
(2012) 1 GLT 572

Gauhati High Court

Case No: Criminal Appeal No. 126 (J) of 2005

Arun Bora

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: Jan. 25, 2012

Acts Referred:

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

Citation: (2012) 1 GLT 572

Hon'ble Judges: A.K.Goel, C.J. and C.R.Sarma, J

Bench: Division Bench

Advocate: Mr. C. Bhattacharyya, Amicus Curiae, Advocate appeared for the Respondent: Mr. K. A. Mazumdar, Addl. PP., Advocates appearing for Parties

Judgement

C.R. Sarma, J.

This appeal is directed against the judgment and order, dated 31.8.2005, passed by the learned Additional Sessions Judge, Jorhat, in Sessions CaseNo.35(JJ)/2005.

2. By the impugned judgment and order, the learned Addl. Sessions Judge, convicted the appellant, namely, Sri Arun Bora, under Section 302 of the Indian Penal Code (for short, "IPC"), and sentenced to suffer rigorous imprisonment for life and pay fine of Rs.2000/, in default, suffer rigorous imprisonment for another period of six months.

3. Aggrieved, by the said conviction and sentence, the conviction person, as appellant, has come up with this appeal from jail.

4. We have heard Mr. C. Bhattachayya, learned Amicus Curiae, appearing for the appellant and Mr. K. A. Mazumdar, learned Addl. Public Prosecutor, appearing for the State respondent.

5. The prosecution case, in brief, as may be necessary for disposal of this appeal, is that, on 2.3.2003, at about 2 pm, Sri Robin Bora (hereinafter called as "deceased"), went to his fatherinlaw's house, on being invited by his motherinlaw and in his inlaws house, he was killed by his brotherinlaw i.e. the appellant, with a khukri. On the following day, at about 34 pm, Sri Nabin Bora, brother of the deceased, came to know about the occurrence. Accordingly, he lodged an FIR with the police. On receipt of the said FIR, police registered a case under Section 302 IPC, and launched investigation in to the matter.

6. During the course of investigation, police visited the place of occurrence, seized the incriminating khukri vide seizure list (Ext. 1), the scooter, used by the deceased for visiting to his fatherinlaw's house vide (Ext. 2), a pair of sandal and a wrist watch, which were found near the dead body, vide (Ext.3). The Investigating Officer conducted the inquest and prepared the inquest report (Ext.4). He arrested the accused person and forwarded him to the Court for recording his confessional statement under Section 164 Cr.P.C. He also forwarded the dead body for postmortem examination. At the close of the investigation, police submitted the chargesheet under Section 302 IPC.

7. The case being committed, the learned Addl. Sessions Judge, framed charge under Section 302 IPC, and read over and explained the same to the accused person, to which, he pleaded not guilty. He claimed to be tried.

8. The prosecution examined as many as ten witnesses, including the Medical Officer (P W 7), who performed the postmortem examination, the Judicial Officer (CW1), who recorded the confessional statement under Section 164 Cr.P.C. After examination of the prosecution witnesses, the learned Trial Judge examined the accused person under Section 313 CrPC. Denying the allegations, brought against him, the accused person, in his statement made under Section 313 Cr.P.C, stated that he made confessional statement (Ext. 8) out of fear of police. He further stated that, on the date of occurrence, his "Bhanijowai" brotherinlaw (deceased) visited his house and picked up a quarrel with his mother i.e. motherinlaw of the deceased. He further stated that when he tried to intervene, the appellant had given blows with a "khukri" and as such, he snatched away the khukri from the deceased and thereafter left the place by brandishing the same. He also stated that he did not know where the khukri had hit the deceased.

9. Considering the evidence on record, the learned Sessions Judge, held the appellant guilty of the offence under Section 302 IPC, and accordingly, convicted and sentenced him as indicated above.

10. Mr. C. Bhattachayya, learned Amicus Curiae, taking us through the evidence on record, as well as the statement of the accused person, made under Sections 313 and 164 Cr.P.C., has submitted that the appellant, who was unarmed, being attacked by the deceased with a khukri, had snatched away the same from the deceased and for the purpose of private defence, inflicted blows with the khukri without any intention or pre

meditation to kill the deceased. The learned Amicus Curiae has further contended that, considering the facts and circumstance, as surfaced from the evidence adduced by the prosecution, there is nothing to show that the appellant was the aggressor and that he had no intention to kill the deceased, Therefore, the learned Amicus Curiae, has submitted that the conviction and sentence recorded under Section 302 IPC is not maintainable.

11. Refuting the said argument, advanced by learned Amicus Curiae, Mr. Mazumdar, learned Addl. Public Prosecutor, Assam, referring to the nature of the injuries, has submitted that the appellant inflicted the fatal injuries, knowing fully well that, the injuries caused by him, were likely to cause the death and as such, the learned Trial Judge has rightly convicted and sentenced the appellant under Section 302IPC.

12. Having heard the learned counsel for the parties and carefully perusing the evidence on record, it is found that, there is no dispute that the deceased, who was the brotherinlaw of the appellant died due to the injuries sustained by him in the occurrence that took place on the night of 2.3.2003.

13. The Medical Officer, who performed the postmortem examination, deposed as PW 7. He conducted the postmortem on the next day i.e. on 3.3.2003 at about 230 p.m. The said Medical Officer found the following injuries on the dead body:

"1. One sharp cut mark, Aprox. 4 cm x 3cm x 4 cm Just above ankle cutting of tibia in medial size.

Left leg.

2. One cut mark over ankle joint= 4 c.m. x 3 c.m. x 4 c,m, Cutting of the ligaments and muscles and skin.

Right hand.

3. One superficial cut mark above dorsal surface of forearm 3 cm x 2 cm x 1 cm over palmone cut mark. Aprox. 6 cm x 5 cm x 3 cm Dissection of little and ring finger.

Lt. hand 1) Sharp cut mark over palm longitudinal 6 cm x 4 cm x 3 cm embtrin of muscles and skin rubertical, cut mark 2 cm x 2 cm x 3 cm. over palm.

Neck

1) Sharp cut mark. Anteriority 5 cm x 6 cm x approximately.

Dissection of fracas & oerophygus of muscle.

2) Post sharp cut mark 6 cm x 4 cm x 6 cm. Fracture of vertebra i.e. dissection of muscles.

Cranium and spinal canal.: Scalp, skull, vertebrae.

3. Cut marks in occipital region. All 5 cm x 4 cm x 2 cm.. All superficial.

One cut mark over occipital protuberancesuperficial

Size 4 cm x 3 cm x 2 cm,

Skull In left parietal region 4 cut marks.

A 4cm 4cm 3cm

B6cm 4cm 3cm

C6cmx4cm.3cm

D 4 cm 3 cm x 3 cm. all deep penetrating fracture of skull.

All deep penetrating ie. Fracture of skull (fracture of certicacal vertebra)

Multiple injuries are found if fracture of skull and in left parietal area and 4 nos sharp cut marks which are deep and penetrating. "No intracranial haemorrhage is found. Fracture of vertical vertebra i.e. sharp cut mark in post part of neck which is deep and 6 cm x 4 cm x 6 cm in size approximately. Dissection of oesophagus and trachea are found and dissection of all muscles are vessels out and part of neck and sharp cut mark above neck which is deep and 5 cm x 6 cm x 1 cm x 1 cm in size appropriately.

Over right palm one sharp cut mark is found Separation of two fingers ring and little finger from its origin."

The Medical Officer, opined that the cause of death was syncope due to multiple hemorrhage from various injuries which were ante mortem in nature.

From the above medical evidence, it appears that the deceased sustained multiple cut injuries, on vital parts including scalp and he died due to such injuries.

14. Now, the question is who caused the injuries.

15. Sri Banghidhar Hazarika, who was the Village Headman, deposed as PW 1. He stated that, on 2.3.2001 at about 930 p.m., the accused visited his house and informed that he had cut his younger sister"s husband i.e. the deceased. According to this witness, the appellant had requested him to inform the police. This witness noticed blood stain in the hands as well as the wearing apparels of the appellant and, accordingly, he informed the incident to Sri Ganesh Hazarika, who was the Lot Gaonburah (village Headman. He, however, stated that on being informed, police arrived and thereafter he along with Sri Ganesh Hazarika went with the police party to the house of the accused appellant, where

they found the dead body of the deceased, in injured condition. He exhibited the khukri (sharp cutting weapon) as Ext. "Ka". This witness stated that the said khukri was found sticking to the neck of the deceased and that the same was seized by police. He was also an witness to the seizure of the scooter from the courtyard of the accused. He exhibited the seizure list as Ext.3 and his signature thereon as Ext. 3(1). This witness denied the suggestion put to him, that the accused had neither visited his house nor, disclosed about the offence committed by him.

Except putting the said suggestion, which was categorically denied by this witness, no other contradiction could be elicited from the cross examination of this witness. There is nothing on record to show that the said witness, who was a village Headman, had any reason to falsely depose against the appellant. We find nothing against the credibility of this witness. Therefore, his evidence, that the accused had made extra judicial confession is believable.

16. Supporting the evidence of PW1, Mr Ajit Bora, who deposed as PW 2, stated that, on the night of 2nd March, 2002 at about 9/930 p.m., PW 2 informed him that the appellant had cut a person and as such, on being requested by P W1, he accompanied him to the house of the appellant, where they found the dead body of the deceased. He also corroborated the evidence of PW 2 regarding seizure of khukri i.e. the weapon of assault from the place of the occurrence.

17. Sri Ganesh Hazarika, deposing as PW 3 stated that, the appellant had informed him that he had cut his younger sister"s husband in his house. According to this witness, he found that both the hands of the appellant were smeared with blood. He further stated that he had informed the police over phone, from the house of PW 1 and thereafter went to the house of the appellant ,where the dead body was found lying in injured condition, He also supported the evidence of P W1 and P W 2 regarding seizure of the weapon of assault. This witness was also duly cross examined by the defence. He denied the suggestion, put to him on behalf of the defence that the accused did not tell him anything about the killing his brother in law. Except putting the said suggestion, which was categorically denied by PW 3, no discrepancy or contradiction could be elicited to make his evidence disbelievable. There is nothing on record to show that he had any reason or grudge to falsely implicate the appellant with the death of the deceased. Therefore, his evidence regarding extra judicial confession made before PW 3 is believable.

18. Sri Pankaj Bora, who deposed as PW 4, did not see the occurrence. However, he saw the dead body and extended cooperation in putting the dead body in the vehicle of the police.

19. Sri Nabin Bora (PW 5) who lodged the FIR, as informant, is the brother of the deceased. He stated that his brother, on the fateful day, had gone to his fatherinlaw"s house by riding a scooter, for spending the night therein. He also stated that, on the next morning at about 34 p.m., he got the information, from the police station, that his brother

was cut to death in his fatherinlaw"s house. He has exhibited the FIR, lodged by him, as Ext. No.6.

20. Sri Jiten Bora (PW 6), who was an adjacent neighbour of the appellant, stated that, on the night of occurrence at about 930 pm, he heard altercation between the appellant and his motherinlaw and thereafter, he heard the cry "don"t kill me., don"t kill me" raised by the appellant. He further stated that after, about 10 minutes, the appellant visited him and informed that, he had killed the deceased. On being so informed, this witness asked the appellant to go to the Gaonburah. He also exhibited his statement made under Section 164 Cr.P.C. as Ext. No.7. He denied the suggestion, put to him on behalf of the defence, that the appellant did not tell him that he had cut the deceased. There is no material to find that this witness had any enmity with the appellant. We find no reason to disbelieve his evidence that the appellant had told him that he had cut the deceased. The said extrajudicial confession, made before PW 6, is found to be acceptable.

21. Smti Putali Bora (PW 8), motherinlaw of the deceased and the mother of the appellant, was the star witness in this case. Supporting the evidence of PW 5, this witness stated that the deceased visited her house, on the night of the occurrence and that he was served with tea. According to this witness, the decease told her that he cut her daughter i.e. wife of the deceased. Of course, according to this witness, she refused to believe the appellant. This witness further stated that her soninlaw had dragged and assaulted her with his hand as a result of which, a scuffle had taken place between them and that hearing her cry, her son rushed to the place of occurrence and she became unconscious. According to this witness, when she regained her sense, she found that the appellant i.e. her soninlaw was lying dead with several cut injuries. She also stated that police, along with Gaonburah and villagers came and took away the appellant and the dead body of the deceased. She further stated that there was no light at the time of occurrence.

In her cross examination, PW 8 stated that she did not see the appellant cutting her soninlaw aforesaid. According to this witness, she got hurt in her left hand and that, the deceased had taken a khukri from the wall.

From the evidence of this witness, it is clearly found that, on the night of occurrence, the deceased, who was her soninlaw, visited her house and picked up a quarrel with her and due to alarm raised by her, the appellant also arrived there. After arrival of the appellant, a scuffle had taken place between the deceased and the appellant and the appellant had brought a khukri from the wall.

In his statement given under Section 313 Cr.P.C, the appellant was stated that, a scuffle had taken place between the deceased and his mother and hearing the hue and cry raised by his mother, he rushed to there and tried to intervene. According to the appellant, as the deceased, after taking up a khukri from the wall, tried to assault him, he had snatched away the said khukri and brandished the same without knowing where it

had hit.

In his statement made under Section 164 Cr.P.C., the appellant stated that as the deceased, after taking up a khukri charged at him with an attempt to kill, he had snatched, away the khukri and out of anger inflicted several blows on him.

Of course, the appellant, in his statement, under Section 313 Cr.P.C, retracting the said confessional statement, stated that he made confession on being threatened by police. However, in his statement, under Section 164 Cr.P.C, the appellant admitted that he had snatched away the khukri from the deceased and moved the same, as a result of which, the appellant sustained injuries.

22. From the above discussed evidence, we find sufficient corroboration in the evidence of the prosecution witnesses to believe that the deceased sustained fatal injuries at the hands of the appellant.

23. As discussed above, it has also been found the deceased visited his motherinlaw's house i.e. house of the appellant and, picked up a quarrel with his motherinlaw and attempted to attack the appellant. Admittedly, the appellant was unarmed and he had snatched away the weapon from the hand of the deceased. As the deceased had tried to attack the appellant with a khukri, he had reason to apprehend that he might be killed or grievous hurt would be caused to him. There is sufficient evidence to find that the deceased before picking a scuffle with the appellant with an attempt to kill had assaulted his motherinlaw i.e. .the mother of the appellant. Therefore, the plea of the appellant that for the purpose of self defence, and on being so provoked he had moved the khukri, cannot be brushed aside. Considering entire facts and circumstance of the case, the said version of the appellant is found to be believable. Hence, it has been established that the deceased died due to the injuries sustained by him, at the hands of the appellant. Therefore, there is no difficulty in concluding that the appellant committed the offence of culpable homicide, by causing the death of the deceased.

24. Now, the question is whether, the appellant had committed the offence of culpable homicide amounting to murder or not.

25. Exception 4 of Section 300 I.P.C. provides that culpable homicid is not murder if the death is caused without premeditation in sudden fight in a heat of passion upon such a quarrel and without offender having taken undue advantage or acted in a cruel or any usual manner.

Exception 2 of Section 300IPC provides that culpable homicide is not murder if the offence, in the exercise of good faith of right of private defence of person or property, exceeds the power given to him and causes the death of the person against whom he is exercising such right of defence without premeditation or without any intention of doing more harm than is necessary for the purpose of such defence.

None of the witnesses deposed regarding the manner in which the assault was caused. Except the PW 8 none were present in the place of occurrence at the time of occurrence. She did not state that she saw the appellant assaulting the deceased. Of course, she saw the injured dead body of the deceased. Therefore, considering the evidence of PW 8 the circumstance, in which the offence was committed, the statement of the appellant, made under Sections 313 and 164 Cr.P.C, we find no reason not to believe the version of the appellant that he, on being attacked by the deceased had snatched away the weapon from the hands of the appellant and brandished the same resulting the injury on the person of the deceased. The appellant has clearly stated that though he had moved the weapon, he did not know on which part of the body, the deceased sustained the injuries. In the absence of any contrary evidence, we are inclined to accept the said plea of the appellant. Therefore, it is found that the appellant had inflicted the injuries, without any intention to hit on a particular part of the body. This circumstance, coupled with the evidence of PW 8, inspires confidence to believe that the appellant had acted for his private defence to protect his body without any intention or premeditation to cause death or to cause bodily injury, as is likely to cause death of the deceased.

26. As provided by Sections 96 and 97 of I.P.C., every person has a right, subject to restriction contained in Section 99, to defend his own body and the body of any other person against any offence affecting his body. The right of private defence may extend to causing the death in cases where the accused can show that there were circumstances giving rise to reasonable ground for apprehension that either death or grievous hurt would be caused to him (*Vishvas Aba Kurane Vs. State of Maharashtra*, AIR 1978 SC 414).

27. As revealed from the above discussed evidence, as well as the uncontroverted statements of the appellant, it has been found that the deceased, after picking up a quarrel with the mother of the appellant and took a khukri and attempted to attack the appellant, who, on being so threatened, snatched away the khukri from the hands of the appellant and moved the same without any intention to any particular injury on any particular part of the body. It is found that in the said process, the deceased sustained injuries. As the deceased had attacked the appellant, with a sharp weapon (a khukri), in view of the attending circumstances, there was reasonable ground, on the part of the appellant for apprehension that, either death or grievous hurt would be caused to him. The fact remains that the deceased had already assaulted the mother of the appellant following a quarrel. In such a situation, it was quite natural reaction, on the part of the appellant to snatch away the dao and brandish the same. That apart, the degree of reaction may vary from person to person depending on the fact situation and the social background of the person concerned. Therefore, the injuries caused by him, by moving the khukri, amounted to an act done in private defence. As observed in the case of *Wassan Singh Vs. State of Punjab* (1996) 1 SCC 458, the reasonable apprehension of an accused that grievous hurt would be caused, is to be judged from point of the view of the accused and it cannot be subjected to microscopic and pedantic scrutiny.

28. It is settled law that in a criminal trial, if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused, should be accepted.

29. In view of the above cardinal principle of criminal jurisprudence and in absence of any direct evidence against the appellant, we find no difficulty in believing and holding that the deceased sustained injuries aforesaid, at the hands of the appellant, while the latter acted in exercise of his right of private defence. Of course, after removal of the khukri from the hand of the deceased, the deceased had no weapon. The fact remains that the appellant caused fatal injuries by hitting on the various parts of the body of the deceased. It appears that, while exercising the right of private defence, against the deceased, who was unarmed, the appellant appears to have exceeded the power given to him. From the evidence on record, it is clearly found that the appellant had no premeditation or any intention to kill the deceased. It has also been found that the incident took place upon a sudden quarrel and the injuries were caused in a heat of passion. As the deceased picked up a quarrel with the mother of the appellant, compelling her to raise alarm, it was quite natural for her son i.e. appellant, to rush for her rescue. That apart, the attempt to kill, made by the deceased, who was armed with a khukri, coupled with assault caused to the mother of the appellant, probably made the appellant angring and this provoked him to assault the deceased after snatching away the khukri from his hand. Therefore, in view of the Exceptions 2 and 3 provided by Section 300 aforesaid, it is found that the appellant, on being provoked, in a heat of passion, upon a sudden fight, without any premeditation or intention to kill, without taking any undue advantage or, acting in a cruel or unusual manner and while exercising the right of private defence in good faith had assaulted the deceased as a result of which the latter died. Therefore, the offence having been committed under the said exceptional circumstances, it cannot be held that the accused committed murder. In view of the death being caused due to the act committed by the appellant, we find no difficulty in holding that the appellant committed the offence of culpable homicide not amounting to murder i.e. the offence under Section 304 I.P.C.

30. Now the question is, under which part of Section 304IPC, the offence committed by the appellant, would fall.

31. As discussed above, it has been clearly found that the appellant assaulted the deceased after snatching the dao from him, without any intention or premeditation to cause his death. There is no controversy to the statements made by the appellant under Sections 313 and 164 Cr.P.C. that he had moved the khukri (weapon) without knowing on which part of the body, the deceased sustained injuries. There is nothing to show that the appellant had given the blows on any particular part of the body. Therefore, there was no intention either to cause death or causing such bodily injury as was likely to cause death.

32. As stated by PW1, PW 2, PW 3 and PW 4, it is found that the deceased immediately after the incident approached them and disclosed that he had committed the offence of causing death. In his statement made under Section 313 Cr.P.C, the appellant also

admitted that the deceased sustained injuries, when he moved the khukri after snatching the same from the deceased. From the record, it is found that the appellant did not flee the place after committing the offence. This conduct on the part of the appellant lends support in his favour. Therefore, as discussed above, in absence of anything contrary, we find no reason to disbelieve his version. His said statements coupled with the evidence of PW 8, safely leads to the conclusion that the injuries were caused without any intention to cause the death or to cause such bodily injury is likely to cause the death. Unless, the intention to cause death or to cause such bodily injury as is likely to cause the death is established the accused cannot be held guilty of committing the offence under Section 304 Pt I, IPC. From the evidence on record, it has been found that the appellant had brandished a sharp cutting weapon, causing multiple injuries on the person of the deceased. There is no difficulty in understanding that injuries caused by giving blows with a sharp cutting weapon may cause death of a person. Therefore, it can be inferred that the accused, while inflicting the said injuries had the knowledge that the act done by him was likely to cause death. Therefore, the offence committed by the appellant will fall under Section 304 PT II, IPC.

33. In the light of the above discussion, we are of the considered opinion, that the learned trial Judge committed error by recording the conviction under Section 302 IPC and sentencing him thereunder. Therefore, we find it to be a fit case to modify the conviction recorded under Section 302IPC to one under Section 304 Pt II.

34. In view of what has been discussed above and considering the facts and circumstance of the case, in which the accused committed the offence in this case, we feel that a lenient view in respect of the sentence should be taken. The appellant is in jail for more than six years. Accordingly, we modify the sentence of life imprisonment as the period already undergone. However, we are not inclined to interfere with the sentence regarding fine.

35. With the above modification, we partly allow this appeal. Return the LCRs.

We appreciate the assistance rendered by Mr. C. Bhattachayya, learned Amicus Curie and direct payment of Rs.3500/ as his remuneration to be paid by the Assam Legal Services Authority.

36. In view of the provision prescribed by Section 357A Cr.P.C. the victim or his/her dependants are entitled to get compensation for rehabilitation in appropriate cases. Therefore, for the sake of brevity and in the light of our discussions, made in Criminal Appeal No.93(J)/2005 (disposed of on 22.12.2011), with regard to the victim compensation, as provided by Section 357 A Cr.P.C, we make the following directions:

(1) As an interim measure, an amount of Rs.50,000/ shall be deposited by the State Government with the District Legal Services Authority of Jorhat District within a period of two months from this date. The District Legal Services Authority, on receipt of the said

money, shall make an enquiry to ascertain as to whether, there is dependant(s), who suffered loss and injury as a result of death of the deceased and if such dependent(s) or legal representative(s) need any rehabilitation.

(2) Upon such enquiry, if it is found that the dependent(s), if any, need rehabilitation, then the District Legal Services Authority shall initially release the said interim amount and thereafter direct payment of adequate compensation, as may be prescribed by the scheme to be prepared by the State Government.

(3) It is made clear that if the District Legal Services Authority, after due enquiry, arrive at the findings that there is no dependent(s) or that the dependent(s) of the deceased/victim does not require any rehabilitation, then the District Legal Services Authority, shall refund the said amount of Rs.50,000/, without delay, in favour of the State Government.

For the purpose of providing financial assistance towards rehabilitation of the victim of his/her dependents, in appropriate case, and for proper implementation of such scheme, as provided by Section 357A, Cr.P.C, it is necessary to ascertain the dependency factor and the financial status of such victim, his/her dependants, and of the accused person(s), as the case may be. Therefore, we direct that the Judicial Officers, working under, jurisdiction of this Court, during the course of trial, shall ascertain (i) the financial status of the victim or his/her dependents), if any, (ii) whether such persons need rehabilitation, as the case may be and also the financial status of the accused person(s). The said findings of the enquiry shall be reflected in the judgment.

Registry shall furnish copy of this judgment to all the Judicial Officers under the jurisdiction of this Court.

37. Let a copy of this judgment and order be furnished to Mr. Z. Kamar, learned Public Prosecutor, and the Chief Secretary to the Government of Assam, for doing the needful.