

**(2007) 03 GAU CK 0034**

**Gauhati High Court**

**Case No:** None

Bharat Das

APPELLANT

Vs

State of Assam

RESPONDENT

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**Date of Decision:** March 2, 2007

**Acts Referred:**

- Evidence Act, 1872 - Section 118
- Penal Code, 1860 (IPC) - Section 302

**Citation:** (2007) 3 GLT 371

**Hon'ble Judges:** B.P. Katakey, J; A.H. Saikia, J

**Bench:** Division Bench

**Final Decision:** Dismissed

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### **Judgement**

A.H. Saikia, J.

Heard Mr. D. Mazumdar, learned Amicus Curiae and Mr. D. Das, learned P.P. Assam.

2. This criminal appeal has been preferred from jail by the appellant challenging his conviction and sentence so imposed by the learned Sessions Judge, Golaghat in Session Case No. 14/2000 by his judgment and order dated 15.11.2000 wherein the appellant having been found guilty of offence u/s 302 IPC was sentenced to suffer imprisonment for life and to pay a fine of Rs. 500.00 in default further rigorous imprisonment for one year.

3. The prosecution case in brief is that on 29.07.1997 at about 7 p.m. the appellant Bharat Das along with his two sons, Tingku and Babul came to the house of Shri Angad Das of Halmara Tea Estate under Golaghat Police Station in the District of Golaghat and hit at the door by an axe and having failed to open the door by an axe, the accused persons left the place by scolding the residents. At the relevant time Shri Angad Das was sleeping due to his illness. The deceased Seela Das wife of Shri Angad Das came out from her house carrying her baby infant on her lap along with another minor daughter P.W.-2, Rupali to lodge an FIR with the Golaghat Police

Station, Golaghat and while they were near the house of one Biren Singh Ghatowar all the three accused person gheraoed her and assaulted her with deadly weapons like dao, axe and khukri causing her death. The baby was found below the belly of the deceased mother. P.W. 2, Rupali accompanied her mother witnessed the entire incident and reported it to her father. The baby was taken out. They therefore went to the house of one Nagen Bora, Manager of Halmira Tea Estate to inform about the incident and said Nagen Bora lodged the ejahar on 29.07.97 narrating the entire episode.

4. On the basis of the above FIR the police started investigation and filed charge-sheet against those three persons u/s 302 IPC. Since the other two accused persons Tingku and Babul were found to be minors and below 16 years of age they were sent to Juvenile Court at Jorhat and the trial proceeded against the appellant.

5. During the trial the prosecution examined as many as six witnesses including the P.W. 2, Rupali Das, the sole eye witness and the minor daughter of deceased Seela Das and P.W.-4, Dr. Beni Madhab Phukan who conducted autopsy on the dead body of late Seela Das.

6. On the appreciation of the testimony of those witnesses including the documents so exhibited before the Court by the prosecution, the learned trial Judge found the appellant guilty of the offence u/s 302 IPC and consequently sentenced him to suffer imprisonment for life and to pay a fine of Rs. 500.00 in default to rigorous imprisonment for one more year.

7. Hence this appeal preferred by the appellant from the jail.

8. We have comprehensively examined the testimony of all the witnesses including the deposition of the P.W. 2, Rupali Das who was aged about 14 years at the time of giving the evidence and obviously a child witness. It is clearly transpired that she saw the incident of killing her mother by three accused persons including the appellant. She categorically deposed that three persons including the two sons of the appellant above mentioned came to their house and attempted to open the door with the help of an axe and failing to do so they went away. As her father was sick, he was sleeping during the relevant time inside their house. When the accused person were appeared to have left their house, her mother with a baby on her lap accompanying with her proceeded towards police station. While they came to the courtyard of P.W. 5, Biren Ghatowar, all those three persons intercepted them and assaulted her mother with an axe and dagger. She pin pointedly stated that the appellant Bharat Das had a "PARASU" axe with him while two other accused persons were armed with dagger and "khukri" and as a result of such assault, her mother fell down on the ground. After commission of such act, the accused persons" left with the weapons. It is also noticed that this piece of evidence remained unassailed during the cross-examination by the defence. According to her, the occurrence took place three year ago; meaning thereby she was only 11 years of age at the time of

incident. It is candidly transpired from the close perusal of the evidence of this witness that there is no iota of doubt and any occasion to disbelieve the testimony of this witness. In our considered opinion, this witness is found to be trustworthy and reliable.

9. Now let us examine the medical evidence. P.W. 4, the doctor found the following injuries.

A dead body of an adult female with average built. Rigor mortis present.

Injuries.

1) 3" x 1" size sharp cut two in numbers over the right side of the head.

One 2" x 1" size sharp cut wound on the occipital region. All are bone depth and oblique, exposing the brain matters.

2) Left pinna (ear) was cut in the middle with incised wound of size 2" x 1" diving the ear in the middle.

3) 2" x 2" to 4" x 2" size sharp cut wounds of total 18 numbers over the whole back and waist. All these injuries are lung depth over the right back.

4) Sharp cut wound over the palmer aspect of the index, Middle and ring finger in the middle with severing the index finger completely in its middle as half of it found missing.

P.W. 4 opined that the death was due to shock and haemorrhage as a result of the injuries sustained by the deceased.

10. The medical evidence above mentioned would clearly indicate that late Sheela Das was inflicted with multiple injuries and this piece of evidence was fully corroborated by the deposition of PW-2 the child witness who categorically testified that her mother was assaulted by the appellant including her two sons with sharp weapons, like dagger, khukri etc. so as to give rise those multiple injuries in her person.

11. As regards competency of child witness, it would be relevant to refer the relevant provision of law as well as judicial authority in this regard.

12. Section 118 of Indian Evidence Act, 1872 (for short, "the Act") mentions the persons who may testify. It provides as under:

118. Who may testify-All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation--A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to

them.

13. A bare perusal of the provisions of law above mentioned would go to manifestly indicate that a person either a minor or a lunatic is not incompetent to testify, unless he is prevented by his minority or lunacy as the case may be from understanding the questions put to him and giving rational answers to them.

14. It is established that the testimony of a child witness should not be rejected only on the ground of the witness being a tender age but the evidence of such witness has to be scrutinized with care and caution.

15. In a recent case of [Suryanarayana Vs. State of Karnataka](#), the Apex Court while dealing with the credibility of the testimony of child witness in paragraph-5 held as under:

5♦The evidence of the child witness cannot be rejected per se, but the Court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the Court to scrutinize her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the Courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the Courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.

16. In view of the above discussion and on discreet appreciation of the testimony of the witnesses aforesaid, we do not find any convincing and compelling materials to upset the impugned conviction and sentence. Accordingly this Court is of the firm view that the learned Judge was justified and correct in convicting the appellant u/s 302 IPC and sentencing him accordingly to suffer imprisonment for life and to pay a fine of Rs. 500.00 in default to rigorous imprisonment for one more year.

17. In the result, this appeal fails and the impugned judgment of conviction and sentence is upheld. Before parting with the case, we wish to put on record our appreciation to Mr. Mazumdar, learned Amicus Curiae for his help and valuable assistance rendered in deciding this criminal jail appeal. We direct that Mr.

Mazumdar shall be entitled to his profession fee of Rs. 2500.00. At this stage, Mr. Mazumdar has fairly submitted he is willing to donate the aforesaid professional fee so awarded to him to the Legal Aid Fund, Gauhati High Court and in view of the same, it is directed that the amount be deposited with the Legal Aid Fund, Gauhati High Court. Sent down the LCR forth with.