
(2000) 05 GAU CK 0004

Gauhati High Court

Case No: Criminal Appeal No. 33 of 1996

Abdur Rouf

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: May 8, 2000

Acts Referred:

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

Citation: (2000) 3 GLT 284

Hon'ble Judges: P.G. Agarwal, J; N.C. Jain, J

Bench: Division Bench

Advocate: H.R.A. Choudhury and N.H. Majarbhuiya, for the Appellant; T.N. Srinivasan, Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

N.C. Jain, J.

1.This criminal appeal has been filed by Abdur Rouf, the sole Appellant; whereas initially three persons, namely, Jaifor Ali, Moti Ali and the Appellant were accused of commission of the crime. The Appellant has been convicted u/s 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. The other two accused persons died during trial and this is how the present appeal has been filed only by the sole Appellant.

2. The prosecution story has been unfolded by the mother of the deceased Alfori Bibi by lodging the FIR at the Karimganj P.S. on 10.3.86 at 12 O'clock (a.m.) alleging therein that at 7.00 P.M. on the previous day the three accused persons i.e. the Appellant, Jaifor Ali and Moti Ali, both sons of Late Momtaz Ali called her son Aziruddin from her house. After half an hour a hue and cry from the western side of the residence of Mokram Ali was heard and then people went to the place of occurrence. They saw her son lying dead and the accused persons going away from

the place of occurrence. The dead body was lying at the place of occurrence.

3. The prosecution in support of its case has examined P.W. 1 Moulana Samsul Islam, P.W. 2 Balu Mia, P.W. 3 Kamaruddin, P.W. 4 Dr. Nazimuddin Ahmed, P.W. 5 Chinmoy Dutta and P.W. 6 Jugamoy Deb.

4. Since P.W. 2 happens to be the eye witness, his statement need be examined in the first instance. He has stated that he knew the deceased Aziruddin and the accused who belonged to his village. Aziruddin's mother Alfori Bibi, according to him, has already died. The witness went on to state that the occurrence took place at about 7/7.30 p.m. about 9/10 years back when he was irrigating his cultivable land with water. He heard hue and cry from the eastern direction and went there and in the flash of torch light, he saw accused Moti Flashing torch light while Abdur Rouf, the Appellant and Jaifor were striking the deceased Aziruddin with daos. The witness further stated that at that time Mokram Ali and Kamaruddin came and he told them about the occurrence. All the three persons then went to the injured and at that time the accused persons fled away. They saw cut injuries upon the person of Aziruddin which were bleeding. Aziruddin was lying dead. His face was slashed off. Later on many people assembled and the police came the next day. The witness was cross-examined at length.

5. In cross-examination he stated that his house was half a mile away from the place of occurrence which took place in the month of March/April. He admitted that he was related to the deceased as paternal aunt's husband. He denied the suggestion that Moti was not flashing the torch and the other two accused were striking the deceased with dao. The witness further stated in cross-examination that the place of occurrence was 60 yards away from his land and that there were no residential houses nearby. He was unable to give the dag and khatian number of his land. He admitted that Samsul Islam, P.W. 1, was his neighbour and nephew. He denied the suggestion that he was not irrigating his land and that he did not hear hulla. When cross-examined further about the location of his land, he stated that on two sides of his land there were cultivable land; whereas on third side was tilla. He sated that at night he did not go to the house of the deceased and so also his sons. He stated that the members of the family of Aziruddin visited the place of occurrence at night. He denied the suggestion that he did not see the occurrence and that he falsely implicated the accused persons. He denied the suggestion that in his statement to the police he stated that Moti had struck Aziruddin and that Mokram and Kamaruddin had gone to the place of occurrence.

6. P.W. 3, Kamaruddin is the elder brother of the deceased. He stated that on the date of occurrence at about 7 he heard noise (hullah) from the direction of south when he was at the shop of one Siddique Ali. He rushed to that direction and after proceeding 10/12 nals at the place of occurrence he could see by flashing torch light that the Appellant and Joifor were striking the deceased with daos and daggers whereas Moti was flashing a torch. He raised a hue and cry on seeing the

occurrence. He could see after going near the deceased that he sustained cut injuries on his person. Aziruddin died instantaneously. The witness further stated that the accused persons fled towards east. According to him, Balu Mia, Mokram Ali, Samsul Islam, Sorbar Ali and Ors. came. He narrated the occurrence to his mother after one hour. The maternal uncle of the witness lodged the FIR. The police came the next day and took the dead body. In cross-examination the witness stated that he used to live in the house adjacent to the house of Aziruddin deceased. He stated that it was a fact that he stated before the police that in the evening he had been fishing in the pond when he heard hue and cry. He further stated in cross-examination that it was not a fact that in his statement to the police he did not say that Moti along with two other accused struck Aziruddin and that the assault had been done with dao and dagger. He further stated in cross-examination that he become unconscious after seeing his brother dead and that his paternal uncle Mokram Ali went to the police station. Next day in the morning, according to the witness, the people of the village saw the dead body. He further stated that it was not a fact that he did not state to the police about the name of Mokram Ali and that he did not say to the police that he has seen the occurrence by flashing torch light. P.W. 2 was described by him as neighbour and grandfather. It was further stated by him that his mother used to call him uncle. He denied the suggestion that all of them have filed false case and that the accused persons were found at the place of occurrence.

7. P.W. 1 Moulana Samsul Islam stated that he knew both the accused and that on the date of occurrence he returned from Phultoli village and when he and his next door neighbour Hazi Sorbor Ali reached the southern side of the homestead of his co-villager Mohabat Ali, they heard hue and cry from the western direction and at that time the accused Jaifor Ali and Moti came running from the western direction. The witness further stated that they were armed with dao and dagger and that their bodies were smeared with blood. The accused went to south and they were seen by him in the light of the torch. The witness and Sorbor Ali thereafter reached the place from where hue and cry came and they saw Aziruddin lying dead on the side of the hillock. Balu Mia, Mokram Ali and Kamaruddin told the witness that accused Joifor and Moti killed Aziruddin.

8. The witness was cross-examined at length. He stated that it was not a fact that his residence was situated at Belala village. The aforesaid village was stated to be one and quarter mile away from the place of occurrence. Phultoli was stated to be one and half mile away from the place of occurrence. The witness went on to state that his house was about 100 nals away from the place of occurrence. He denied the suggestion that he did not tell the police that he had seen the weapons in the hands of the accused and the blood on the persons. He further denied that it was not a fact that in his statement to the police he did not say that he had seen cut injuries on the person of the deceased and that he found Kamaruddin, Balu Mia and Mokram Ali at the place of occurrence. He further stated in cross-examination that it was not a fact

that he did not tell the police that Mokram Ali, Moti and Kamaruddin told him that the accused persons have cut Aziruddin. The witness went on to state that they were returning from Phultoli along a beaten path which was not a road and that he was present when the police came on next date. He denied the suggestion that he did not go to Phultoli village and that it was false that on the day of occurrence he returned from the village. He further stated that he went to the house of the Aziruddin at Phultoli village and that it was not a fact that he and Sorbor Ali had seen the accused. He repeated again in cross-examination that the night was dark and that he had a torch in his hand. He admitted that there was a rape case against him in which he was acquitted. He denied the suggestion that the members of the accused side gave evidence in the rape case and out of the grudge against the accused persons, he gave false evidence. He admitted that Moti and Jaifor have already died.

9. P.W. 4 Dr. Nazimuddin Ahmed performed post mortem examination and found following eleven (11) injuries on the person of the deceased:

1. Incised wound 7"x3"x3.1/2" over the bridge of the nose and nose was hanging.
2. Incised wound 9"x2"x4" in the left side of the head.
3. Incised wound 2"x1"x1/2" on the anterior aspect of the left arm.
4. Incised wound on right parietal region measuring 6"x2"x2.1/2".
5. Incised wound 5"x1 1/2"x4 1/2" just below left ear.
6. Five wounds 3"x1"x2" in the sacro aliac region on the right side.
7. Right leg was hanging by skin only by a cut above the knee.
8. Incised wound 3"x3"x2" in the mid right Calf.
9. Incised wound medial aspect of right sole 3"x2"x1".
10. Abrasion front of the abdomen 1"x2" below the umbilicus.
11. Incised wound superficial in nature. It is in the left side of the chest below the nipple 1"x1/2 cm.

The death in the opinion of the doctor was due to shock caused by massive haemorrhage from multiple injuries. The doctor further opined that death was instantaneous due to head injury and that most of the injuries, namely 1 to 9 and 11 could have been caused by dao or dagger. All the injuries except injury No. 10 were found by the doctor to be sufficient collectively or individually to cause death in the ordinary course of nature. When cross-examined, the doctor stated that he had not given the age of the injuries and that he did not know whether the deceased was taken to the hospital as alive or dead. He further stated in cross-examination that it appeared from the copy of the post-mortem report that the deceased was

despatched from Seki Kani Sail at 5.00 p.m. arriving at the morguary the same day at 8.30 p.m. The witness went on to state that the injuries might have been caused by sword or sharp pointed weapon and that he could not say as to how much time would be taken by one man to cause all the injuries.

10. P.W. 5 Chinmoy Gohain had written the ejahar (FIR) on the asking of the informant i.e. the wife of the deceased and he stated that after writing the ejahar he took thumb impression of the complainant. He denied the suggestion that he did not write the FIR as per the words of the informant, but as per the words of some other persons i.e. Abdur Rahman and Samsul Islam.

11. P.W. 6 Jugamoy Deb is Assistant Sub-Inspector of Police who stated that he knew Kanti Moy, Assistant Sub-Inspector of Police and was acquitted with his handwriting and signature and that the case diary was written by Kanti Moy who has since died. Whatever was stated by this witness, it was from the record in view of the death of the Investigating Officer. In cross-examination he stated that P.W. 1 Samsul Islam had not stated before the Investigating Officer that they were armed with dao and dagger and that they were smeared with blood and that they fled away towards south. It is further stated by him that P.W. 1 had not stated before the Investigating Officer that he saw in the flash of the torch light that they were fleeing and further that he did not state that he found Balu Mia and Kamaruddin there. The witness further stated that P.W. 2 Balu Mia did not state before the Investigating Officer that he had seen in the focus of the torch light that one person was focussing torch light and the other persons were giving blows with sharp weapons on the deceased and that Moti was holding torch. He further stated that P.W. 2 did not state before the Investigating Officer that Makram Ali and Kamaruddin came and he narrated the occurrence to them and thereafter they went near the injured and at that time the accused fled away. This witness P.W. 6 was further constrained to admit in cross-examination that P.W. 3 Kamaruddin had not stated before the Investigating Officer that he heard cry from the shop of Siddique Ali and that P.W. 3 stated before the Investigating Officer that he was fishing in the tank when he heard the cry. P.W. 6 also admitted during cross-examination that P.W. 3 Kamaruddin did not state before the Investigating Officer that he saw in the focus of torch light from a distance of 10/12 nals that the Appellant and Jaifor were holding the deceased. P.W. 6 admitted that there was one police patrol post at Kaliganj. He admitted that the case was registered on 10th of March/86 at 12.00 a.m.

12. The accused was examined u/s 313 of the Code of Criminal Procedure. All the material circumstances were put to him. His case is one of denial.

13. We have reappraised the entire evidence in the earlier part of the judgment and are of the considered view that the prosecution has been able to prove its case beyond reasonable doubt. P.W. 2 is an eye witness and there is absolutely nothing to disbelieve him. His land is near the place of occurrence. He has given minute details and has clearly stated that he had seen with the help of torch light that the

Appellant and Jaifor were assaulting the deceased; whereas the third accused Moti was flashing the torch light. When all the three persons i.e. P.W. 2, Mokrom Ali and Kamaruddin went near the deceased they noticed cut injuries upon the person of the deceased which were bleeding. He went to the extent of stating that Aziruddin was already lying dead. Although the witness was cross-examined at great length, but nothing could be elicited in his cross-examination making him unworthy of reliance. The factum of his being related with the deceased does not create any dent in the prosecution case as his presence at the place of occurrence was natural on account of location of his cultivable land. The place of occurrence being only 60 yards away from his land, his presence at the place of occurrence could not be doubted.

14. P.W. 3 Kamaruddin despite being elder brother of the deceased is equally reliable as he reached the place of occurrence after hearing hue and cry. He has also stated as was stated by P.W. 2 that he flashed the torch light and saw the Appellant and Jaifor assaulting the deceased with daos and dagger; whereas accused Moti was flashing a torch. On this point the statement of both the eye witnesses is in conformity with each other. He also like P.W. 2 went near the deceased and saw cut injuries. He has also stated like P.W. 2 that Aziruddin died instantaneously. This witness like P.W. 2 was also cross-examined at length. He stated in cross-examination that he used to live in the adjacent house where deceased Aziruddin lived. We have gone through the cross-examination of this witness minutely. Nothing has come in cross-examination making his presence doubtful at the place of occurrence.

15. The statement of P.W. 1 corroborates the statements of P.Ws. 2 and 3 to the extent that he had seen the accused persons coming with dao and dagger and that their bodies were smeared with blood. This witness is also equally reliable.

16. The statement of P.W. 4 Dr. Nazimuddin Ahmed also supports the eye version account, inasmuch as, he found as many as 11 injuries on the person of the deceased. Out of the 11 injuries, most of the injuries are incised wounds including head injury. The doctor opined that all the injuries excepting injury No. 10 were collectively or individually sufficient in the ordinary course of nature to cause death.

17. P.W. 6 Jugamoy Deb, the Assistant Sub-Inspector of Police could not state anything from his personal knowledge because it is he who has not investigated the case. He never recorded the statement of any prosecution witness. The Investigation Officer has since died during the pendency of the trial, whatever has been deposed by him it is only after seeing the records. In view thereof, we hasten to add that if there is any contradiction here and there or if there is any lapse on the part of the investigating agency, the same will have to be ignored on a account of non-availability of the Investigating Officer. Had the Investigating Officer been alive, he could have explained about the recording of statements of the prosecution witnesses during investigation. Above all, once we believe the statements of the eye

witnesses which we have in the earlier part of the judgment, some minor discrepancy in the statement of the prosecution witnesses cannot be said to make the prosecution case doubtful. We, while placing our full reliance upon the prosecution evidence find the complicity of the Appellant in the commission of the crime. There is absolutely nothing in the appeal which, in our considered view, deserves to be dismissed. The appeal is thus dismissed.

18. Before parting with the judgment, it is necessary to deal with some arguments of the learned Counsel for the Appellant. It has been vehemently argued that the investigating agency has not seized any torch from any of the witness. It has further been argued that P.W. 2 was an old man aged 70 years and he would not be irrigating his land with water at 7.00 p.m. when he had five sons. The counsel has argued that P.W. 3 should be disbelieved as he is the elder brother of the deceased. The counsel has also pointed out to a discrepancy in the statement of P.W. 3, inasmuch as, he had stated at one stage that he heard hue and cry when he was present at the shop of one Siddique Ali; whereas in cross-examination he stated that he was fishing in the pond when he heard the noise. P.W. 1 has been described by the counsel to be a chance witness. It has also been argued that P.W. 1 should not be relied as he was an accused in a rape case.

19. Non seizure of the torches through whose lights the occurrence has been seen by witnesses does not help the accused for earning acquittal. If the investigating agency has in its wisdom or carelessness not seized the torches, it would not mean that the eye version account should be disbelieved. There is nothing improbable that an old man aged 70 years would water his fields at 7.00 p.m. It depends upon the nature of a person as to how much work he wants to do even if he has got his sons who can perform that very job which he is doing himself. Above all, P.W. 2 having given consistent version cannot be disbelieved simply because in normal circumstances he would not be irrigating his fields in the evening. There is absolutely nothing in the argument of the counsel for the Appellant that the statement of P.W. 3 should be discarded as he is the brother of the deceased. The factum of eye witness being a close relation only puts the court to a caution. We have gone through the statement of P.W. 3 minutely and have not been able to persuade ourselves to disbelieve him on the ground of relationship. May, be there is a discrepancy in the statement of P.W. 3 in the sense that he stated at one stage that he was present at the shop of Siddique Ali when he heard hue and cry and at Anr. stage in cross-examination he stated that he was fishing in the pond, such a discrepancy nevertheless would not create any dent in the case of the prosecution as the occurrence took place in the year 1986; whereas the statement of P.W. 3 was recorded on 19.5.94. The statement of P.W. 1 can also not be discarded on he ground that he was a chance witness. He has clearly stated that his house was about 100 nals away from the place of occurrence. Above all, he has seen all the three accused with daos and daggers in their hands. Equally untenable is the argument of the counsel for the Appellant that P.W. 1 should be disbelieved as he was accused in

a rape case in which the accused side had given evidence against him. P.W. 1 was acquitted in the rape case. No judgment has been brought on the record of the case showing that one accused or the other had appeared against P.W. 1 in that rape case

20. For the reasons recorded above, the appeal is found to be devoid of any merit and the same is ordered to be dismissed.