

**(2006) 08 GAU CK 0013**

**Gauhati High Court**

**Case No:** None

Binda Bimpak

APPELLANT

Vs

State of Arunachal Pradesh

RESPONDENT

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**Date of Decision:** Aug. 3, 2006

**Acts Referred:**

- Arms Act, 1959 - Section 27, 5, 7
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 27
- Penal Code, 1860 (IPC) - Section 302

**Citation:** (2007) 1 GLR 582 : (2006) 3 GLT 598

**Hon'ble Judges:** D. Biswas, J; Brojendra Prasad Katakey, J

**Bench:** Division Bench

**Final Decision:** Allowed

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**Judgement**

B.P. Katakey, J.

The Criminal Appeals are arising out of the judgment of conviction dated 16.6.2005 in B.S.R. Sessions Case No. 2/02 passed by the learned Additional Sessions Judge, Fast Track Court, Basar, Arunachal Pradesh convicting the accused/appellant u/s 302 IPC and u/s 27 of the Arms Act and sentencing him to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs. 5,000 in default to undergo further rigorous imprisonment for 2 years for the conviction u/s 302 IPC and to undergo rigorous imprisonment for 3 years and to pay a fine of Rs. 2,000 in default to undergo further rigorous imprisonment for 6 months for conviction u/s 27 of the Arms Act. The reference has been made for confirmation of the sentence in view of the provision contained in Regulation 30(1) of the Assam Frontier (Administration of Justice) Regulations, 1945.

2. On the basis of the FIR lodged by Dungsing Bimpak, PW5, on 10.12.1999 alleging that his father has been murdered at Bimpak village by Binda Bimpak, the

accused/appellant, by the gun at about 4.00 PM, with the Officer-in-Charge of Taliha Police Station, Taliha P.S. Case No. 10/99 u/s 302, IPC read with Section 27 of Arms Act, 1959 was registered. The investigating agency after completion of the investigation submitted the chargesheet against the accused/appellant u/s 302 IPC read with Section 27 of the Arms Act. Since the case was exclusively triable by the Court of Sessions, the learned Magistrate vide order dated 21.7.2000 committed the accused-appellant to the Court of Sessions and accordingly the charges under the said provisions of law were framed by the learned Additional Sessions Judge, Fast Track Court, Basar on 19.12.2002 against the accused/appellant which when read over and explained, the accused pleaded not guilty and claimed to be tried.

3. The prosecution in order to bring home the charges levelled against the accused/appellant examined 8 witnesses including the first informant, investigating officer as well as the Doctor who conducted the autopsy on the body of the deceased. After closure of the prosecution witnesses statements of the accused u/s 313 Cr.P.C. was recorded. The accused did not examine any defence.

4. There was no eye witness to the occurrence and the prosecution case was based on the circumstantial evidence as well as the evidence leading to the discovery of the skeleton alleged to be that of the deceased person. The learned Additional Sessions Judge recorded the judgment of conviction on the basis of circumstantial evidence as well as the evidence leading to the discovery of the skeleton and convicted the accused persons u/s 302 IPC read with Section 27 of the Arms Act and sentenced him as stated above.

5. We have heard Mr. A.K. Roy, learned Counsel for the appellant in Criminal Appeal No. 189/05(GHY) and the learned amicus curiae in Criminal Appeal (J) No. 92/05 and Mr. B. Bannerjee, learned Public Prosecutor, State of Arunachal Pradesh on behalf of the State respondents in both the appeals as well as of the reference.

5. Mr. Roy, learned Counsel referring to the depositions of the prosecution witnesses including the Doctor's evidence, who conducted the post mortem examination on the dead body, has submitted that admittedly there is no witness to the occurrence alleged and the conviction was based on circumstantial evidence as well the alleged evidence leading to the discovery of the skeleton. According to the learned Counsel the chain of circumstances in the present case is not complete and accused in fact did not lead the police party to discovery of any fact so as to record conviction. It has therefore been submitted that the prosecution in fact could not even establish that the skeleton allegedly recovered was the skeleton of the victim and, therefore, in fact the death of the alleged victim was not proved by the prosecution. Referring to the post mortem examination report (Ext. 5), the learned Counsel has further submitted that the injuries on the said skeleton having been found as cut of left femur bone sharply in between the upper 2/3rd and lower 1/3rd just above the left knee joint and the cause of the death having been found to be because of the injuries caused by the show weapons, the prosecution's case that

the victim was killed by gun fire till through as no bullet injury was found on the decomposed body. It has further been submitted that the prosecution did not sent the skeleton for any forensic examination to establish that it is of the alleged victim who was allegedly killed. The learned Counsel further submits that the judgment of conviction recorded against the appellant is not based on any evidence as the prosecution has to prove the charges against the appellant beyond all reasonable doubt.

6. The learned PP on the other hand supporting the judgment of conviction recorded by the learned trial court has submitted that the conviction being based on the circumstantial evidence and the chain of circumstances having been complete, i.e., the incriminating circumstances such as recovery of article belonging to the deceased from the custody of the accused/appellant and the seizure of gun from his possession, threatening the witnesses and also absconding of the accused, having been proved, conviction was rightly recorded by the learned trial court. It has further been submitted that in fact accused person led the police party to recover the skeleton and at the instance of the accused the skeleton was recovered from the jungle. The learned PP, therefore, submits that it is not a fit case where the accused can be acquitted from the charges levelled against him and hence the judgment of conviction recorded by the learned trial court may be confirmed.

7. PW5, who lodged the FIR in his deposition has stated that on 19.5.1999 when he was at Taliha he got the information about the killing of his father being informed by Smt. Pone Bimpak, PW3 and he immediately rushed to Daporijo and informed his three brothers who are staying at Daporijo at that point of time. It has further been deposed by the said witness before the court that in the morning of 10th May, 1999 all the four brothers including two brother-in-laws, namely, Tapor Mera and Kengm Mera (who were not examined) went to the jungle for search of the dead body but though they searched the dead body for 5 days they could not find anything. The said witness has also deposed that he was informed by Smt. Pone Bimpak, PW3 that the accused threatened to kill all the brothers and besides that the accused himself came openly and threatened them to kill if they go for the search of the dead body in the jungle. PW5 during the examination in chief has also stated that thereafter he made a complaint before the police to apprehend the accused and to recover the dead body. Sri Dungsing Bimpak, PW5 during his examination-in-chief has further stated that though the accused person was arrested after about 2 months of incident, initially he did not disclose anything regarding the killing, but subsequently he was severely beaten up and then the accused confessed the killing and led the police to recover the dead body of the deceased. Regarding the motive for killing of his father this witness has stated that his father was killed because of the enmity as the accused was found guilty by "Kebang" for making false charge and accordingly he was fined of Rs. 5,000. Replying to the question put by the court as to whether he informed the police about the threatening given by the accused, this witness has stated that he made a written statement to Taliha P.S. According to the FIR (Ext. 1)

the same was lodged by PW5 on 19.5.1999, which is contrary to his deposition before the court as he stated that the four brothers went to the jungle, for search of the dead body and they searched for the body for 5 days and could not find anything and thereafter only they lodged the FIR. This witness in reply to the question put by the court has stated that he informed the police in writing about the threatening of the accused but in fact nothing has been mentioned in the FIR lodged by this witness before the police. This creates doubt about the threatening allegedly given by the accused as well as lodging of the FIR by PW5 himself.

8. Smt. Pone Bimpak, who according to PW5 informed him first and also informed him about the threatening given by the accused that her brothers will also be killed, was examined as PW3 by the prosecution. This witness, in her evidence before the court has stated that on 18.5.1999 when she was returning from cultivation she heard firing of two gun shots and after reaching home she prepared the food and was waiting for the deceased, Sidung Bimpak's arrival. She has further stated that when she took her meal and went to bed, Kobin Bimpak (PW2) came and informed her that Sidung Bimpak will not come and while discussing the matter one Rakpor Bimpak (not examined) informed that they should flee away from the house as the accused killed Sidung and, therefore, all the relatives fled away from the house towards Damporjo side. It has further been stated that on hearing the information about Sidung's death the relatives came and ask her to show the place where she heard the gun shots and accordingly she took them to the said place and at that time the accused threatened her and attempted to kill her for helping them to show where the dead body was expected. PW3 who is the mother-in-law of the deceased during cross-examination stated that she did not see the occurrence but was informed by the villagers only. In her cross-examination she has also admitted that when she went to jungle for showing the relatives of the deceased where she heard the gun shots, there were as many as five persons including Dongsing Bimpak (P.W.5) and others, namely, Dongpak Bimpak, Sri Donpu Bimpak, Late Tepe Bimpak and the another villager, who were, however, not examined by the prosecution. PW5, who was allegedly present when the accused threatened PW3 for showing the place where she heard the gun shots in his deposition did not support the version of PW3, as PW5 has not stated anything about any threatening given by the accused and she simply stated that she was informed by PW3 only. PW5 never stated that he was also present when the accused threatened PW3. Admittedly both PW3 and PW5 are related witnesses, the former being the mother-in-law and later the son of the deceased. Their evidence has no doubt can not be brushed aside as they are related witnesses, but at the same time their evidence are to be scrutinized carefully. As discussed above, the PW3 and PW5 did not support each other in their evidence. Both the witnesses tried to improve then version so as to implicate the accused/appellant to the occurrence. Therefore, the evidence of both PW3 and PW5 are not at all trustworthy to place reliance for the purpose of recording the conviction of the the accused/appellant. Moreover, the other witnesses who were

allegedly present, as stated by PW3, when the accused threatened PW3 for showing the place where she heard the gun shots, were not examined by the prosecution and they were in fact withheld. They being the villagers would have been the most neutral person to depose about such incident. The conduct of the prosecution for withheld of such persons from the court creates serious doubt to the deposition of PW3 as well as about the prosecution story.

9. PW1, Kokap Bimpak in his deposition has stated that on 19.6.1999 when he was at Taliha his younger brother Kobin Bimpak (PW2) informed him that the accused killed Sidung. He has stated that on the same day he informed the police at Taliha P.S. about the killing of Sidung by the accused. According to this witness, his brother Kobin has informed him and accordingly he informed the police by filing a written "ejahar" on 19.5.1999 about killing of his father. From the depositions of the PW1 as well as PW5 about the lodging of the FIR, doubt arises as to who in fact lodged the FIR, as, according to PW1, he lodged the FIR but the FIR (Ext.1) shows that it was lodged by PW5. PW1 in his deposition has further submitted that sons and other relatives of Sidung went to the jungle for search of the dead body but accused, Binda Dimpak has threatened and did not allow anybody to get the dead body. This witness has also stated that the accused led the police team where the dead body was lying and the same was recovered by the police in presence of the Circle Officer, Taliha. But the said officer was not examined by the prosecution in support of its case that the accused led the police to recover the dead body. During cross-examination this witness has stated that there was enmity between the accused and the deceased relating to imposition of fine on the accused by the "Kebang". This witness during cross-examination has also admitted that he did not go to the place of occurrence where the dead body was found but he saw it in the police station only. This witness in his examination-in-chief has stated about the accused leading the police party to recover the skeleton of the victim. From the statements made during cross-examination it is clear that he was not present when the accused allegedly led the police party to recover the body of Sidung as he has categorically stated that he did not go to the place of occurrence where the dead body was found and he saw deceased Sidung first time in the police station. This witness in his deposition has also stated that sons and relatives of Sidung went to the jungle in search of the dead body and the accused threatened them. But PW5, who in his deposition has stated that he along with other four brothers went to the jungle in search of the dead body. In his deposition, PW5 has not stated anything about the presence of PW1 in the place of occurrence at that point of time when the brothers went in search of the dead body and also about giving any threatening by the accused. Therefore, the evidence of Kokap Bimpak, PW1 is not found to be trustworthy and can not, therefore, be relied upon for the purpose of recording the conviction against the accused/appellant.

10. PW2, Kobin Bimpak, in his deposition has stated that on 18.5.1999 while he was taking meal at about 9.00 PM his elder sister, who is the wife of the deceased, came

to his house and informed him about missing of the deceased and requested him to search for her husband. This witness has stated that accordingly he came out to find out the where about of the deceased. He having found nothing regarding the whereabouts of the deceased, he went to the house of accused, Binda Bimpak and found that all family members fled away from the house, which leads to his presumption that Binda Bimpak has killed the deceased. During cross-examination, he has stated that he heard someone telling that the accused had killed his brother-in-law. In answering to the question put by the court as to whether he straightaway went to the house of the accused having failed to trace out his brother-in-law, this witness has stated that he did not even come to the house of the accused but he heard from other persons that the accused has killed his brother-in-law. From the deposition of this witness, it is, therefore, evident that his story of visiting the house of the accused person and fleeing of the family members are completely false as he himself admitted on being asked by the court that he never went to the house of the accused and he heard about the killing of his brother-in-law from some other persons without naming them. According to this witness, he was informed by his elder sister, i.e., the wife of the deceased Smt. Pone Bimpak. But Smt. Pone Bimpak, PW3 did not support that version of the PW2. This witness has only presumed that accused killed Sidung. The evidence of this witness is also not at all trustworthy so as to base the conviction.

11. Smt. Konga Bimpak, widow of Sidung Bimpak was examined as PW4 by the prosecution. She in her deposition has stated that Smt. Pone Bimpak (PW3) the other wife of the deceased as well as the deceased and others were in the cultivation field and in the evening time when the lady was returning to the house, the deceased went to the jungle for hunting of birds and they heard the gun shots from the jungle. She has further stated that as Sidung did not return till late night she informed the villagers. It has further been stated by this witness that after sometime the accused threatened his brother and other relatives to leave the village telling that he has killed Sidung. According to this witness, she has informed his sons and relatives staying at Daporijo and Taliha who came home and searched for the dead body. But as they were threatened by the accused they have decided not to search for the dead body. During cross-examination, this witness has stated that she left the cultivation field sometime earlier than PW3 and the deceased. According to this witness, she informed the villagers about Sidung not returning from jungle who went for hunting and she informed his sons including the PW5 and who though ready to go in search of Sidung but did not do so as the accused threatened them to kill, But PW5 himself did not support the version of PW4 as according to PW5 he was informed by PW3 and thereafter he informed other three brothers staying in Daporijo. The version given by this witness and by PW5 regarding the search for the dead body as well as the threatening given by the accused are contradictory. According to PW5 they searched the dead body for 5 days and he has not stated anything about the threatening given by the accused to him or to any of the

brothers. Therefore, the evidence of PW4 also can not be relied upon for the purpose of recording conviction, as her statement is not found to be truthful and reliable.

12. PW6. Sri Mito Riba who was the Officer-in-Charge of Taliha Police Station and conducted the investigation in his deposition has stated that during investigation he along with the Magistrate proceeded to the place of occurrence in the jungle but in spite of thorough search the dead body of the deceased could not be traced out. But, subsequently upon interrogation, the appellant stated that he killed Sidung because he had illicit relationship with his wife. According to this witness at the time of arrest his subordinate seized the gun from the possession of the accused person in presence of the witnesses, namely, (1) J.T. Obey, C.O. TLH, (2) T. Norah and on the basis of revelation made by the accused person during interrogation, he along with the police team, accompanied by the villagers of Bimpak village proceed to the place of occurrence and recovered skeleton of the deceased and also found 14 numbers of pellets and a local made carry-bag, local cap, local dao with a cover and a local bidis. Thereafter skeleton was sent for expert opinion to Taliha Hospital. During cross-examination this witness has stated that he seized two guns from the accused person and empty cartridge were not recovered from the place of occurrence as well as from the accused person and he can not say from which barrel of the gun the recovered pellet came out. This witness has further stated that none of the guns seized including the articles seized in connection with the case are seen in the court.

13. PW7, Nitin Geba, I.C.O.C. of Taliha P.S. who arrested the accused person from nearby jungle has stated that he seized one SBBL gun along with one Tagin knife with cover and one cartridge and one torchlight belonging to the accused person. He has also stated that seizure was made in presence of two witnesses J.T. Obey, CO. Taliha and court, T. Nora. During cross-examination he stated that he did not seized the gun licence of the gun and also that he seized unused cartridges.

14. From the deposition of PWs6 and 7, it is, therefore evident that according to PW6 two guns were seized but according to PW7 only one gun was seized and both witnesses stated that seizure was made in presence of J.T. Obey, CO., Taliha and T. Norah but the prosecution did not examine those witnesses to prove the seizure. According to PW6, during interrogation the accused revealed about the place of occurrence as well as the killing of Sidung and on the basis of such revelation he along with police team accompanied by the villagers went to the place of occurrence and recovered the skeleton. None of these witnesses have stated that the accused person was also present when the skeleton was recovered from the jungle. According to these witnesses other villagers accompanied them during the recovery of skeleton but no such villagers were examined by the prosecution. Even PW7, who was part of the police party, who arrested the accused person and make seizure of the gun also did not state anything regarding the recovery of skeleton. That apart, those witnesses to the seizure seizing the skeleton were not examined. The witness

PW6, in fact has admitted in his cross-examination that he can not say from which of the two guns seized, shots were fired. This witness has admitted that guns were not sent for examination to the ballistic experts. None of the witnesses have stated anything about the recovery of any article belonging to the deceased from the possession of the accused person. Though the learned PP. has submitted that one of the circumstances linking the accused to the offence alleged is the recovery of articles belonging to the deceased from the possession of the accused. Non-sending of the guns, which according to the PW6 are two in number and according to PW7, one in number for forensic examination and to ballistic experts creates doubt about the credibility of the prosecution story.

15. The PW8, the Doctor who conducted the autopsy in his deposition has stated that on examination it was found that skeleton was incomplete and it was found to be skeleton of Sidung only being identified by the son, Dungsing Bimpak, PW5. He has stated that body was mutilated having injury caused by sharp cutting weapons and the identification of the person came from a cane hat, cane bag (local-made) and necklace and Dao with cane cover which was identified by his son, PW5. In the post mortem report which was exhibited as Ext. 5, no guns injury was found on the dead body but one sharp cutting injury was found which has resulted in death. The medical evidence of PW8 has completely demolished the prosecution story that the person was killed by gun shots. It also creates doubt about whether the skeleton was at all the skeleton of Sidung who was allegedly killed by the accused/appellant, as according to the prosecution story Sidung was killed by the accused by firing two gun shots, but according to the medical evidence the death of the person, whose skeleton was examined, was caused due to the cut injury in the left knee joint. The medical evidence also, therefore, do not support the prosecution story.

16. The only circumstances, which, therefore, appears against the accused person is the alleged threatening and fleeing away from the place of occurrence. We have discussed the evidence adduced by the prosecution witnesses regarding threatening given by the accused and found that the prosecution story regarding threatening given by the accused is not reliable and trustworthy. The other circumstance is that the accused fled from the village. Naturally, there was an enmity between the accused family and the deceased family relating to some allegation of the deceased having illicit sexual relationship with the accused wife and inflicting of punishment on the accused by "Kebang" for his false deposition. It is also in evidence that the accused family fled away from the village when they were informed by villagers that the accused killed the deceased. That circumstance cannot link the accused person to the offence alleged against him. Apart from that circumstance, there is no other circumstances against the accused/appellant.

17. It is a settled position of law that to maintain the conviction on the basis of the circumstantial evidence the chain of circumstances has to be complete and the facts and circumstances from which the conclusion of guilt is sought to be drawn must be



fully established beyond any reasonable doubt and such circumstances must be consistent and unerringly pointed to the guilt of the accused and the chain of circumstances must be established by the prosecution.

18. In the instant case, as discussed above, the circumstances which according to the prosecution appears against the accused/appellant cannot be taken to be true and the prosecution has failed to establish the circumstances and, hence, the accused cannot be convicted on the basis of such circumstantial evidence.

19. Section 27 of the Evidence Act provides that when any fact is deposed to as disclosure in any consequences of information received from a person accused of any offence, in the custody of a police officer, so much if such information, whether it amounts to a confession or not, or relates distinctly to the fact thereby discovered may be proved. Unless the ingredients of Section 27 are proved, no conviction can be passed on the fact leading to the discovery. In the instant case as discussed above only the PW6 in his deposition has stated that accused disclosed certain information and in pursuant to which the skeleton was recovered, in presence of villagers and other members of the police team. PW7 who arrested the accused person did not support that version. PW6 also did not prove what revelation was made by the accused which lead the police party to recovery. According to the PW6 the accused person did not accompany the police party to the jungle to recover the skeleton who was accompanied by the villagers and other members of the police team. The said villagers were not examined. Moreover, the prosecution also could not prove whether the skeleton which was recovered was that of Sidung, the person who was allegedly killed by the accused/appellant. Therefore, in our view the ingredients of Section 27 are absent in the instant case and, therefore, it cannot be said that the accused led the police party to the recovery, hence, the accused can not be convicted in aid of Section 27 of the Evidence Act.

20. The learned Additional Sessions Judge has recorded the conviction basically on the basis of circumstances as the accused has threatened the relatives of Sidung and the accused led the police team to recovery of the skeleton as well as on the fact of enmity between the accused and the deceased.

21. We have already discussed the entire witnesses on record and found that those were no circumstances which can linked the accused to the offence alleged and in fact the accused did not lead the police party to recover the skeleton.

22. The other charge levelled against the accused/appellant was u/s 27 of the Arms Act. For punishing an accused person u/s 27 of the said Act the prosecution must prove the use of any arms or ammunition in contravention of Section 5 or use of any prohibited arms or ammunition in contravention of Section 7 of the Act. Section 5 of the Arms Act provides that no person shall use, manufacture, sell, transfer, convert, repair, test or prove or expose or offer for sale or transfer or have in his possession for sale, transfer, conversion, repair, test or proof any fire arm or any other arms of

such class or description as may be prescribed or any ammunition unless he holds in this behalf a licence issued in accordance with the provision of the Act and the Rules framed thereunder. Section 7 prohibits acquisition or possession or of manufacture or sale of prohibited arms or prohibited ammunition, unless specifically authorised by the Central Government in this behalf.

23. In the instant case PW6 in his deposition has stated that two guns were seized from the possession of the accused but he did not seized the licence. It is not the case of the prosecution that the accused/appellant did not have any licence in respect of the guns seized. The prosecution has also failed to prove the use of said guns for commission of any offence. Therefore, the prosecution has failed to prove the ingredients of Section 27 of the Arms Act, so as to convict the accused under the said provision of law.

24. In view of the aforesaid discussion, we are of the view that the prosecution has failed to prove the charges levelled against the accused/appellant beyond reasonable doubt and, hence, the accused person is entitled to acquittal. The accused person is, therefore, acquitted from the charges levelled against him. The judgment of conviction recorded by the learned trial court is hereby set aside. The appellant is set at liberty if not wanted in connection with any other case.

25. The appeals stand allowed. The reference is also answered accordingly.