

(2012) 05 GAU CK 0010

Gauhati High Court

Case No: Criminal Appeal No. 98 (J) of 2006

Ganesh Mura at Fishi at Biren

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: May 23, 2012**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 304

Citation: (2012) 3 GLT 422**Hon'ble Judges:** Iqbal Ahmed Ansari, J; Arun Chandra Upadhyay, J**Bench:** Division Bench**Advocate:** Debajyoti Talukdar, Amicus Curiae, for the Appellant; K.A. Mazumdar, Add.PP, for the Respondent

Judgement

I.A. Ansari, J.

By the judgment and order, dated 3rd August, 2006, passed by the learned Sessions Judge, Golaghat, in Sessions Case No. 189 of 2004, the present appellant stands convicted u/s 302 IPC and sentenced to suffer imprisonment for life and pay a fine of Rs 2000 and, in default of payment of fine, suffer rigorous imprisonment for one year more. The prosecution commenced with the lodging of an Ejahar (in short, FIR), at the Dhekial police outpost, by Shri Dimbeswar Bora(PW1), who is gaonburah of village No.1 Sensowar, in Golaghat district, alleging to the effect, inter alia, that on the night of 12.9.04, some unknown miscreants had killed Biku Sadhani of his village and left the victim lying in a drain by the side of a PWD road. Based on this FIR, a General Diary (GD) entry was made and, in course of time, the FIR became the basis for registration of Golaghat PS Case No.443/2004, u/s 302 IPC, against some unknown miscreants. During the course of investigation, police visited the place of occurrence held inquest on the dead body arrested the accused, who allegedly made a judicial confession voluntarily and truthfully and, on completion of investigation, submitted charge-sheet against the accused-appellant u/s 302 IPC.

2. To the charge framed, at the trial, u/s 302 IPC, the accused-appellant pleaded not guilty.

3. In support of their case, prosecution examined as many as 8(eight) witnesses. The accused was, then, examined u/s 313 CrPC wherein, while claiming to be innocent, he did not deny that he had made a judicial confession before the Sub-divisional Judicial Magistrate(S), Goalpara(PW7), on 14.9.2004. No evidence was, however, adduced by the defence.

4. Having come to the conclusion that the accused-appellant was proved to have committed the offence of murder, learned trial Court convicted him accordingly and passed sentence against him as mentioned above. Hence, this appeal.

5. We have heard Mr. D. Talukdar, learned amicus curiae, and also Mr. K. A. Mazumdar, learned Addl.PP, Assam.

6. While considering the present appeal, it needs to be noted that as far as PW1, 2 and 5 are concerned, none of them had seen Biren (since deceased) being assaulted. Their evidence merely shows that on 11.9.2004, at around 6.30 AM, dead body of Biren was found lying in a nullah(sewer) on a PWD road. It is the evidence of PW3, which has great bearing in the present case. This witness has deposed that about eight months back, when he was on way back home, he saw the accused and the deceased quarreling and when he asked them, the accused-appellant assaulted him with a lathi and, then, ran away, leaving the lathi.

7. The defence, it may be noted, neither disputed nor denied the evidence of PW3. The evidence of this witness, therefore, proves that before the dead body of Biren was found, the accused and the said deceased were seen quarreling with each other. So far as PW4 is concerned, he is a witness to the inquest.

8. Dr. Mukul Sarma (PW6), who performed post mortem on the dead body on 12.9.2004, has found the following injuries:

1. Extensive sharp cutting wound over the right side of the head: 4 1/2" x 3" x 3 1/2"
2. Brain matter clotted with blood.
3. All the layers of the cranium lacerated and mixed with blood.
4. Fracture of the right forearm.
5. Extensive wound over the left side of the chest on the upper part below the flap.

On dissection right side of the lung lacerated and mixed with blood clot. Left lung also severely lacerated and mixed with blood".

9. It is in the evidence of Dr. Mukul Sarma (PW6) that the injuries are ante mortem in nature and the cause of death was shock and haemorrhage, which resulted from the injuries sustained by the deceased, Ext. 4 being the post mortem report.

10. Apart from the fact that the findings of the doctor and the opinion given by him with regard to the nature of injuries and the cause of death have gone unchallenged by the defence, we, too, do not notice anything inherently incorrect in the evidence given by the doctor with regards to his findings. We are, therefore, of the view that the injuries found on Biren's dead body were homicidal in nature and that the shock and haemorrhage, which resulted from the injuries sustained by him, became the cause of his death.

11. When we turn to the judicial confession made by the accused-appellant before Sub-divisional Judicial Magistrate(s), Goalpara (P W7), we find that the learned Magistrate had not only given sufficient time to the accused-appellant for reflection, but also had informed him about the consequences of his making confession as well as the fact that even if he chose not to confess, he would not be sent back to the police custody. The accused-appellant, however, made it clear, while answering the questions so put to him, that he was making his confession as he felt sorry, while fleeing away, and, as such, he decided to make confession and that was why, he had appeared at the police station. The accused-appellant was also told that if he chose to make confession, the same might be used against him as an evidence. When he was asked if he would like to take the help of an advocate, the accused-appellant opted not to have the services of any advocate. In response to the question whether he was assaulted by some one to make confession, or was assured that if he made a confession, he would be freed, the answer of the accused-appellant was in the negative.

12. In the circumstances indicated above, the learned trial Court has held the confession to be a voluntary made confession. We see no reason to take a different view, especially, when we notice that during the course of examination, u/s 313 CrPC, the accused-appellant did not dispute the fact that he had appeared at the police station voluntarily nor did he dispute that he made the confession before Sub-divisional Judicial Magistrate(S), Goalpara(PW7).

13. Having, thus, determined that the confession, in question, was voluntarily made by the accused-appellant, we are to, now, determine if the confessional statement was true. The confessional statement of the accused-appellant reads as under:

Around 8/9 p.m. on Saturday, I had a quarrel with Biku Sadhani at the cross roads. He was drunk. Come home, I was having a little liquor. At first I was eating rice at my house. I heard someone abusing me. Then gong out I met Biku Sadhani. I went to ask him the matter when he assaulted me in my legs and hands with a bamboo pole. Then out of anger, I returned home. Entering inside I did not find anything but a dao. Then I came out taking the dao. While searching for Biku, I saw him sitting nearby the cross roads without any wearing in the upper portion of his body. Then I cut him with the dao without waiting for a moment. Then I came home in a run. I told my wife to bring the open lamp. I saw in the light of the open lamp that they legs ere smeared with blood. Then I went towards the cowshed in search of a

bucket. I cleaned the blood the pond. After coming home, I again fled to Sepaguri line. Then I slept inside a school building. I returned home in the morning. I wanted to sleep but instead, I left for the tea garden. Later on, when I was returning home I saw many people surrounding the place where Bishnu was lying dead. After coming home, I again went to see the man. Going there, I saw Biku lying dead inside a road side nullah. Then I again came back home and fled from the place. That night, I stayed at elder sister's place at Salmora. In the morning, I again fled away and entered my elder sister's house at Bengenakhowa. I asked for roti and slept after having the roti. Around 11.30 am I have came to the P.S. directly from elder sister's house. Coming to the P.S. I told about the incident. From Golaghat P.S. I was taken to Dhekial and then to the court. I want to confess my guilt on my own. From the court, I have been sent to the jail. Today, I have come from the jail. I have confessed my guilt since I have committed a sin.

14. Apart from the fact that PW3 had witnessed the accused-appellant and the deceased quarreling with each other, the judicial confession, made by the accused-appellant, clearly shows that on the night of occurrence, the accused-appellant did have a quarrel with Biku(since deceased). It may be noted that according to the judicial confession, the deceased was in drunken state. On reaching home, the accused-appellant, too, had a little liquor; when he was having rice at his own house, he heard someone passing lewd comments at him and, after coming outside, he saw Biku Sadhani standing and, on being asked the reason for passing lewd comments at him, Biku Sadhani (since deceased) assaulted him with a bamboo pole. In a fit of rage, the accused-appellant returned home and found nothing, but a dao, which he lifted in his hand and, then, started searching for Biku and when he saw Biku sitting in a cross-road without having an apparel on the upper part of his body, he (accused-appellant), without waiting for a moment, gave blow on the person of Biku and ran to his house, where, in the light of a lantern, he saw his legs smeared with blood and, immediately, he washed it off. It is also in the judicial confession of the accused-appellant that at around 11.30 AM, on the following day of the occurrence, he went to police station directly and reported the matter there.

15. The judicial confession, which the accused-appellant has made, receives corroboration not only from the evidence of P W3, who saw the accused and the deceased quarreling with each other, but also from the medical evidence on record inasmuch as the injuries, found on the said dead body could have been caused by a sharp-cutting weapon like dao.

16. Situated thus, we have no doubt in our mind that the judicial confession was not only voluntary, but also true.

17. The question that, now, arises is: What offence, if any, the accused-appellant has committed?

18. While considering the question posed above, it needs to be noted that the deceased sustained, as the medical evidence on record discloses, as many as 5 injuries and that the blows were given not only on his head but also on the chest too. In the light of the injuries, which the said deceased sustained, it is apparent that the accused-appellant intended to cause nothing less than Biku's death and he(accused-appellant) did succeed in his intention.

19. The question that also confronts us is: Whether the accused-appellant could be convicted u/s 302 IPC? While answering this question, it needs to be noted that the confessional statement, which has become the foundation for conviction of the accused-appellant, clearly shows that the assault on Biku (since deceased) was caused without any pre-meditation and was preceded by lewd comments passed at him. The accused-appellant went to the deceased to know the reason for hurling invectives at him. The said deceased, instead of regretting, assaulted the accused-appellant on his legs and hands by a bamboo pole. In such a situation, the accused-appellant claims that he became so enraged that he returned home and finding nothing but a dao, he lifted the dao and started searching for Biku and, on finding Biku, he hacked Biku by dao. The acts of the accused-appellant, when considered in their proper perspective, make it more than abundantly clear that the accused-appellant, on being deprived of his power of self-control, by grave and sudden provocation, which the said deceased had provided, caused the death of Biku.

20. Because of the reason that the intention of the accused-appellant was, nonetheless, to cause Biku's death, his offence can be described to be an offence of not murder but culpable homicide not amounting to murder, which falls u/s 304(Part-I) of the Indian Penal Code. We are, therefore, clearly of the view that the learned trial Court has completely ignored the relevant factors, which ought to have been taken into account before holding the accused-appellant guilty of the charge of murder and the accused-appellant ought to have been convicted u/s 304(Part I) of Indian Penal Code.

21. This appeal, therefore, partly succeeds. The impugned judgment and order convicting the accused-appellant u/s 302 IPC stand set aside. The accused-appellant stands convicted hereby u/s 302(Part-I) of the Indian Penal Code. As regards the sentence, it may be noted, the accused appellant has been in custody since 14.9.2004.

22. In the attending facts and circumstances of the present case, we are of the view that the imprisonment, which the accused-appellant has already undergone, would serve the ends of justice if the said period of imprisonment is made the period of his sentence. We, accordingly, convict the accused-appellant u/s 302 (Part-I) of the Indian Penal Code and sentence him to suffer an imprisonment for the period, which he has already undergone. The accused-appellant be set at liberty forthwith unless he is required to be detained in connection with any other case. Send back

the LCR.