
(1999) 2 GLT 576

Gauhati High Court

Case No: Criminal Appeal No. 267 of 1997

Ismail Ali Barbhuiyan

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: Sept. 18, 1998

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 164, 207
- Penal Code, 1860 (IPC) - Section 302, 324, 326, 34, 448

Citation: (1999) 2 GLT 576

Hon'ble Judges: M. Sharma, J; D. Biswas, J

Bench: Division Bench

Advocate: J.M. Choudhury, B.M. Choudhury and S.B. Choudhury, for the Appellant; Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

D. Biswas, J.

Shri Ismail Ali Barbhuiyan was tried by the learned Sessions Judge, Cachar, Silchar u/s 302 and 324 I.P.C. in Sessions Case No. 58/96 and was convicted u/s 302 I.P.C. for causing death of Samsuddin Chowdhury and sentenced to imprisonment for life and to pay a fine of Rs. 5,000/-, in default, to undergo further rigorous imprisonment for a period of two years. He was also convicted u/s 324 I.P.C. and sentenced to undergo rigorous imprisonment for a period of two years for causing injury on the person of Smti Shanta Banu Choudhury, wife of the deceased.

2. The prosecution case, in brief, is that on 23.9.92 at 1.30 A.M. the accused along with others entered the house of Samsuddin Choudhury, an employee of Regional Engineering College, Silchar and stabbed Shri Choudhury and his wife. Shri Choudhury succumbed to his injuries while his wife Smti Shanta Banu Choudhury sustained stab injuries. The occurrence was reported to the Officer-in-Charge of Ghungur Police Outpost, Silchar at 2.10 P.M. on the same date. On receipt of the ejahar, the police

registered a case and took up investigation. The F.I.R. was forwarded to the Officer-in-Charge of Silchar Police Station on 24.9.92 at 10.00 A.M. and the police registered P.S. Case No. 983/92 u/s 448/302/326/34 I.P.C. Eventually on completion of investigation, the police submitted chargesheet against Md. Ismail Ali Baibhuiyan, Md. Mainul Haque and Md. Rahimuddin. The learned Magistrate, after complying with the requirements of Section 207 of the Code of Criminal Procedure committed the case to the Court of Sessions for trial. On appearance, the learned Sessions Judge framed charge against the accused Md Ismail Ali Baibhuiyan u/s 302 and 324 I.P.C . and, on denial thereof, proceeded with the trial.

3. In this case as many as twelve witnesses have been examined by the prosecution to bring home the charge of murder and assault. The learned Sessions Judge relying upon the evidence of P.W. 8, Smti Shanta Banu Choudhury, awarded the verdict of guilt. Shri J.M. Choudhury, learned senior Counsel appearing for the accused argued that Smti Shanta Banu Choudhury cannot be treated as a reliable eye witness of the occurrence and, as such, the conviction rendered by the learned Sessions Judge relying upon her belated statement involving the accused with the alleged crime cannot be sustained. It is in this context we are to examine the statement of P.W. 8, Smti. Shanta Banu Choudhury.

4. Before we take up the statement of P.W. 8 for consideration, it is considered imperative to refer to the evidence of other witnesses on record on the question of involvement of the accused in the alleged offence of murder.

5. P.W. 1, Shri Sukumar Roy, who was on duty as a Nightguard in the Regional Engineering College Campus stated that after hearing a scream from the house of deceased Samsuddin, he went there and found P.W. 8, Smti. Choudhury in an injured condition. From her, he could come to know that her husband was also assaulted by "some body". This witness and another person named Giridhari called Sudip Chakraborty and Pramesh Nath from the neighbourhood. The injured Samsuddin was shifted to Silchar Medical College. At this stage this witness was declared hostile. But the prosecution did not confront this witness with any material statement made to the police u/s 161 Code of Criminal Procedure

6. Similarly, P.W. 2, Shri Giridhari Kurmi, who went along with P.W. 1 to the house of the deceased after hearing the scream, stated that they found the wife of the deceased in an injured condition. According to him, the wife of the deceased, Smti Shanta Banu Choudhury told them that "some one" entered their house and killed her husband and also caused injuries on her person. He further stated that she could not recognise the persons who had assaulted them. He also stated that he saw Samsuddin lying in an injured condition in his house. This witness was also declared hostile and thereafter he denied the suggestion put to him that he had stated to police that he saw the accused "came in a Taxi and injured, the deceased".

7. P.W. 3, Shri Pramesh Chandra Nath, an adjacent neighbour of deceased Samsuddin, stated that P.W. 8, on the night of occurrence at about 1 P.M. called him from his verandah and told him that "some one" had assaulted her husband. This witness came to the place of occurrence after the people gathered there and found Samsuddin in an injured condition.

8. P.W. 4, Shri Makabbir Ali Laskar, another Nightguard, evinced that he had seen a car near the Girls' Hostel. He came back home. After some time, he was called by another watchman and told that Samsuddin has been murdered. He went to the place of occurrence and found Smti Choudhury lying on the road with injury. He shifted Smti Choudhury to the Medical College Hospital with the help of persons present there. From his statement, we also find that on the sixth day after the occurrence, Smti Choudhury regained her "sense" and disclosed the name of the accused Ismail Ali Barbhuiyan as the assailant and killer of her husband.

9. P.W. 5, Shri Binoy Krishna Roy, a lecturer of the Regional Engineering College, who lodged the ejahar, Exbt. 1, stated nothing about the identity of the accused.

10. From the evidence of the above five witnesses, the important and relevant evidence that we find is that P.W. 2 stated before the police that he had seen the accused who had come in a taxi and assaulted the deceased. From the evidence of P.W. 4, we find that P.W. 8 Smti Shanta Banu Choudhury disclosed the name of the accused as the assailant of her husband before the police on the sixth day after the occurrence.

11. P.W. 6 Dr. K.K. Chakraborty conducted the post-mortem examination and proved the injuries along with his opinion. The report is not in dispute and needs no further elucidation. P.W. 7, Dr. Ashutosh Suklabaidya proved the injuries on the person of Smti Choudhury. His evidence will be discussed hereinafter in due course.

12. It would appear from the statement of P.W. 11 Shri Binoy Bhushan Nath Laksar, I/O that P.W. 2 told him that he suspected the accused Ismail Ali to be the assailant of the deceased. P.W. 11 further stated that excepts Abdus Samad Choudhury (P.W. 10), nobody gave any statement about the accused. But on confidential report gathered, he could come to know that the accused was not living with his wife in his quarter and a woman of questionable character used to visit his house. It is, therefore, apparent that P.W. 2 and P.W. 4 did not make any statement before the I/O incriminating the accused. A careful scrutiny of evidence of Investigating Officer shows that the prosecution also did not seek any corroboration to the statement made by P.W. 2. Therefore, the alleged statement of P.W. 2, if any, made to the Investigating Officer inculcating the accused goes uncorroborated. The evidence of P.W. 4, P.W. 9 and P.W. 10 to the effect that P.W. 8, Smti Choudhury disclosed the name of the accused after regaining her "sense" in the hospital to the Investigating Officer does not find any support from the Investigating Officer himself.

13. It is important to mention here that from the evidence of I/O we find that on 23.9.92 he went to the official residence of the accused. But the accused was found absent. The Principal of the Regional Engineering College told him that the accused had left the quarter without taking any leave. Then he went to the Hailakandi and, thereafter, to Lakhinagar and arrested the accused from the house of his father-in-law. According to him, he had proceeded to arrest the accused on the basis of secret information gathered by him. Therefore, it is the settlement of Smti Choudhury, P.W. 8 alone which will have to be relied upon for assessing the culpability of the accused. None of the Pws. corroborated her in any respect. She has deposed that there was a dispute between her husband and the accused as her husband had informed the wife of the accused about his doubtful relationship with one lady named Smti Nazma Begam. According to her, on the night of occurrence, at about 1/1-30 A.M., the accused called her husband and asked him to open the door for some urgent work. She woke up and went to the room of her husband and at that time two electric lights were burning, one in the room of her husband and the other in the front of verandah. Her husband opened the door and then the accused went back and give signal to some persons. Immediately three persons along with the accused came inside the room of her husband and the accused dealt with a dagger blow on the chest of her husband. Two other persons also dealt with dagger blows on him. She was also stabbed on her chest by the accused. On her bid to save her husband, another person assaulted her with a rod. She rushed towards the gate and raised alarm seeking help. On arrival of the neighbours she became senseless and regained her sense at Silchar Medical College Hospital. Her statement was recorded by the police after four days of her admission in the hospital. She also proved Exbt. 4, the statement recorded by the learned Magistrate u/s 164 Code of Criminal Procedure According to her, she had disclosed the name of the accused to Makabbir Ali Laskar, P.W. 4, Abdus Samad Choudhury, P.W. 10 and her parents who were present in the hospital when she made the statement. But from the evidence of I/O we find that none of the P. Ws. stated anything about the accused. The P. Ws who were present when Smti Choudhury disclosed the name of the accused to the I/O having failed to depose the same, a doubt is cast as to whether P.W. 8, Smti Choudhury had made any statement before the I/O in presence of them. This strikes at the credibility of P.W. 4, P.W. 9 and P.W. 10. That apart, a suggestion was put to P.W. 8 during the course of cross-examination that she stated to I/O that she did not tell the I/O that the accused Ismail Ali had assaulted her and her husband, but stated that she was in firm conviction that accused Ismail Ali had assaulted her and her husband with a dagger. She further denied another suggestion that she did not tell the I/O that two unknown persons assaulted her husband with dagger and one of them assaulted her with a dagger. To this, the I/O in his cross-examination stated that P.W. 8 did not tell him that she saw the accused assaulting the deceased but stated that the accused along with other persons assaulted the deceased. The I/O further clarified that this witness stated to him that two unknown persons assaulted her husband with daggers and one of them also assaulted her with a dagger. The statement made by her before the Court and before the I/O show that there is a contradiction so far the dealing of dagger blow by the accused is

concerned. But this contradiction would not have been material had she been examined immediately after the occurrence. The aberration in the prosecution case as pointed out above in many of its facets rules out complete reliance on her uncorroborated solitary statement.

14. Be that as it may, the question arises whether she was completely senseless and incapacitated to speak during these four days of her confinement in the hospital. According to P.W. 8, her statement was recorded on 28.9.92, that is, four days after the occurrence. P.W. 11 stated that he visited the hospital on 23.9.92, but found P.W. 8 in unconscious condition. This statement is in tune with the claim of P.W. 8 Smti Choudhury that she was senseless during those four days and the doctor also advised her not to speak. It is a fact that the trauma and shock she had sustained because of this attack might have incapacitated her to speak. But this could have been accepted conclusively had there been any medical evidence to this effect. P.W. 7, Dr. Ashutosh Suklabaidya who had examined her found a sharp cutting injury over the serums (on the chest) measuring 1" x 1 1/2" x 1 cm. According to the doctor, the injury was simple and caused by sharp weapon. Apart from this, there is nothing in the evidence of the doctor to show that the injury sustained by Smti Choudhury was so grievous that she was completely senseless during the four days of her confinement in the hospital. Her statement that she was advised by the doctor not to speak also creates doubt as to her incapacity to speak, atleast to speak out the name of the accused. The nature of the injury, in our opinion, in ordinary course cannot be accepted as sufficient enough to render her senseless continuously for 4/5 days. Her statement disclosing the name of the accused was recorded by I/O on 28.9.92 and it was for the first time after the occurrence he made the statement involving the accused. It is pertinent to note here that this statement came out from her only after arrest of the accused by the I/O on suspicion. P.W. 3, Shri Pramesh Chandra Nath, an adjacent neighbour, whose door she knocked at the first instance simply deposed that P.W. 8 told him that some one has assaulted her husband. His statement is significant in the sense that had she seen the accused, she would have named him to P.W. 3.

15. In our considered opinion, before disclosure of the name of the accused by P.W. 8, police arrested him on suspicion. Only after his arrest, Smti Choudhury the lone eyewitness of the occurrence made the statement before the police incriminating the accused. The nature of injury sustained by her does not appear to be so grievous as to incapacitate her to speak. The statement of P.W. 4, P.W. 9 and P.W. 10 to the effect that in their presence P.W. 8 for the first time disclosed the name of the accused to the Investigating Officer stands rebutted by the 10 himself when he clarified during the course of cross-examination that except P.W. 10, who suspected the accused as an assailant, none else made any reference to the accused. The F.I.R. was lodged by the Principal-in-charge of the Regional Engineering College obviously on information collected by him. The murder took place inside the residential campus of the Regional Engineering College and it was his employees who had gathered at the scene

immediately after the occurrence. If the identity of the accused was known to any of them, certainly the Principal-in-charge would have reflected the same in his ejahar. All these infirmities in the prosecution case cast a spell of doubt.

16. It is true that in ordinary course the Court cannot disbelieve the wife of the deceased when she indicts any person as the assailant of her husband. But situated above, it will not be safe to put absolute reliance on her statement to convict the accused. Doubt about the identification of the accused by P.W. 8 being predominant, other factors suggesting probability of the involvement of the accused cannot prevail upon the former so as to enable this Court, to come to a conclusion that the evidence on record irresistibly leads to the conclusion that it is the accused alone and none else who could have committed the murder. In our opinion, it is a case where doubt persists and, therefore, the benefit must go to the accused.

17. In the result, the appeal is allowed and the judgment of conviction and sentence is hereby set aside. The accused is discharged from the liability of bail bond.