(2000) 05 GAU CK 0010

Gauhati High Court

Case No: Criminal Appeal No. 174 of 1998

Abdul Kasem		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: May 7, 2000

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 302, 34, 94

Citation: (2000) CriLJ 5004 : (2000) 2 GLT 234

Hon'ble Judges: N.C. Jain, J; D. Biswas, J

Bench: Division Bench

Advocate: HRA Choudhury, K. Majumdar and P. Choudhury, for the Appellant; PP, Assam, for the Respondent

Final Decision: Allowed

Judgement

D. Biswas, J.

On conclusion of trial in Sessions Case No. 25/97 the learned Sessions Judge, Morigaon convicted the appellant Abdul Kasem u/s 302 IPC and sentenced him to imprisonment for life and to pay a fine of Rs. 1,000, in default, to undergo R.I. for a further period of one month. Being aggrieved thereby, the appellant has preferred this appeal on various grounds mentioned in the Memorandum of Appeal.

2. Before we deal with the factual aspect of the matter in the light of the submission made by Mr. HRA Choudhury, learned senior counsel for the appellant, we would like to clear the facts which culminated in the conviction of the appellant.

3. An FIR was lodged by Md. Ismail Hussain on 8.12.1994 at 9 P.M. before the Officer-in-Charge of Bhuragaon Police Out-post alleging that on the previous night someone haced Md. Sohrab Ali to death with weapons and his body was thrown into the wheat cultivation of Abdul Barik of Falihamari farm. It is stated in the FIR that the deceased was a distant nephew of the informant.

4. On receipt of the FIR. the Officer-in-Charge of the Police Out-post forwarded the same to the Lahorighat Police Station for registration of a case and accordingly P.S. Case no. 135/94 u/s 302 IPC was registered. The police took up investigation, forwarded the dead body for post-mortem examination, examined a number of witnesses and, eventually, on conclusion thereof submitted charge sheet against the appellant Abdul Kasem and Mohammed Ali u/s 302/94 IPC.

5. On commitment by the learned Chief Judicial Magistrate, Morigaon, charges were framed against the accused Abdul Kasem and Mohammed Ali u/s 302 read with Section 34 of the IPC. The accused persons denied the charge and claimed to be tried. The learned Sessions Judge examined nine witnesses products by the prosecution and one witness for the defence. On conclusion of trial, the learned Judge awarded the verdict of guilt against the appellant Abdul Kasem and sentenced him as aforesaid.

6. Mr. HRA Choudhry, learned senior counsel for the appellant pointed out that there is no eye witness to the occurrence and the learned Sessions Judge has relied upon certain circumstances which, in his opinion, do not complete a chain to warrant conviction of the appellant. According to him the learned Sessions Judge committed grave error in convicting the appellant only on surmises and probabilities and, as such, his conviction cannot be sustained in law.

7. There is no doubt that there is no eye witness to the occurrence in the instant case the dead body of the deceased was found in the wheat cultivation field of Abdul Barik. The conviction has been recorded on the basis of blood marks traced from the place where the dead body was lying to the house of the appellant and recovery of blood stained quilt from the house of the appellant.

8. P.W.7 is Dr. Ranjendra Prasasd Borah who had performed the post-mortem examination over the dead body of the deceased Sohrab Ali. This witness tendered in evidence the Autopsy report marked Ext-2 which shows that the following injuries were found on the person of the deceased:

"1. Lacerated injury in the scalp, two are situated on the right frontal area measuring 2" and 1" in length and two are situated on the left frontal area measuring 2" and 1" in length. Fractures seen in four sides.

2. Membrane are torn.

3. Blood present inside the brain."

9. The doctor has not been cross-examined, in fact, there is no dispute with regard to the fact that Sohrab Ali was murdered by unknown culprits.

10. PW. 1 Abdul Motleb deposed nothing worthy of notice. After hearing the news of death of Sohrab Ali, he went to the wheat cultivation and saw the dead body of Sohrab Ali. Similar is the position with regard to the evidence of PW-3 Abdul Razak.

He along with his brother PW-4 Abdul Barek went to see their nephew Sohrab Ali who was lying dead in the wheat cultivation. They saw the injuries on his head. This witness reported the incident verbally to the police Outpost. PW-4 Abdul Barek reiterated what was stated by PW-3. This witness was declared hostile and he was examined by the prosecution as well as the defence. During the course of cross-examination, he denied to have told the police that there was trail of blood leading to the house of accused Abdul Kasem and that there was blood marks in the house where Abdul Kasem has been sleeping. He also denied to have stated that the accused Abdul Kasem confessed on being questioned by the police that he had killed Sohrab Ali by assaulting him on the head with a wooden lathi and had thrown the dead body into the wheat cultivation. He also did not admit to have stated to the I/O that the accused produced the wooden shaft and other blood stained clothes.

11. PW-5 Mustt. Fatema Khatun stated that the deceased Sohrab Ali was the son of her elder brother. She heard about the death of Sohrab Ali and went to see the dad body. This witness was also declared hostile and cross-examined. In her cross-examination, she admitted that the accused Abdul Kasem had confessed before the police that he had killed Sohrab Ali and thrown the dead body to the wheat cultivation.

12. The salient part of the evidence of the above PWs have been reproduced in a nut-shell. They have not deposed anything incriminating against the accused/appellant. The statement elicited from PW-4 and 5 by the defence during cross-examination will, however, be taken into consideration in due course here-in-after.

13. PW-2 Md. Ismail Hussain, the informant and PW-6 Mustt, Sahera Khatun, sister-in-law of PW-2 have made positive statements incriminating the appellant. The learned Sessions Judge appeared to have recorded the verdict of guilt primarily relying upon their statements. PW-2 Md. Ismail Hussain stated that after hearing that someone had killed Sohrab, he went to see the dead body and saw the injuries on the head of the deceased. He also saw trails of blood from the "wounds of Sohrab Ali" leading to the house of the accused/ appellant. Both the accused (father and son) were living in the same house. This witness found a blood stained rake near the door, inside the house. Thereafter, he lodged the FIR, Ext. 1. According to him, the police cam. seized the blood stained wooden rake and the blood stained quilt from the house of the accused and, thereafter, prepared the inquest report, Ext.2. He also exhibited the blood stained quilt, mat. Ext-1. In the same tune, PW-6 Mustt. Sahera Khatun. sister-in-law of PW-2 deposed that she had been trails of blood leading to the house of the accused. She also saw some marks of scrabbled blood. She was prevented by the mother of the accused Kasem from entering the house. This witness also saw the blood stained wooden lathi inside the house of the accused Kasem. According to her, on being interrogated by police. Kasem admitted that he had killed Sohrab.

13. It would appear that PW-2 and PW-6 only deposed about the trails of blood leading to the house of the accused/appellant. These two witnesses also saw the blood stained wooden rake kept near the door within the home stead premises of the accused. No other witness has supported PW-2 and PW-6 so far their evidence with regard to the trail of blood and the rake is concerned. The denial of PW-4 and PW-5 of the suggestion put to them by the prosecution has not been brought on record through the I/C. PW-8 is the I/O. Nowhere in his evidence he made any mention of the trail of blood leading to the house of the accused. The statements made to the I/O by PW- 4 and 5 during their examination u/s 164 of CrPC remain uncorroborated. The statement elicited in cross-examination is, therefore, of no consequence. Situated thus, we are to consider whether PW-2 and PW-6 could be relied upon and their evidence could be accepted as conclusive proof of trail of blood marks leading to the house of the accused.

14. In our considered opinion, in the absence of any statement to this effect from the I/O and form any other independent witness, it would not be safe to act and rely upon their statements as conclusive proof of the circumstance. The prosecution could not answer this omission satisfactorily although it is in evidence that the villagers simultaneously visited the house of the accused. That apart, PW-2 and PW-6 are closely related and the fact remains that PW-6 admitted in her cross-examination that her husband and PW-2 and Osman. All cultivated the 4 Bighas of land of Sohrab Ali who was a duffer living on charity of others. The defence suggested to PW-6 that it is they who had murdered Sohrab to grab his land. This factum that the land of the deceased under possession of PW-2 and the husband of PW-6 would permanently remain with them on the demise of Sohrab Ali has its own significance. We are unable to solely rely upon the statement of such witnesses to form the basis for conviction. That apart. It becomes difficult to accept their statements that they had seen the wooden rake inside the house of he accused, for no man of least prudence, after having committed such a grievous offence, would retain the weapon of offence inside his house with stains of blood for public exhibition.

15. PW-2, PW-6 and PW-8, the I/O, in their-evidence stated that blood stained earth was collected form the place where the dead body was lying, and a blood stained wooden rake and quilt were seized from the house. But PW-8, the I/O admitted in his evidence that he had not sent the seized articles for chemical examination. Had it been done, and the blood group of the deceased with that of the blood stains found on the wooden rake and quilt were found to be the same, there would have been the end of the matter. Even in cases, where report was available from serologist that the clothes seized from the accused were stained with human blood, acquittal was considered to be the safer course for want of proof to connect the blood group found on the seized materials with that of the deceased. In this case, there is no evidence to show that the stains were of human blood. The default on the part of the I/O to send the seized articles for chemical examination has subverted the very

object of the investigation. The I/O nowhere in his evidence claimed to have tracked the trails of blood which landed him in the house of the accused, We are aware that the conduct of the I/O in the instant case although reprehensible, yet, would not jeopardise the prosecution case if other reliable evidence is available on record. But unfortunately, there is no such evidence on record to connect the appellant with the alleged crime.

16. For reasons above, the circumstance relating to trails of blood does not appear to have been proved beyond all shadow of doubt. Recovery of blood stained quilt and wooden rake alone cannot be the conclusive proof of a nexus between the accused and the crime.

17. Next comes the extra judicial confession allegedly made in presence of the witnesses. Except PW-2 and PW-6, none else have evinced the same. It is evident from their statement that the extra judicial confession was made during the course of interrogation by the police. Obviously, it has no evidentiary value and cannot be acted upon.

18. It is also of immense consequence to note here that PW-2 and PW-6 themselves stated in their cross-examination that the deceased was a bachelor, used to work here and there and was, in fact, a duffer. PW-2 specifically stated in his cross-examination that he is not aware of any enmity between the deceased Sohrab Ali and the accused. There being no proof of nay deep-seated enmity between them and, the accused having no remote possibility or scope of laying any claim over the land of the deceased is not expected to have committed the crime. It is true that motive is not always an important feature in a criminal prosecution where there are sufficient evidence on record, but in a case where the evidence is doubtful and not worthy of credence, it has its role to play. In the instant case, we are unable to trace out any motive behind the crime so as to connect the accused/ appellant with the offence. In our opinion, there is no legally acceptable evidence of proof of any circumstance in the instant case and, as such, absence of motive can also be taken as consistent with the presumption of innocence of the accused.

19. If we read the evidence of D.W. 1 it, would appear that I/O first went to Md. Ismail''s (PW-2) house for having tea and, thereafter, searched for the accused Kasem. There is no evidence that the I/O tracked the trails of blood which led him to the house of the accused. Therefore, the evidence of D.W. 1 although not to be treated as exculpatory, has its own significance. It creates doubt when read with the irregularities committed by the I/O.

20. The law with regard to circumstantial evidence is well settled; Any circumstance which destroys presumption of innocence can be taken into consideration for the purpose of ascertaining whether the circumstances lead to no other inference than that of the guilt of the accused. The court has to take the totality of circumstances into account to find out if the case has been established, i.e. whether the facts

established are inconsistent with the innocence of the accused and not capable of being explained on any hypothesis other than the guilt of the accused. To sum up, there is no report of the serologist about the blood group, there is no independent corroboration to the evidence of PW-2 and PW-6 and even there is no proof of any deep-seated enmity between the deceased and the accused. Besides, the accused is also not the likely beneficiary of the landed property of the deceased on his demise. There is also no evidence that the deceased was in the house of the accused on the night of the occurrence or that they were last seen together. The post crime conduct of both the father and the son that they were very much present in their house and made no attempt to abscond do not create any suspicion. No motive for the crime is also attributable to the accused-appellant. Considering all these aspects, we are of the opinion that the circumstances sought to be relied upon by the prosecution have not been proved. It is needless to reiterate that in a case based on circumstantial evidence, in the absence of motive, the evidence will have to be weighed with great care. The cumulative value of the evidence do not inspire us to agree with the learned Sessions Judge that the circumstances in the instant case have been proved. The inevitable conclusion, therefore, is that the accused is entitled to acquittal on benefit of doubt.

In the result, the appeal is allowed and the impugned Judgment of conviction and sentence is hereby set aside. The accused is acquitted on benefit of doubt.