(2007) 08 GAU CK 0037

Gauhati High Court

Case No: Criminal Appeal No. 181(A)(J)of 1997

Bhaity Karmakar		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: Aug. 10, 2007

Acts Referred:

- Penal Code, 1860 - Section 302
- Penal Code, 1860 (IPC) - Section 302

Citation: (2009) 1 GLR 557 : (2008) 2 GLR 735

Hon'ble Judges: Aftab H.Saikia, J and H.N.Sarma, J

Bench: Division Bench

Advocate: B.Choudhury, D.Das, Advocates appearing for Parties

Judgement

Aftabh. Saikia J.

1. We have taken up this Criminal Jail Appeal for hearing today itself only for the reason that on enquiry, we are informed that no paper book has been prepared till date, although this jail appeal has been pending since 1997 for the alleged incident occurred in the year 1992, because Ext. 5, FIR/Ejahar and connected commitment order have not been received from the learned Sessions Judge, Golaghat. Since speedy trial is also a fundamental right guaranteed under article 21 of the Constitution of India, we are of the considered view that as the appellant has been in custodial detention for last 12 years, the instant jail appeal needs to be heard even without preparation of paper book. Accordingly, this Criminal Jail Appeal is being heard today for its final disposal.

2. Heard Ms. B. Choudhury, learned amicus curiae appearing on behalf of the appellant. Also heard Mr. D. Das, learned Public Prosecutor, Assam.

3. The conviction under section 302, IPC and resultant sentence to imprisonment for life and to pay fine of Rs. 1,000 in default to undergo further rigorous imprisonment

for 6(six) months so handed down to the appellant by the learned Sessions Judge, Golaghat in Sessions Case No. 48/93 vide Judgment and Order dated 20.5.1997 has been assailed by preferring this Criminal Appeal by the appellant from jail.

4. The brief facts of the case so unfolded by the prosecution may be noticed as under:

5. On 6.10.1992 an ''ejahar'' was lodged by one Dasarath Nayak, the father of victim/deceased with the Sumonigaon Outpost under Dergaon Police Station alleging that on the night of 6.10.1992 at about 1230 AM his son Dilip Nayak was killed by some unknown persons by causing grievous injuries by sharp weapons. This information put the law in motion and investigation ensued. The police on completion of the investigation filed chargesheet against the appellant under section 302, IPC

6. On committal of the case to the Court of Sessions, being exclusively triable by the Court of Sessions, the learned Sessions Judge, Golaghat on appreciation of all the police papers and upon hearing the learned counsel for the parties framed charge against the appellant under section 320, IPC and when the same was read over to the appellant, he denied all the charges and claimed to be tried.

7. During the trial, prosecution examined as many as 7(seven) witnesses including 2 official witnesses, PW6, Dr. Darul Haque who conducted the postmortem on the dead body of the deceased and PW.7, Sri Someswar Bora, the investigating officer (10). Having considered and on appreciation of the testimony of all the witnesses including the documents so placed on record as exhibits as well as upon hearing learned counsel for the parties, the learned Sessions Judge found the appellant guilty of the offence under section 302, IPC and vide Judgment and Order dated 20.5.1997 convicted and sentenced the appellant as mentioned above. Hence, this appeal from jail.

8. The conviction of the appellant as observed by the learned Sessions Judge, basically based on the ''extra judicial confession'' so purportedly made by the appellant before PW.l and PW.2, namely, Bajen Nayak and Sajen Nayak respectively. The learned Sessions Judge also taken into account the recovery of the ''Dao'', the weapon used in the alleged killing, at the instance of the accused/appellant.

9. Ms. Choudhury, learned amicus curiae, in favour of the appeal and assailing the conviction and sentence, has forcefully argued that the impugned conviction is not tenable in law on the basis of the present set of evidence so adduced by the prosecution. The main thrust in her submission is that the ''extra judicial confession'' so established by the prosecution, made by the appellant to PW. 1 and PW.2 is not admissible in the eye of law due to basic reason that the said statement was not duly reiterated by the appellant while recording his statement under section 313, Cr.PC. As regards the recovery of the ''Dao'' on being led by the appellant it is also contended that the same also cannot be sustained as because the entire finding

based on the recovery of the said weapon is contrary to the established law.

10. Relying on a decision of the Apex Court AIR 1970 SC1934 equivalent to Jaffar Hussain Dastagir v. State of Maharashtra, (1969) 2 SCC 872. Ms. Choudhury has submitted that the essential ingredients required to make such recovery of the weapon at the instance of the appellant must be constituted with the following three factors, namely, (i) the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information, (ii) only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused and (iii) the discovery of the fact must relate to the commission of some offence. Neither of the three factors is found to be present the instant case to rope in the appellant under the alleged offence. Accordingly, it is submitted that the conviction and sentence of the appellant deserves to be interfered with by this court.

11. In para5 of Dantagir''s case (supra) the Supreme Court held as under:

"5.....Section 27 is a proviso to section 26 and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient to of the section is that the information give by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as in distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. The embargo on statements of the accused before the police will not apply if all the above conditions are fulfilled. If an accused charged with a theft of articles or receiving stolen articles, within the meaning of section 411, IPC states to the police, ''I will show you the articles at the place where I have kept them'' and the articles are actually found there, there can be no doubt that the information given by him led to the discovery of a fact, i.e., keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not discovery of the articles but the discovery of the fact that the articles were kept by the accused at a particular place. In principle there is no difference between the above statement and that made by the appellant in this case which in effect is that, "I will show you the person to whom I have given the diamonds exceeding 200 in number," The only difference between the tow statements is that a "named person" is substituted for "the place" where the articles is kept. In neither case are the articles or the diamonds the fact discovered."

12. Mr. Das, learned Public Prosecutor has, on the other hand, vehemently opposed the submission advanced on behalf of the appellant. His case is that the ''extra judicial confession'' so made by the appellant himself to the PW.l and PW.2, when they were returning home from witnessing ''Bhawana'' on that night, by stating that he ff killed the deceased, is sufficient to implicate the appellant under section 302,

IPC and there is no illegality or perversity committed by the learned Sessions Judge in convicting and sentencing the appellant accordingly.

13. We have given our conscious consideration to the submissions so advanced on behalf of the appellant by the learned amicus curiae and also that of the learned Public Prosecutor. We have thoroughly and meticulously scanned entire evidence on record including PW.l, PW.2, PW.6 the Doctor and PW.7, the investigating officer.

14. It is noteworthy to mention the evidence of the Doctor, who conducted the postmortem of the deceased. While examining the dead body of the deceased the doctor found the following injuries:

"Injuries

1. One incised would in the middle of scalp placed transverse size 5" x W x bone deep, covered with clotted blood, beneath which intracranial haemorrhage present. Both the parietal bones are fractured.

2. The neck is hanging from the body only with skin on right side, as there is one through and through incised wound at left cutting all the vital structures of the neck.

3. One abrasion on left arm size IVfc" x 1/10".

4. All the changes are ante mortem.

5. All the injuries are ante mortem in nature."

15. The Doctor in his opinion stated that death was due to shock and haemorrhage as a result of the injury sustained by the deceased.

16. The testimony of PW. 1 and PW.2 needs to be critically analysed. PW.l and PW.2 both being brothers, after witnessing ''Bhawana'' when they were returning on their way home, they saw the deceased, Dilip Nayak lying with blood injuries on the place of occurrence and the accused/appellant standing near the place of occurrence armed with a blood stained ''dao'' in his hand and accused told them that he killed the deceased and also warned them not to divulge the same before anybody. But according to their own version, after seeing the occurrence, they without going home, returned back to ''Bhawana'' out of fear and on the following morning the deceased was found lying dead at the place of occurrence. Their deposition did not reveal that such incident of killing and subsequent declaration by the appellant about such killing by him to them was ever disclosed to anyone or persons who were present witnessing ''Bhawana'' (an Assamese traditional theatre). Such conduct of both PW. 1 and PW.2 is really surprising and as such the same smacks doubt and fails to inspire confidence to accept such ''extra judicial confession''.

17. In cross, PW.2, Sajen Nayak deposed that on that night they informed about the incident to the B.D.P. Secretary and also to the Secretary of the Garden.

18. We have also found that both the aforesaid witnesses are independent and disinterested witnesses and there is nothing on record to show that they were remotely enemical to the accused.

19. The appellant in his statement recorded under section 313, Cr.PC also did not give any explanation as regards the ''extra judicial confession'' so made to both witnesses, i.e., PW.l and PW.2. It is also transpires from the evidence of PW.7, the investigating officer that at the instance of the appellant they recovered the offending instrument used for the alleged killing of the deceased and the same was seized as Ext.2. Such seizure was corroborated by the evidence of PW.3 , Paiko Nayak, who deposed that the ''dao'' was seized from the possession of the appellant.

20. From theabove discussion of the testimony of PW. 1 and PW.2 and also having considered the testimony of PW.7, we are of the opinion that ''extra judicial confession'' being a weak piece of evidence as in the present case, cannot be accepted for making it a sole basis of the conviction. Moreover, since the entire case is based on the extra judicial confession, without any eyewitnesses, we do not find any cogent and/or overwhelming and convincing evidence to indict the appellant for commission of the offence so as to convict him under section 302, IPC.

21. That apart, we do not find any circumstantial evidence to support the case of the prosecution against the appellant in this case. We have also noticed the facts that PW.l and PW.2 after hearing of''extra judicial confession'' made before them by the appellant, they went to witness ''Bhawana'' and only the reason they put on record was that out of fear they went to ''Bhawana'' instead of home. There is no whisper in their evidence that during witnessing ''Bhawana'' they ever made any attempt to inform anybody about the incident.

22. We have considered the legal position as regards the information given by the appellant leading to discovery of the offending weapon supported by the judicial authority of Dastagir''s case (supra). There is no hesitation on our part to hold that the essential ingredients required under the law to approve such discovery is wholly absent in the case in hand.

23. It is also settled law that ''extra judicial confession'' can be used against the accused, only when it conies from unimpeachable sources.

24. That being the position, we are of the considered view that it is not a fit ease to convict the appellant only on the basis of such evidence of PW.l and PW.2 who claimed that ''extra judicial evidence'' as regards killing of the deceased was made to them by the appellant and for the reason of recovery of the weapon at, the instance of the appellant.

25. In view of what has been discussed, observed and stated above, we have no hesitation to hold that the impugned conviction and sentence of the appellant is

liable to be set aside and quashed. We ordered accordingly.

26. The appellant be set at liberty forthwith, if he is not otherwise connected or wanted in any other criminal case.

27. In view of the above, this criminal appeal stands allowed. Send down the LCR forthwith.

28. Before parting with the case records, this court would like to put on record the appreciation to Ms. B. Choudhury for her valuable assistance rendered in arriving at a decision aboverecorded in this case as amicus curiae. Accordingly, it is ordered that she is entitled to professional fees, which is quantified at Rs. 3,000.