passed by the learned Sessions Judge, Kamrup in Sessions Case No. 149 (K)/2002, convicting the Appellants under Sections 302 / 323 / 34 of the Indian Penal Code (hereafter for short referred to as the Code) and sentencing them to undergo rigorous imprisonment for life and to pay a fine of Rs. 3,000/-, in default to suffer further RI for 6 (six) months, for the offence of murder and to undergo RI for 1 (one) month and to pay a fine of Rs. 1,000/-, in default to suffer for another ten days for the offence of causing hurt, they are before this Court for redress.

2. We have heard Mr. J.M. Choudhury, Senior Advocate assisted by Mr. B.M. Choudhury, Advocate for the Petitioner and Mr. K.C. Mahanta, learned Public Prosecutor, Assam.

3. One Sri Hit Ram Kalita having lodged a FIR with the Officer-in-Charge, Rangia Police Station on 07.03.1999, alleging that the Appellants-accused had at about 3.00 p.m. on the very same day ambushed and assaulted his nephew Sri Jiban Kalita being armed with sharp cutting weapon and fire arm and fiat 2 hours thereafter, i.e. at 5.00 p.m. they, as well, assaulted and killed his brother Narayan Kalita (Benga) by strangulating him with "Gamocha" (a local towel), the police registered Rangia P.S. Case No. 30/99, under Sections 341 / 325 / 326 / 302 / 34 of the IPC. On completion of investigation, charge-sheet was submitted against the Appellants. The learned trial Court framed charge under the above provisions of the Code to which they pleaded not guilty. In course of the trial that followed, prosecution examined 16 witness, including the Investigation Officer of the case and the Doctor (PW 10), who had performed the postmortem examination. The accused persons did not adduce any evidence in defence, but their statements were recorded u/s 313 of the Code of Civil Procedure, in course of which they stood by their denial of the charge. The impugned judgment and order as above followed thereafter.

4. Mr. Choudhury, has not, either questioned the authenticity or adequacy of the evidence adduced by the prosecution vis-a-vis the charge of assault. Qua the charge of murder, the learned Senior Counsel has urged that the only witness of the prosecution projected as eyewitness, i.e. PW 6, is wholly untrustworthy and, therefore, the learned Court below erred in law and on facts in acting on his testimony to record the finding of guilt against the accused-Appellants vis-a-vis 302 of the IPC. While traversing the evidence of this witness at length, Mr. Choudhury, has sought to impress upon this Court that not only did he, though an able bodied son did not intervene to prevent the assault of his father by the accused-Appellants, thereby displaying a very unusual human conduct rendering him unreliable, the omission on the part of the prosecution to examine, amongst others, Nalen and Molen, who according to this witness had been formed of the incident at the earliest point of time, has destroyed the substratum of the prosecution case. He has further submitted that though, PW 6 has deposed that his father had been assaulted by the Appellant No. 1, while the Appellant No. 2, held him, the reason for his death having been detected to be Asphyxia, the prosecution ought to have identified the owner of the gamocha to prove to the hilt the guilt of the accuses-Appellants. As PW 6 as a solitary witness has failed to satisfy the legal essentialities to demonstrate him as unimpeachably reliable so as to enable the Court to act on his testimony in absolute terms in support of the charge of murder, the conviction of the accused-Appellants of the said offence, on the face of the records is untenable in law and thus the appeal ought to be allowed.

5. Mr. Mahanta in his equally emphatic reply has argued that the evidence of PW 6 read as a whole together with other attendant facts and circumstances, makes him wholly creditworthy a id, therefore, in view of the limited challenge laid in this appeal, no interference with the impugned decision is warranted.

6. In order to be satisfied we have, as well, perused the evidence of the witnesses for the prosecution. Whereas, the PW 1 is the informant, PW 2 is the injured in the first incident

that allegedly had taken place at 3 p.m. PW 5 and PW 3 claim to be witness of that incident. PW 4, PW 13, PW 14 are not eyewitness of any of the incidents. PW 7, PW 8 and PW 9, though, had referred to some land dispute between the parties do not claim to have seen either of the incidents. PW 12 is the seizure witness of an iron rod and PW 15 is witness to the inquest report. As it is not the case of any of the parties that, except PW 6 is the eyewitness of the incident, we do not consider it essential to dilate on their evidence to burden the judgment unnecessarily. This is more so, as the learned Senior Counsel for the Appellant s, as alluded hereinabove, has not questioned the probative value of the evidence of the witness relating to the first incident for which they had been convicted under Sections 323 / 34 of the Code.

7. The above notwithstanding, by all means, the evidence of PW 6 Sri Durga Kalita deserves to be dealt with in some details. The witness stated on oath that the deceased Narayan Kalita was his father. According to him, on the date of the incident at about 3.00 p.m. he was sitting in his shop at the IOC chowk. On being informed by his brother-in-law that his (witness) elder brother and his (witness) paternal uncle are involved in a quarrel with the accused-Appellants, he (witness) came home. Not having found his father at home and being told by his mother that he had gone to the Garaka paddy field to herd back his cows, he (witness) proceeded to fetch his father. On the way he noticed the accused-appellants also going hurriedly some time later, he saw the accused-appellant No. 1, Chakreswar Kalita holding his father and Maneswar Kalita, accused-appellant No. 2 assaulting him with a lathi on his back. There was a scuffle between his father and the accused-Appellants. The witness stated that out of gripping fear, he instead of intervening, rushed back home and on his way, he informed one Nolen, Molen and others about the incident. Thereafter, he returned to the place of occurrence along with them being accompanied by the aforementioned two persons with Ghana, his mother and sister. He then found his father lying on the ground bleeding from his ears and nostrils and unable to speak. He mentioned about a seizure of an iron rod by police, which was found lying near the body and also proved his signature on the seizure list prepared in connection therewith. In cross-examination, he stated that on being informed by his brother-in-law at about 3.00 p.m., he reached home within five minutes on a bicycle. He denied to have disclosed anything about the incident to Jiban and Naren. He also admitted of not having raised any alarm at the place of occurrence when his father was assaulted. He admitted as well, of not mentioning about Nalen and Molen accompanying him on his second visit to the place of occurrence.

8. Reading the evidence of this witness as a whole, we are not being able to persuaded ourselves to certify his testimony to be that of a solitary witness on whom reliance can be placed without any reservation whatsoever. Not only, at the relevant point of time this witness was a able bodied adult aged 22 years and that it was highly unexpected and inconceivable that he would have preferred to remain a silent on looker to the gruesome assaults being made on his father and meekly return home without even raising an alarm, the prosecution for inexplicable reason has chosen not to examine any of the persons

named by him, who were reported of the incident immediately thereafter. Conspicuously, the prosecution for reason best known to it did not examine either Nalen and Molen or the sister of this witness even to confirm the scenario said to have been witnessed by them when they all visited the place of occurrence after the deceased had been injured and was lying on the ground in a moribund state. Even, if we may reconcile that going by the temperament and mental make up of PW 6 he did not dare to obstruct the accused/Appellants, there being no explanation whatsoever to justify the omission of citing Nalen and Molen to be the witness for the prosecution and to examine them in the trial, the evidence of this witness leaves a lot to be desired to be of such persuasive value to base the conviction of the accused-appellants for murder. Not only, PW 6 as solitary witness with the above deficiency has failed to satisfy the requirements enumerated by several judicial pronouncements to command the confidence of a Court to record the conviction on his testimony, the omission to examine the persons aforementioned, leaves his evidence in isolation without any corroboration. We, therefore, do not consider it safe to act on the evidence of P W 6 to sustain the conviction of the accused-appellants for murder.

9. One more aspect cannot be overlooked as well. Though the evidence of the PW 6 is limited to the assault on the back of the deceased by a lathi by the accused-appellant, Maneswar Kalita, the cause of death as detected by the PW 10, Dr. Pratap Ch. Sarmah is Asphyxia following strangulation by the gamocha found around his neck. No evidence is forthcoming as to the identity of the owner of the gamocha. No forensic report as well, is available to throw any light in this regard. In the opinion of the Doctor, death was due to Asphyxia resulting from the ligature strangulation wound over the neck which is ante mortem and homicidal in nature. Significantly, there is no evidence whatsoever to connect the accused-appellants either with the gamocha or the overt act of strangulation of the deceased thereby.

10. In the above view matter, considering the evidence as a whole, on the charge u/s 302 of the Code, as well as other relevant materials on record, we are of the unhesitant opinion that the conviction of the accused-appellants on this count is unsustainable in law. Their conviction under Sections 323 / 34 is however upheld.

Vis-a-vis the offence of u/s 323 of the IPC, we find from the records that meanwhile the accused-appellants have been in custody for over 3 (three) years as on date in the process of serving the sentence imposed by the impugned judgment and order.

Considering the punishment prescribed, though, we sustain their conviction, on this count, they are not liable to be detained any further.

In the result the appeal is allowed. The impugned judgment and order is interfered with to the extent as it relates to the conviction and sentence of the accused-appellants under Sections 302 / 34 IPC. They are acquitted of this charge. In view of the period of the detention already undergone for their conviction under Sections 323 / 34, IPC, we direct

their release Forthwith.

Send down the LCR for the needful.