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## **Niranjan Shil Vs The State of Tripura**

### **Criminal Appeal (J) No. 29 of 1995**

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**Court:** Gauhati High Court (Agartala Bench)

**Date of Decision:** Sept. 1, 1999

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) â€” Section 313, 464#Penal Code, 1860 (IPC) â€”  
Section 149, 302, 304, 326, 34

**Citation:** (1999) CriLJ 4498 : (1999) 3 GLT 462

**Hon'ble Judges:** H.K.K. Singh, J; A.K. Patnaik, J

**Bench:** Division Bench

**Advocate:** P.K. Biswas and M.K. Bhowmik, for the Appellant; H. Sarkar, Assistant Public  
Prosecutor, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

H.K.K. Singh, J.

This appeal is against the judgment and order dated 19-8-1995 passed by the learned Additional Sessions Judge, West

Tripura, Agartala in Sessions Trial No. 146(W.T/ A) of 1993 thereby convicting the accused-appellant u/s 302 of I.P.C. and  
sentencing him to

undergo life imprisonment.

2. On 1-5-1985 one Anukul Debnath came to Sidhai Police Station and lodged an oral ejahar stating that on the same day i.e.  
1-5-85 at about

9,15/9"30 p.m., on hearing hue and cry coming from the direction of the house of one Baneshwar Choudhury, he rushed towards  
the direction and

there he found Abinash Sarkar lying near the back side of the house of Baneshwar. He also found Rabindra Choudhury supporting  
the head of

Abinash. Abinash Sarkar had severe bleeding injuries on his body. The informant also learnt from the persons who were present  
there that accused

Niranjan Shil along with Biswanath Shil and others assaulted Abinash Sarkar. On the basis of the report (ejahar), Sidhai P.S. case  
No. 1 (5)/85

under Sections 326 34 of IPC was registered. Subsequently Abinash Sarkar succumbed to his injuries on 2-5-85. After investigation, the appellant

and the aforementioned Biswanath Shil were charge sheeted for the offence u/s 302 read with Section 34 of IPC. Hence the trial.

3. After trial, the learned Sessions Judge acquitted the aforesaid Biswanath Shil of the charge levelled against him and convicted the appellant for

the offence u/s 302 as noted above. The plea of the accused-appellant as gathered from his statement u/s 313 of Cr.P.C. and also from the trend

of cross-examination is of total denial and that he has been falsely implicated in the case.

4. We have heard Mr. P.K. Biswas, the learned counsel appearing on behalf of the accused-appellant and Mr. H. Sarkar the learned Additional

Public Prosecutor appearing on behalf of the respondent. Mr. Biswas challenged the judgment of the learned Sessions Judge on more than one

ground and he has taken us through the judgment and also the evidence and other materials on record.

5. As per prosecution case, the occurrence took place on 1-5-85. After the occurrence victim Abinash Sarkar was immediately shifted to the

hospital where he succumbed to his injuries on 2-5-85. The post-mortem examination was performed by one Dr. B.K. Paul, who died before the

trial so, Dr. Pijush Kanti Das who had worked with Dr. B.K. Paul for about 27 years deposed before the court and proved the post-mortem

examination report Ext.P/11). The injuries found by the Doctor on the body of the deceased are as follows:-

1. The incised looking wound over the left and posterior part of scalp 5''' x 1''' x 1/2''' and 4''' x 1''' x 1/2''' having the bone beneath cut off and stitch

given.

2. One incised looking wound over the upper part of right shoulder extending from back to front aspect 4''' x 1''' x 1/2 stitch given.

3. One incised looking wound over the right side of back at the middle part 6''' x 1''' x 2''' stitch given.

4. One lacerated cut injury over the palmir aspect of right hand extending from base of hand up to the root of the middle finger"4''' x IVi''' x 1'''.

6. According to the post-mortem report, injuries were caused by sharp cutting and moderately heavy weapon. The cause of death was ""due to

shock and haemorrhage resulting from the multiple injuries including brain injury which is fatal"". Further the doctor who deposed on the basis of the

post mortem report Ex. P/11 prepared by Dr. B.K. Paul also has given his independent opinion before the court that the injuries available in the

post mortem report are not sufficient in the ordinary course of nature to cause death, but the injury on the head was imminently dangerous to cause

death. In the course of the trial and also at the time of hearing of the present appeal the opinion of the doctor who performed the post mortem

examination is not disputed. Thus, we have no hesitation to come to the conclusion that the finding of the learned Sessions Judge that the deceased

Abinash Sarkar died on 2-5-85 as a consequence of the injuries caused on him was correct.

7. Regarding the occurrence, the prosecution has relied upon the oral evidence of eye-witnesses, corroborative evidence of other witnesses who

rushed to the spot of crime just after the occurrence and oral dying declaration.

8. Shri Gautam Dhar P.W. No. 2 and Sankar Deb, P.W. 15 are the direct eye-witnesses of the occurrence. Sankar Deb (P.W. 15) and deceased

Abinash Sarkar went to the house of Gautam Dhar (P.W. 2) at about 8/8.30 p.m. and they gossiped there for about an hour. Thereafter at about

9/9.30 p.m. P.W. 15 and deceased left the house of P.W. 2. P.W. 2 also escorted them up to his gate. Thereafter P.W. 2 remained at his gate.

P.W. 15 and deceased proceeded towards south and had moved about 25/26 cubits from the gate of P.W. 2. P.W. 2 also saw accused Niranjan

Shil going towards the same direction. Suddenly, Niranjan Shil chopped Abinash Sarkar With a dao near the shop of Sankar Choudhury. Abinash

raised alarm. In the meantime, P.W. 2 also rushed towards the spot to intervene in the matter, but accused Niranjan Shil threatened him wielding

the dao in his hand thus through fear P.W. 2 went back home. In the meantime, P.W. 15 also raised alarm when he saw the accused assaulting

Abinash Sarkar with a dao. At that time accused Biswanath Shil also advanced towards the spot with a lathi in his hand saying ""see the result of

quarrel with us"". Both P.W. 2 and P.W. 15 saw accused Niranjan Shil assaulting Abinash Sarkar with a dao. As P.W. 2 left through fear, P.W. 15

also left the place out of fear. Abinash Sarkar after receiving 2/3 injuries from the dao ran away towards south and fell down in front of the house

of Banerwar Choudhury. Both P.Ws. 2 and 15 came back to the spot after 15/20 minutes and also on hearing the alarm and hue and cry many

persons of the locality rushed there. Anukul Debnath (P.W. 1) who also rushed to the spot on hearing the hue and cry along with Ratan Dutta

P.W. 13 went to the police station and lodged the ejahar orally which was reduced into writing by P.W. 17 Sujit Gupta who was Sub-Inspector of

Police of Sidhai P. S. In the meantime, P.W. 6, Rabindra Sarkar, P.W. 7 Prembilash Sarkar and P.W. 9 Partha Sarkar carried the injured

Abinash to" Mohanpur Primary Health Centre and thereafter injured was shifted to G. B. Hospital. The informant P.W.I also mentioned in his

ejahar that at about 7 p.m. of the date of occurrence Abinash Sarkar came to the shop of one Harakrishna Debnath and told the informant that on

that day a settlement would be made between accused Niranjan Shil and others regarding the "golmal" which occurred two days before the

occurrence.

9. Regarding the dying declaration, P.W. 11 Rabindra Choudhury, who is one of the persons who rushed to the spot after the occurrence after

hearing the hue and cry raised by the victim and others, stated that he (P.W. 11) learnt from Abinash Sarkar that he was assaulted by accused

Nira and Bishu. Rabindra Sarkar (P.W. 6) and Prembilash Sarkar (P.W. 7) who are brother/ cousin of the deceased stated that in presence of

others they learnt from Abinash Sarkar that accused Nira and Bishu assaulted him. Again Partha Sarkar (P.W. 9) has also stated that he learnt

from P.W. 11 that accused Nira and Bishu inflicted the injuries on Abinash Sarkar and P.W. 11 also stated that he learnt from Abinash Sarkar that

he had been assaulted by accused Nira and Bishu.

10. The learned Additional Sessions Judge, relying upon the evidence of the eye-witnesses which is supported by the other evidence along with

material exhibits like weapon of the offence (dao) found that accused Niranjana Shil is the guilty of the offence of murder. But accused Biswanath

Shil was acquitted of the offence as noted above though the learned Sessions Judge did not rely upon the oral dying declaration and, rightly so.

11. Two accused, namely, Niranjana Shil and Biswanath Shil were charged for the offence u/s 302 read with Section 34, I.P.C. Accused

Biswanath was acquitted and accused Niranjana Shil was convicted u/s 302 simpliciter. Mr. P. K. Biswas, the learned counsel for the appellant has

strongly contended that in absence of a specific charge for the offence u/s 302, I.P.C. against accused Niranjana Shil no conviction can be made.

Mr. Biswas has also submitted that charge framed against accused for offence u/s 302 read with Section 34 has not been altered into one u/s 302

simpliciter and as such conviction cannot lie. Mr. Biswas has relied upon decision of the Apex Court in the case of Lakhan Mahto v. State of Bihar

reported in Lakhan Mahto and Others Vs. State of Bihar, and also another decision in the case of State of West Bengal Vs. Vinu Lachmandas

Sakhrani alias Deru, On the other hand, the learned Public Prosecutor has submitted before the court that in case where more than one accused

have been charged and tried for a substantive offence read with Section 34, IPC and if, as per evidence offence is disclosed against a specific

person and no evidence has come out against the other person then the accused against whom evidence of specific offence is available may be

convicted for the substantive offence simpliciter if, no prejudice has been caused to the accused.

12. In the aforesaid case of Lakhan Mahto and Others Vs. State of Bihar, several accused persons were charged and convicted for the offence u/s

302 read with Section 149, IPC. One of them specifically charged u/s 302 and was acquitted of that charge. There was an appeal against

conviction but there was no appeal by the State against the acquittal u/s 302, IPC. The Apex Court held that the High Court cannot alter a

conviction u/s 302/149 into one u/s 302 or 326 simpliciter. The ratio of this case is not directly applicable in the present case as the provision of

section involved in the case was Section 149 and not Section 34, IPC and as such considering the difference of the scope and the principles of the

aforesaid two sections i.e. 34 and 149, IPC concerning vicarious criminal liability, this decision may not be applicable in the present case at hand.

13. In the next case, relied upon by the learned counsel for the appellant, State of West Bengal Vs. Vinu Lachmandas Sakhrani alias Deru, two

accused were charged for the offence u/s 302, read with Section 34 of IPC. One accused was acquitted but the other was convicted u/s 302, IPC

simpliciter, though no independent charge u/s 302 was framed. The Apex Court held that common intention being core of the charge, no conviction

can be made without an independent charge u/s 302, IPC. But in that case the Supreme Court clearly held that there was no direct evidence in that

case and prosecution relied upon various circumstances and the High Court acquitted the respondent on the ground that there was no sufficient

evidence against the respondent. Affirming the order of acquittal in appeal preferred by the State, the Supreme Court dismissed the appeal. Thus,

in this case also there was no specific evidence against the accused who had earlier been convicted by the trial Court and latter acquittal by the

High Court in appeal, committed the offence. Thus, it is not helpful in the present case.

14. Section 464, Cr.P.C. provides that no finding, sentence or order shall be deemed to be invalid on the ground of error, omission or irregularity

in the charge, unless, a failure of justice has in fact been occasioned thereby. Thus in the light of the provision of Section 464, Cr.P.C. the present

case has to be decided.

15. In the case of Kishore Chand Vs. State of Himachal Pradesh, three accused persons were charged for the offence u/s 302, IPC and 201/34,

IPC. Two accused were acquitted of the charges "and the other accused person was convicted for the offence u/s 302 simpliciter. There was no

independent charge u/s 302, IPC. The Apex Court held that if from the evidence, it is established that any one of the accused have committed the

crime individually, though the other accused were acquitted, even without any independent charge u/s 302, the individual accused would be

convicted u/s 302, IPC simpliciter. The omission to frame an independent charge for the offence u/s 302, IPC simpliciter does not vitiate the

conviction and sentence u/s 302, IPC.

16. In the case of Yeshwant and Others Vs. The State of Maharashtra, it was also held by the Apex Court that in a trial for an offence u/s 302

read with Section 34 of IPC, when all the accused persons except one were acquitted on the ground of benefit of doubt or any other ground, the

remaining accused may be convicted, if the evidence available against him was sufficient for the offence u/s 302 simpliciter.

17. In the case of Sawal Das Vs. State of Bihar, the Apex Court replying upon an earlier decision reported in Sohan Lal and Others Vs. The State

of U.P., held that when three persons are charged u/s 302 read with Section 34, IPC, two are acquitted and if the liability of the third accused is

proved individually and not conjointly upon him, conviction may be made u/s 302, IPC simpliciter.

18. Again a Division Bench of this Court in the case of Sambhu Bora and Another Vs. State of Assam, held that in a case of murder charge u/s

302 read with Section 34 IPC was framed and convicted by the trial Court. In appeal acquitting one and convicting the other remaining accused

u/s 304 Part I IPC held that no prejudice should be caused to the accused and in that case the learned court relied upon the decision of the

Supreme Court in the case of Lok Pal Singh Vs. State of M.P.,

19. From the above decisions it is to be seen if the conviction of the accused for the offence u/s 302 simpliciter may be maintained. In our case, the

direct evidence of P.W. 2 and P.W. 15 are found supported by the corroborative medical evidence, inquest report and recovery of the weapon of

the offence and as per evidence it is proved that accused Niranjan Shil assaulted the deceased with a dao in his hand. The learned Sessions Judge

acquitted accused Biswanath Shil and no appeal has been filed by the State against the acquittal, thus we need not go further in respect of accused

Biswanath Shil and the learned Sessions Judge specifically mentioned in examination u/s 313, Cr.P.C. about the dao blows given by the accused

Niranjan Shil on the person of deceased. Thus, accused Niranjan Shil well aware of the evidence against him. Hence, we are of the opinion that no

prejudice would be caused if the accused is convicted u/s 302 simpliciter even if no charge has been framed for the offence u/s 302, IPC.

20. The next point raised by Mr. P. K, Biswas is that the FIR is anti-timed and anti-dated and the learned counsel relied upon the decision of the

Apex Court in the case of Meharaj Singh (L/Nk.) Vs. State of U.P., In our case in the body of the FIR it is mentioned that the same was lodged at

22.30 hours and the Investigating Officer P.W. 17 stated that the informant "came to the Police Station at 22.20 hours and reported the incident

which was recorded in the CD."" entry No. 31, dated 1-5-85 which took about 10 to 15 minutes. After making the G.D. entry he arranged for a

police vehicle and deputed officers and staff to the place of occurrence which took place about 5 minutes and thereafter the Investigating Officer

(P.W. 17) recorded the F.I.R. Ext.P/1 on the oral report of the informant P.W. 1. The learned counsel has also submitted that no reference of

crime number or police station case number is mentioned in the inquest report (Ext. P/7) nor in the post mortem examination report (Ext. P/11).

21. We have considered the matter and we are of the opinion that the submissions of the learned counsel for the appellant has no substance.

Everything happened in a quick succession and we also find the F.I.R. was lodged promptly and investigation commenced. Non-mentioning of the

case number in inquest report or in the post mortem report, in the circumstances of the case is only a minor omission which cannot go to the root of

the case.

22. Another point raised by Mr. Biswas, is that in the post mortem examination stomach was found full of rice and no abnormal smell was there.

The learned counsel has submitted that in such a case the occurrence as narrated by the prosecution is not probable and he relied upon the Modi's

Medical Jurisprudence and Toxicology, Twenty-first Edition at page 185. The learned Counsel has submitted that as the occurrence took place at

9/9.30 p.m. and as there is no evidence that deceased took meal within about 2/ 3 hours before the occurrence, thus, the entire prosecution" story

as narrated by P.W. 2 and P.W. 15 is not believable. The learned counsel has also relied upon the decision of the Supreme Court in the case of

Meharaj Singh (supra) in this regard.

23. In the present case at hand, according to P.Ws. 2 and 15, the deceased was all along with them from 7/7.30 p.m. onwards i.e. about 212Vi

hours. Though there is no direct evidence from the mouth of the witnesses that they took meal while they were gossiping, it is also equally possible

that they might have taken food. Again in Modi's Medical Jurisprudence at page 185 inferred to by Mr. Biswas it is found, ""the rate of emptying of

stomach varies in healthy persons. The emptying of stomach depends on (i) consistency of food, (ii) motility of stomach, (iii) osmotic pressure of

stomach contents, (iv) quantity of food in duodenum, (v) surroundings in which food is taken, (vi) emotional factors and (vii) residual variations. It

varies in man from 2.5-6 hours. A meal containing carbohydrates generally leaves the stomach early and one containing proteins later. The fatty

food delays emptying time while liquids leave the stomach immediately after ingestion. Sometimes the emptying of stomach remains in abeyance for

a long time in states of profound shock and coma. Food has been seen in the stomach remaining undigested in persons who received severe head

injuries soon after their meal and died within twelve to twenty-four hours afterwards. In one case the food consisting chiefly of rice and dal (pulse)

remained in the stomach for about forty hours without undergoing digestion. It must also be remembered that the process of digestion in normal,

healthy persons may continue for a time after death. The presence of tablets or parts of capsules may be significant.

24. Thus, even if the deceased took his evening meal before he met any of the witnesses the post mortem report does not go against the

prosecution story. Both the cases relied upon by the learned counsel for the appellant will not be of any relevance with the present case.

25. The next point raised by the learned Counsel for the appellant is that in the present case many important witnesses, namely, Harakrishna

Debnath, Sankar Choudhury, Sanjib Dey and Banerwar Choudhury were withheld by the prosecution. To this learned Public Prosecutor has

submitted that Sankar Choudhury and Banerwar Choudhury were not available at their respective house and shop and it was further submitted that

it is not necessary to examine all the witnesses for the sake of avoiding repetition. It is true that important witnesses should be examined if available

but sometimes prosecution may not examine all the witnesses just to avoid repetition of narration of the same fact. If evidence available on record

are sufficient to prove the case beyond any doubt then non-examination of one or some of the witnesses may not result in discarding the whole

prosecution story which is otherwise found proved from available materials on record.

26. For the aforesaid reasons and conclusion we are of the view that the prosecution has been able to prove the case that the accused Niranjana

Shil assaulted the deceased on the date, time and place with dao causing multiple injuries on the body of the deceased Abinash Sarkar and

accordingly we affirm the conviction and sentence as recorded by the learned Additional Sessions Judge, West Tripura, Agartala.

27. The appeal fails and accordingly the same is dismissed.