

(1988) 1 GLJ 456

Gauhati High Court

Case No: Criminal Appeal No. 95 (J) of 1984

Tetubar Deka Raja

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: March 7, 1988**Acts Referred:**

- Criminal Procedure Code, 1973 - Section 161, 164(5)
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 164(5)
- Penal Code, 1860 - Section 304 Part 2
- Penal Code, 1860 (IPC) - Section 304 Part 2

Citation: (1988) 1 GLJ 456**Hon'ble Judges:** J.M.Srivastava, J and S.Haque, J**Bench:** Division Bench**Advocate:** D.Goswami, A.Sarif, Advocates appearing for Parties

Judgement

Srivastava, J.

Appellant Tetubar Deka Raja was prosecuted on charge under section 302 IPC for the murder of his father Sivaram Deka Raja on 18.8.82 at about 4 P.M., was convicted and sentenced to imprisonment for life.

2. Briefly, the prosecution case as revealed in the First Information Report, Ext. 3. lodged on 18.8.82 at 6 P.M. at P.S. Raha, was that at about 4 P.M. that day, Tetubar Deka Raja, accused appellant, had assaulted his father Sivaram Deka Raja with lathi and feet, etc. and had also squeezed his throat as a result of which he had died a little later. The accused appellant had made extra judicial confession before Bhadra Singh Dewri, Headman and Matiram Bordoloi, a covillager. Bhadra Singh Dewri lodged the F.I.R. Investigating Officer, Sri Tapan Chandra Barua (PW7), arrived at the place of occurrence soon after and commenced investigation. Accused appellant who had been held by the public was arrested. Sketch map was prepared. Inquest over the dead body of Sivaram Deka Raja was held and it was sent for post mortem examination. The accused made a

confessional statement which was recorded by a magistrate. The investigation completed, charge sheet against the accused appellant was submitted.

3. The prosecution, in support of the charge, examined PW1 Dr. Prabin Barua who had conducted the post mortem examination on the dead body of Sivaram Deka Raja on 19.8.82, PW2 Upendra Chandra Gogoi, Judicial Magistrate, 1st Class, Hojai who had on 19.8.82 recorded the confessional statement of the accused appellant which is Ext. 1, PW3 Naren Das, a police constable who had escorted the dead body of Sivaram Deka Raja to Nowgong Civil Hospital for autopsy, PW4 Bhadra Singh Dewri, Headman, to whom the accused appellant is stated to have made extrajudicial confession and who had soon afterwards gone to the place of occurrence and thereafter lodged the First Information Report, Ext. 3, PVV5 Smti Anjali Deka Raja, wife of the elder son of Sivaram Deka Raja (deceased) who is stated to have been present at the place of occurrence, PW6 Matiram Bordoloi, a covillager who having learnt about the occurrence had gone to Bhadra Singh Dewri, the headman of the village and had informed him about the occurrence. He has also deposed about the arrival of the accused appellant soon after at Bhadra is place and has deposed about the extrajudicial confession made by the accused appellant, and PW7 Tapan Chandra Barua, Investigating Officer.

4. Accused appellant had pleaded not guilty to the charge. In examination, under section 313 of the Code of Criminal Procedure, hereafter the Code, the appellant had said that his father did not like him and used to quarrel with him. He did not, however, kill him. No evidence was produced in defence.

5. On consideration of the evidence, learned Sessions Judge, Nowgong, found the charge under section 302 IPC established, convicted and sentenced the accused appellant, as noted earlier.

6. Sri A. Sarif, learned counsel appearing as amicus curiae for the appellant, has submitted, that the prosecution had failed to prove the charge inasmuch as there was no evidence of any intention to cause death or even to cause such bodily injuries as were likely to cause death, that the appellant did not make any extrajudicial confession, and the confessional statement recorded by the Magistrate was in clear violation of the provisions of subsection (5) of Section 164 of the Code, that in any case the confession did not show the accused had intentionally caused the death of his father; that the evidence of PW5 Anjali Deka Raja at the trial was not reliable and that her statement during investigation revealed that following an altercation with his father the accused appellant had caught hold of his father by the neck and pushed him away as a result of which his father had fallen on the ground and sustained fracture injury, that his father who was then about 70 years of age had succumbed to his injuries about half an hour later. Sri Sarif has submitted that the charge under section 302 IPC cannot be sustained and the offence that can be said to have been committed was under section 326 IPC or at the most under section 304 Part II IPC. Sri Sarif has accordingly urged that since the appellant has been in custody since he was arrested, the period of sentence already

undergone, may be considered sufficient for the ends of justice in this unfortunate case.

7. On the other, hand Sri D. Goswami learned P.P., Assam has submitted that the deceased had died as a result of injuries caused by the appellant and since he had intentionally caused the said injuries, the appellant could not escape the liability for the offence under section 302 IPC. Sri Goswami has accordingly submitted that the charge under section 302 IPC had been established beyond any reasonable doubt and there is no good reason for interference with the judgment of the learned Sessions Judge.

8. We have considered the submissions of the learned counsel on both the sides, and also the evidence on record.

9. Dr. Prabin Barua, autopsy surgeon had found the following injuries on the person of .0 years old deceased Siva Ram Deka Raja :

1. Two crescentic marks of abrasion 2 cm. and 1 cm. in , length, in the left and right sides of the upper part of the neck respectively. Both the abrasions were at the level of upper border of adam"s apple. Internally, antemortem blood clots in soft parts of the neck. Fracture of the thyoid bone.

2. One abrasion, 2" x V", *n tne posterior aspect of left forearm.

3. One abrasion on posterior aspect of right arm, iġ½"xīġ½".

4. One abrasion on the back of the chest over the right scapula, 4" x 2".

5. Fifth rib fractured at costochoudral junction on right side. In the opinion of Dr. Barua, all the injuries were antemortem and the injury No. 1 was sufficient to cause death. The death was due to asphyxia resulting from throttling. In crossexamination, Dr. Barua said that the thyoid bone may be fractured otherwise than by pressure of hand. He also said that in case of throttling death follows almost instantaneously. It is, however, significant to note that in the instant case death did not take place instantaneously but followed after about half ah hour, as is clear from the evidence of PW5 Smti Anjali Deka Raja, the only eye witness. In view of this important fact that the death did not result instantaneously which should normally follow in a case of throttling if the intention was to kill a person by throttling, and also considering the other injuries which were abrasions and fracture of a rib, the medical evidence in this case, in our opinion, would not be sufficient to conclude, as a fact established beyond any reasonable doubt, that there was "any intention" to cause death or even to cause such bodily injuries as were in the ordinary course of nature sufficient to cause death. We accordingly think that on the basis of the medical evidence alone it should not be said that the aforesaid act committed constituted the offence of "murder", that is that some more facts supported by reliable evidence for the prosecution shall be required to establish that the offence committed was murder.

10. The other evidence for the prosecution may next be considered. Apart from the direct testimony of eye witness PW5 Smti Anjali Deka Raja, the prosecution has placed reliance on the extrajudicial confession said to have been made by the accused to PW4 Bhadra Singh Dewri, the headman, and PW6 Matiram Bordoloi, and the confession made by the accused before the Judicial Magistrate PW2 Upendra Chandra Gogoi.

11. In so far as the confessional statement Ext. 1 is concerned, we are of the opinion that it suffers from a serious infirmity which renders it illegal and consequently inadmissible in evidence. Therefore, even if it is found that the confessional statement was otherwise recorded in accordance with law and was true and voluntary, the said defect shall, in our opinion, be sufficient to exclude the confessional statement, Ext. 1. The confessional statement shows that the Magistrate had administered oath to the accused before he recorded the statement. The provision of subsection (5) of Section 164 of the Code read, as follows :

"Any statement (other than a confession) made under subsection (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded".

The provisions of subsection (5) of Section 164 of the Code clearly are that while recording a statement under section 164 of the Code, the Magistrate may administer oath to other persons except a person who is accused of having committed an offence. In our opinion, therefore, it clearly follows that the Magistrate cannot administer oath to the accused before recording his confessional statement and if he does so the statement is not in accordance with Section 164 of the Code and, therefore, is illegal and it should be excluded from consideration. The manner of recording the statement is to be as in Section 281 of the Code which nowhere provides for administration of oath before an accused is examined. In Phillip vs, State of Karnataka 1980 Cr. L. J. 171 (Karnataka) a Division Bench of that Court held that if oath is administered (before recording a confession under Section 164 of the Code) it is an illegality and as such the confessional statement loses its evidentiary value. In our opinion, therefore, Ext. I, the confessional statement recorded by PW2 Upendra Chandra Gogoi, Judicial Magistrate having been recorded after administration of oath, is inadmissible in evidence and accordingly is excluded from consideration.

12. The prosecution also relied upon the extrajudicial confession said to have been made by the accused to PW4 Bhadra Singh Dewri, the Headman, and also to PW6 Matiram Bordoloi. PW4 Bhadra Singh Dewri has said that on the day of occurrence at about 3. 00 P. M. Matiram had come to him and had said that Tetubar had killed his father and as soon as he had said that Tetubar himself came to him and said, "I have done something very serious. Everything is lost". PW4 Bhadra Singh Dewri said that he did not ask Tetubar what he had done so serious, because he had already heard it from Matiram. Bhadra Singh Dewri then went to the house of the deceased and on hearing the version

from the eldest daughterinlaw of the deceased, i.e. PW5 Anjali Dekaraja, be had the F.I. R. written which is Ext. 3. It is significant that even though the extrajudicial confession is said to have been made before the F. I. R. (Ext. 3) was written, there is nothing in it about the extrajudicial confession. The F. I. R. (Ext. 3) is as follows :

"Humble submission is that at about 4 P. M. this day, Sri Tetubar Deka Raja of Kahiquiri village assaulted his father, Sivaram Deka Raja, with lathi, feet etc., and also squeezed his throat. He died a little later.

I therefore, request you to come over immediately, investigate the occurrence and take necessary steps."

It is difficult to accept that if any extra judicial confession had indeed been made by the accused to the PW4 who had made the F. I. R., the said fact of extra judicial confession having been made would not have been stated in the F. I. R. Moreover, PW6 Matiram Bordoloi has said that he had learnt about the incident and the members of the public had sent him to inform the Headman, that he went to him and while he was talking with him, Tetubar turned up there and told the Headman, "Please come to my house". When the headman asked him the reason, Tetubar said, "I have killed my father". It may be noted that the statement of PW4 Bhadrasingh Dewri, the headman, is quite different in that he had said that since Matiram had already told him about the occurrence he had not asked Tetubar what he had done, whereas Matiram specifically imputes to the accused the statement made to the headman that "I have killed my father". In this connection, it may also be noted, that though as PW6 Matiram Bordoloi has denied, he had in his statement under Section 161 of the Code to the Investigating Officer said, that while he was still in the Headman's house, Tetubar came and told him, "Please come to my house. My father has died". (emphasis supplied). The said statement of the witness to the Investigating Officer has been duly proved by the testimony of PW7 Tapan Chandra Barua, I. O. It appears to us that the statement of the witness at the trial is an improvement in the prosecution version and for this reason also we are not inclined to accept the version that the appellant had made any extrajudicial confession as attributed. On careful consideration of the evidence of PW4 Bhadrasingh Dewri and PW6 Matiram Bordoloi, together with the fact that nothing was stated in the FIR about the so-called extrajudicial confession, we are inclined to think that no extrajudicial confession as attributed was made by the accused. All that he might have said as stated by PW6 Matiram Bordoloi during investigation was that his father had died. We, therefore, do not find prosecution evidence in regard to the extrajudicial confession worthy of any credit and reliance.

13. The prosecution has relied upon the evidence of PW5 Smti Anjali Dekaraja, who is stated to be an eye witness. She undoubtedly was living in the same house with her fatherinlaw and therefore she could be an eye witness. However, it may be noted that it is in the evidence of PW4 Bhadrasingh Dewri that the mother of the accused was also present although she was totally blind and that the accused also had a sister, but whether she was present or not was not clear from the evidence. However, it is clear from the

evidence of PW5 Smti Anjali Dekaraja that one more lady was present for it was with her assistance that after the assault she had carried her fatherin law inside the room. The said lady has not been produced and the prosecution has relied upon the only evidence to PW5 Anjali Dekaraja. She has stated that on that afternoon her fatherin law was doing some bamboo work sitting in the veranda of the house. Tetubar came from the roadside shouting a great deal and at that time she was sleeping. On hearing Tetubar's shouts she came out and found Tetubar quarrelling with her fatherinlaw who had said that ""Son, I cannot quarrel with you. Go back the way you have come". Saying that, her fatherinlaw got up and from the veranda went into the house Tetubar went after him. Fatherinlaw closed the door without bolting. Pushing the door open, Tetubar went in and started pulling his father to take him out. She tried to separate them and at that moment Tetubar gave father inlaw a mighty shove. Fatherinlaw was thrown against another door the "portico" door. The door got opened, fatherinlaw fell on the floor near the bed. He fell on the bricks. As soon as fatherinlaw fell down, Tetubar kicked him on the chest, that at the time of falling, father inlaw and Tetubar had fallen one over the other, Tetubar had got up and had kicked fatherinlaw on the chest and Tetubar squeezed fatherin law's throat while the latter still lay flat. She raised a hue and cry, the accused went away. A woman came and the two of them carried father inlaw to the front room and laid him on the bed. We poured water on his head and gave other treatment. He died half an hour later.

14. It may be clear from the evidence of Smti. Anjali Dekaraja that the deceased had not died as a result of throttling immediately, and that he had died after half an hour. It is significant to note that during her interrogation, under section 161 of the Code, during investigation, Smti. Anjali Dekaraja had said that at that time her fatherinlaw had been sleeping in the bed. She denied that she did not tell the I. O. that "after father inlaw had fallen on the floor, Tetubar had squeezed his neck". It is significant that she had then made the statement that a little later, fatherinlaw had stood up by holding the door and that she had helped him to the bedroom. She had also stated that Tetubar " and fatherinlaw used to quarrel rather frequently over betelnut and leaf etc. of the plantation. The statement of smti. Anjali Dekaraja at the trial does not inspire confidence in that there is material contradiction from her statement during investigation. PW7 Tapan Chadra Barua, I.O., has stated that "Anjali did not tell me that Tetubar had squeezed Shivaram's throat after the latter's fall on the floor", and also that Anjali had then told him that a little later my fatherinlaw stood up by holding the door and I helped him to his bed". A careful consideration of the statement of PW5 Smti Anjali Dekaraja shows that her statement "*" at the trial is not wholly correct and considering her statement during investigation it appears to us that the probability of the occurrence having taken place in the manner suggested by that defence, the is, that following an altercation the accused had caught hold of his father's neck and had given him a shove or push so that the latter fell down and sustained injuries and had died later, cannot be ruled out there being a distinct probability of its being correct, for the fact that death followed half an hour later can then alone be explained, for otherwise, if indeed, Tetubar had intended to kill his father by throttling, the appellant would have throttled him until he had died while he was lying flat

on the ground, as stated by Smti. Anjali Dekaraja (PW5) at the trial. The very fact that the deceased got up with the help of his daughter-in-law, as she said during investigation and was helped to his bed inside the room and died after half an hour, as a clear circumstance, suggests that the prosecution version given by Smti Anjali Deka Raja at the trial, is not correct. It appears to us that the prosecution has endeavoured to improve the version and the witnesses have also modified their statement in order to make it a case of "murder". In this view of the matter, the statement of Matiram Bordoloi during investigation that the appellant had told the Headman that "his father had died," is consistent with the probability of the occurrence having taken place in the manner suggested by the defence. It may also be noted that PW6 Matiram Bordoloi has said that after returning from the field, he had seen some children also on the road and heard them saying, "Tetubar"s father has died from a fall after being pushed by him". This statement by persons assembled on the spot soon after the occurrence is also consistent with the probability of the defence version being correct.

15. On a careful consideration of the evidence of Smti. Anjali Dekaraja (PW5) as above, we have not found it possible to place reliance on her testimony at the trial in regard to the manner in which the occurrence took place but on the contrary we think that her statement during investigation was perhaps correct about what actually had happened and which in substance is also the defence version even though during statement under section 313 of the Code, the accused had made a total denial of the entire occurrence. We, therefore, conclude that the probability that on the date of occurrence, the accused-appellant had an altercation with his father during which he had caught hold of his father by the neck shook him and had given him push as a result of which he had the injuries on the neck and since he had fallen on the bricks and sustained injuries which also could include fracture of rib cannot be excluded and hence we are unable to accept the prosecution case that the accused had intentionally throttled the deceased while he was lying on the ground following the push given by the accused.

16. The question, then is what offence was committed by the accused appellant in causing the injuries which ultimately led to the death of his father. We do think that the accused while committing the said act of getting hold of the deceased, an old man of about 70 years of age, by the neck, shaking him while so holding and pushing him could safely be attributed with the knowledge that by the said act he could have caused the death of his father, and we accordingly hold that the accused appellant can safely be said to have committed the offence punishable under section 304 Part II IPC.

17. The appellant was arrested on 18.8.82 and had been in custody pending investigation and trial and has been undergoing sentence following conviction. Considering that there was property dispute, and an altercation on the day of occurrence and the act was committed during the said altercation, we are inclined to, think that the ends of justice in the present case shall adequately be met if the sentence is modified to that already undergone.

18. For the aforesaid reasons, this appeal is partly allowed. The conviction of appellant under Section 302 IPC is altered to one under Section 304 Pt.II IPC and the appellant is sentenced to imprisonment already undergone. The appellant shall be released forth with.