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**(2007) 02 GAU CK 0030**

**Gauhati High Court**

**Case No:** None

State of Assam

APPELLANT

Vs

Babul Deka

RESPONDENT

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**Date of Decision:** Feb. 28, 2007

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302, 307, 326

**Citation:** (2007) 3 GLT 80

**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.

Since correctness and justification of the death sentence of Babul Deka, the appellant in Criminal Appeal (J) 104 of 2006 and the respondent in Criminal Death Sentence Reference No. 3 of 2006 hereinafter referred to as "the appellant", awarded by the learned Sessions Judge, Nagaon in Sessions Case No. 29(N)/05 has been questioned in both the Criminal Jail Appeal and Death reference above noted, they are being taken up together for analogous hearing and are being disposed of by this common judgment and order.

2. The appellant was convicted u/s 302 IPC for committing murder of late Prasanna Sarma and his wife late Minu Devi and accordingly he was sentenced to death. He was also convicted for commission of offence u/s 307 IPC for attempting to commit murder of P.W.3 Queen Sarma, P.W. 4 Shri Ashok Sarma, P.W. 5 Renu Sarma Devi, P.W. 8 Shri Rupam Sarma and P.W. 12 Tosheswar Sarma and sentenced him to undergo imprisonment for life.

3. It was alleged in the Ejahar dated 14.10.2004 lodged by P.W. 2, Shri Moon Sarma with the Nagaon Sadar Police Station that his uncle the deceased Prasanna Sarma, a resident of village Mahariati married Minu Devi of Mangaldoi town. Thereafter he

brought along with him the accused-appellant from Mangaldoi to work at his house as domestic servant. The said Babul Deka, after working there for about 10/12 years, left his house and went to Mangaldoi and stayed there for about 1 ♦ years and then he again came to Nagaon and started to work as servant to one Tarun Sarma who was a relative of late Prasanna Sarma. On 12.10.2004 the appellant came to the residence of Prasanna Sarma to attend "Shradha" ceremony of the grandfather of Prasanna to be held on 13.10.2004. After completion of "Shradha" ceremony on 13.10.2004 the appellant did not return to Nagaon and slept at the house of Prasanna Sarma along with his menial worker Ashok Sarma @ Kancha P.W. 4 in the adjoining bedroom of Prasanna Sarma and Minu Devi. However, on good faith the door in between the room of Prasanna Sarma and P.W. 4 was not bolted. But as ill luck would have it, in the morning on the next day i.e. 14.10.2004 the appellant surreptitiously went inside the room of Prasanna Sarma and Minu Devi with a "dao" and brutally injured them on their neck, face, head etc. resulting in the death of both Prasanna Sarma and Minu Devi. Hearing scream of Minu Devi from the adjoining room, P.W.4 woke up and pushed the door of Prasanna Sarma and Minu Devi and could see the pathetic serious injuries on those persons. Hardly could he open the door, the appellant started to assault him. To save his live, P.W. 4 came out from the room and raised alarm. The appellant thereafter assaulted P.W. 12 Tosheswar Sarma, P.W. 5 Smti Renu Sarma, P.W. 8 Rupam Sarma and P.W. 3 Queen Sarma with dao. Pradip Sharma P.W. 1 the next door neighbour of P.W. 12 came to the place of occurrence on being informed by P.W. 4. The appellant also tried to assault Pradip Sarma but he straightway went to the Bebejia Police Station by his own auto rickshaw and the I/C Bebejia Police Station made G.D. Entry and later on came to the place of occurrence.

4. On the basis of the FIR, the Nagaon Police formally registered a case against the appellant under Sections 302/307/326 IPC and law of investigation was set in motion. During investigation, P.W. 15 Shri Lakhi Kanta Nath, the Investigating Officer (I.O.) recorded the statements of witnesses u/s 161 Cr.P.C. All the injured persons i.e., P.W. 2, P.W. 4, P.W. 8 and P.W. 12 except P.W. 5 were sent to Nagaon Civil Hospital and examined by P.W. 13 Dr. Jagannath Dev Nath when P.W. 5 Smti Renu Sarma Devi, another injured, was examined by P.W. 14 Dr. Durgeswar Kachari. Post mortem on the dead bodies of Prasanna Sarma and Minn Devi was conducted by P.W. 10 Dr. P.K. Sarma. The statements of P.W. 3 Queen Sarma, P.W. 4 Ashok Sarma and P.W. 5 Smti Renu Sarma Devi were also recorded by the I.O. under Sections 164 Cr.P.C.

5. When the appellant was in police custody, the I.O. recovered and seized the "dao" which was used by him for committing the offence on being led by the appellant to the place of hiding the weapon.

6. On completion of the investigation and having obtained the post mortem report of the two deceased as named above and the injury report of the injured persons,

the I.O. submitted charge-sheet against Babul Deka, the appellant alleging commission of offence under Sections 324/326/307/302 IPC. Since the case was triable exclusively by the Court of Sessions, the learned Sub-Divisional Judicial Magistrate, Nagaon committed the case for trial to the Court of learned Sessions-Judge, Nagaon.

7. The learned trial Court framed charges against the appellant u/s 302 IPC for having committed offence by intentionally killing both the deceased Prasanna Sarma and Minu Devi and charge u/s 307 IPC was also framed against the appellant for attempting to commit murder of P.W. 3, P.W. 4, P.W. 5, P.W. 12 above mentioned. The appellant was also charged u/s 326 IPC for causing grievous hurt to P.W. 3 and P.W. 5 by means of sharp cutting weapon when charge u/s 324 IPC was framed against him for causing simple injuries to PW 4, P.W. 8 and P.W. 12.

8. During the trial as many as 16 witnesses including the doctor and I.O. were examined by the prosecution and 47 documents were exhibited and proved. All the prosecution witnesses were duly cross-examined by the learned Counsel for the accused.

9. On completion of recording of the evidence of the prosecution side the appellant was also examined u/s 313 Cr.P.C. The learned Sessions Judge on discreet appreciation of the material evidence on record both oral and documentary and upon hearing the learned Counsel for the parties, found the appellant guilty for commission of offence u/s 302 IPC read with Section 307 IPC and sentenced him accordingly as already noted above. Hence this Criminal Appeal from jail as well as the Criminal Death Reference before this Court.

10. We have heard Mr. Kamal Agarwal and Mr. Moinul Hoque Choudhury, the learned Amicus Curiaes appointed to represent the appellant and assist the Court to arrive at a correct and just decision in answering the question raised herein.

11. Evidently there was no eye witness to the occurrence in this case. It is the admitted case of the prosecution that no body had seen the appellant murdering both Prasanna Sarma and his wife Minu Devi while they were sleeping. The entire prosecution case has been based on circumstantial evidence.

12. The circumstances which found favour with the learned Sessions Judge are:

a) Deceased Prasanna and Minu Devi were found dead in the same room, where they were sleeping.

b) The accused was sleeping on the previous night with PW-4 Ashok Sarma in the room which was adjacent to the room where both the deceased were sleeping.

c) In the adjoining room in which the accused was sleeping with P.W.-4 had a door inside the room towards the room where Minu Devi and Prasanna Sarma were sleeping and the door was not bolted from inside.

d) In the wee hours of the morning Ashok Sarma P.W. 4, who was sleeping in the adjoining room heard a scream of Minu Devi, "Marile ou, Katile ou" (am killed and I am cut) on hearing which, P.W. 4 woke up and looked around, but did not see Babul beside him, who was sleeping with him on the previous night.

e) Sensing something might have happened in the room of Minu Devi, he went towards the bedroom of Prasanna Sarma and Minu Devi and pushed the door. The door opened up.

f) Accused was seen by P.W.-4 inside the bedroom of Minu Devi and Prasanna Sarma with a "Dao" in his hand.

g) When P.W.-4 entered the bed room, accused Babul Deka was brandishing a "Dao" in his hand and without waiting a second, without uttering a word accused Babul severely assaulted P.W.-4 on his hand, shoulder and on his neck. In order to save himself P.W.-4 escaped from the place of occurrence.

h) P.W.-10 found deceased Prasanna having obliquely placed two incised wounds only on both side of the neck, each of the size 2" x 1" x 2" involving all major structures of the neck including vessels of the neck,

i) P.W.-10 found deceased Minu Devi having three obliquely placed incised wounds only on both side of her face and one on the chin and another incised wound on her scalp and detection of the blood clot inside the brain. P.W.-15, Executive Magistrate who prepared the inquest found the face of the deceased having been smashed and defaced by blunt hit of the assailant.

j) "Dao" a deadly weapon of assault, was recovered on the basis of information given by the accused while in custody.

k) Accused beat a hasty retreat towards bamboo grove.

l) After witnessing such an incident in the house of his past master, the accused who was a past servant of the house beat a hasty retreat. This curious behavior is a very strong circumstances against the accused which is sufficient to hold that the accused guilty.

13. Be it noted that the appellant Babul Deka was a domestic servant of the deceased Prasanna Sarma for several years prior to commission of offence of murder upon whom much confidence and trust were reposed by the deceased and such fact is evident by allowing him to sleep during the fateful night in the adjoining room of the deceased without bolting the door.

14. The presence of the appellant at the place of occurrence on the ill fated night and subsequent next morning is not in dispute.

15. We have carefully analysed and appreciated the testimony of the prosecution's witnesses.

16. P.W. 3 Smti Queen Sarma, P.W. 4 Ashok Sarma @ Kancha, P.W. 5 Smti Renu Sarma Devi, P.W. 8 Rupam Sarma and P.W. 12 Tosheswar Sarma were the injured persons who were attacked and assaulted by the appellant with "the Dao" after commission of alleged offence of murder.

17. It is clear from the evidence of P.W. 4 Ashok Sarma @ Kancha who was engaged as servant in the house of P.W. 12, Tosheswar Sarma that on previous day the appellant came from Nagaon and attended the "Shradha" ceremony and after finishing all household chores at about 10 p.m. this witness made arrangement in his room which was adjacent to the room where both the deceased were also sleeping, to sleep on the floor for himself and the appellant. He specifically deposed that both of them slept together but on 14.10.04 at crack of dawn he heard the deceased Minu screaming, "I am killed, I am cut". Hearing the scream he woke up and looked around but he did not see the appellant besides him who was sleeping with him on the previous night. Sensing some trouble in the room of Minu, he went towards her bedroom and pushed the door which opened up and inside the room he saw the appellant brandishing a "dao" in his hand and without waiting a second, he assaulted this witness twice on his hand and neck. The witness ran away from the scene of occurrence shouting "Babul cut me and to kill me" and straightway headed to the house of P.W. 1, Pradip Sarma, a next door neighbour. Then he came to the residence of P.W. 12, Tosheswar Sarma and reaching the varandah he lost his sense and fell down.

18. The injuries, so inflicted as stated by this witness PW-4, were also found on his person by PW-13, Dr. Jagannath Devnath who examined him. The injuries found by the doctor are as follows:

- 1) Cut injury 2"x 1" on the left shoulder joint.
- 2) Two cut injuries 1" x 1" in size each of forearm.
- 3) Small cut injury 1" x 1" in size of left side of neck.

Impression simple injury caused by sharp Weapon. Ext. 12, 13, 14 are the medical reports and Ext. 12(1), 13(1), 14(1) and 15(1) are my signatures.

19. P.W. 8 Shri Rupam Sarma deposed in his evidence that on hearing screaming and hue and cry from the room of deceased Prasanna Sarma early in the morning on 14.10.2004, he woke up hurriedly from the sleep and came out toward the room. Then he saw the accused-appellant Babul Delta just near the door of Prasanna's room. Hardly he could realize the situation, the appellant straightway stepped towards him with a dao to assault. Though he ran away towards tube well to save himself the appellant chased and before he could reach tube well the accused assaulted him behind his back. He fell down and then Babul assaulted repeatedly on his neck, head and both his hands. This witness was also examined by the P.W. 13, the doctor Jagannath Devnath who found the following injuries on his person.

- 1) Cut injury 1" x 1" on the occipetal region.
- 2) Cut injury 3" x 1" in size on the left side of neck.
- 3) Cut injury 2" x 1" x 1" on the right shoulder joint.
- 4) Cut injury 1" x 1" in size of left shoulder joint.
- 5) Cut injury with haemotoma 2" x 1" x 1"

20. Queen Sarma P.W. 3, in her deposition also narrated the entire facts with full corroboration with the evidence of witnesses aforementioned to the extent that the accused Babul Deka alongwith P.W. 4 Ashok Sarma slept together in the adjacent room of Prasanna to which one can go through a middle door. On the day of occurrence when they were sleeping, she heard a noise in their house and got up from her bed and went to back side to enquire what happened and there she found the accused Babul Deka hitting her elder brother P.W. 8 Rupam Sarma near the tube well with a dao. When she went to resist the appellant in order to save her elder brother, she hit the appellant with a bucket that was lying by the side of tube well. Then Babul hacked her with that dao in her head and neck. The appellant also injured her on right elbow by hacking with the "dao". The injuries so inflicted were found to be present on medical examination on being conducted by P.W. 13 which are as follows:

- 1) Cut injury 3" x 1" x 2" in size on the left side of neck.
- 2) Cut injury 3"x 2" in size on the right parietal region.
- 3) Lacerated injury 3" x 2" in size of left arm.
- 4) Bony fracture seen with laceration in both right 4th and 5th finger. Amputation of 4th and 5th finger of right hand was done in the emergency ward in Civil Hospital, Nagaon.
- 5) Cut injury 1" x 1" of left hand.

21. Insofar as P.W. 12 Tosheswar Sarma is concerned, he was also examined on oath by putting the question in writing and this witness answered all those question in writing as he could not speak due to the injuries inflicted on his person by the appellant. According to this witness, hearing the cry of Kancha P.W. 4, in the morning on that day, he went to the backside of the house and then the appellant Babul Deka cut him on his head and hand. Later on he came to know that his younger brother Prasanna and his wife Minu were cut by the appellant and his wife Renu (P.W. 5), son Rupam (P.W. 8), daughter Queen, P.W. 3 and Kancha, P.W. 4 were also injured by cutting. The injuries suffered by this witness were also corroborated by the medical evidence of P.W. 13, the doctor who found the following injuries:

- 1) Cut injury 3" x 1" x 1" size of left hand.

2) Cut injury 5" x 1" in size of the frontal parietal region of left side of head. Impression simple injury caused by sharp cutting weapon. Fresh bleeding seen on the injures.

22. The victim of such attack and another injured, P.W. 5 Smti Renu Sarma Devi wife of P.W. 12 was examined by P.W. 14 Dr. Durgeswar Kachari, who in his medical evidence narrated that on examination upon P.W. 5 he found the following injuries:

One sharp cut wound across the left side of face with active bleeding. The injury was severe in nature and caused by sharp weapon. I have not indicated the size of the injury. The injury was across the face. The cut was stitched in our hospital after proper cleaning.

23. P.W. 5, in her deposition, narrating the episode, testified that after the "Shraddha ceremony", the appellant stayed back at their residence and slept in their house with P.W. 4, in the room adjoining the room of Prasanna and Minu. Her husband P.W. 12, son P.W. 8 and daughter, P.W. 3, were all in the house. Early next morning while she alongwith her husband P.W. 12 were sitting on a bench in front varandah of their house after returning from a morning stroll, they heard screams and cry emanating from the backyard of the house. They rushed there but as they reached, suddenly the appellant dealt a dao blow on her and wounded her left cheek causing gaping injury. Due to such assault, her ear-lobe was severed and her two teeth were also broken. The appellant also assaulted her on her forehead with the dao and she lost her senses. Later on she came to know that the appellant killed those two family members.

24. From the testimony of the above injured witnesses, it candidly appears that all those injured witnesses so examined by the prosecution, corroborated in their deposition to indicate the presence of Babul Deka the appellant in the place of occurrence whom they found themselves within the premises after killing both the deceased persons. Their clear stand was that they themselves were the victims of his assault with the help of dao which was undisputedly used in killing both the deceased above mentioned,

25. It is found in the evidence of those witnesses particularly on scrupulous scrutiny of the testimony of P.W. 4 that when he heard the cry of the wife of his master, he immediately woke up and found Babul Deka who was sleeping with him was missing from the room. He pushed the door of the room through which one could go to the room wherein both the deceased were sleeping. As soon as the door was opened, the appellant inflicted the injuries as mentioned above.

26. That apart, the evidence of P.W. 3, P.W. 5, P.W. 8 and P.W. 12 were also found to be very specific, categorical, corroborative and all throughout consistent.

27. Now let us examine the medical evidence of P.W. 10, the doctor who held postmortem over the dead bodies of late Prasanna Sarma and Minu Devi. The

doctor found the following injuries of:

(a) Prasanna Sarma

Obliquely placed two incised wound on the both side of neck. Each of size is 2" x 1/2" x 2" involving all the major structure of the neck including all the vessels of the neck. All other organs of the dead body was found healthy.

(b) Late Minu Devi

1. On the right side of the face size 2" x 1/2" x upto bone deep.
2. Oblique incised wound of the left side of the face 2" x 1/2" x upto bone deep.
3. Oblique incised wound over the chin size 2" x 1" x 1/2" x bone deep

One incised wound over the scalp 3" x 1/2" x 1/2" x bone deep situated on the right tempo paintal bone region. In the brain I found blood clot in the right temporal lobe. All the injuries are anti mortem.

28. After thoroughly going the deposition of the prosecution witnesses including the medical evidence aforementioned, it is noticed that circumstances taken cumulatively formed a chain so complete that there was no scope from the conclusion that within all human probability, the crime was committed by the appellant and none else.

29. Having closely analysed the corroborative nature of the evidence brought on record by the prosecution, we are fully satisfied that the chain of evidence led by the witnesses is complete and as such there is no plausible or cogent reason to even presume the innocence of the appellant. It is established that the conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of the law relating to such circumstantial evidence as has been laid down by the Supreme Court in a catena of decision starting from Hanumant Govind Nargundkar's case in the year 1952 [Hanumant Vs. The State of Madhya Pradesh](#), to the recent case of Bablu (Bablu @ Mubarik Hussain v. State of Rajasthan reported in AIR 2007 SCW369. In Hanumant Govind Nargundkar's case (supra), the Supreme Court observed as under:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such a to excuse every hypothesis but the one proposed to be prove. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.



30. The proposition of law pertaining to circumstantial evidence so laid down in Hanumant Govind Nargundkar's case (supra) above has been reiterated in a catena of decision by the Apex Court and as such it is settled law that in a case based on circumstantial evidence the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature and more so, to the circumstances which should be complete so that there should not be any gap left in the chain of evidence. It is also accepted that the proved circumstances must be consistent only with the hypothesis of guilt of the accused and totally inconsistent with its innocence.

31. The Apex Court in a recent decision of Bablu @ Mubarik Hussain v. State of Rajasthan AIR 2007 SCW 369 delving upon the law of circumstantial evidence in paragraph 17 ruled as under:

17. ♦ The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and no may be established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except has the accused is guilty;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved; and

(5) There must be a chain of evidence so compete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

32. On meticulous scanning of the factual circumstances of the case on the anvil of the testimony of injured witnesses as mentioned above, we have no hesitation to hold that the prosecution successfully proved that the chain of evidence was complete without leaving any reasonable ground for a conclusion consistent with the innocence of the accused. Consequently, we have firmly opined that the impugned conviction u/s 307/302 IPC deserves no interference and accordingly the sentence to suffer imprisonment for life u/s 307 IPC handed down to the appellant stands upheld.

33. However, the question remains as to whether the punishment of death, in view of the attending facts and circumstances of the case at hand, can at all be imposed upon the appellant/Babul Deka. In a recent decision of a case of Bishnu Prasad Sinha v. State of Assam reported in AIR 2007 SCW 569, the Supreme Court had the occasion to deal with the question of death penalty based on circumstantial

evidence. In Bishnu Prasad Sinha's case (supra) the conviction u/s 302 IPC and subsequent death sentence was entirely based on circumstantial evidence and in the backdrop of the factual situation arisen in the said case, the question came up for determination as to whether under circumstantial evidence, the extreme penalty of death could be awarded. In paragraph 57, the Apex Court held as under:

The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded♦.

34. In view of the above settled proposition of law, this Court is constrained to hold that since the appellant was convicted solely on the basis of circumstantial evidence, the attending peculiar facts and circumstances of the case proved by the corroborative evidence of the injured witnesses above noted, would manifestly go to indicate that the case at hand is not a case to fall within the purview of the rarest of rare case so as to hand down the death penalty to the appellant. Consequently, we are of the considered opinion that ends of justice would be met if the sentence of death penalty is commuted to one of rigorous imprisonment for life with payment of a fine of Rs. 2000.00.

35. The appellant, therefore, instead of being awarded death penalty is sentenced to undergo rigorous imprisonment for life and also pay a fine of Rs. 2000.00. Other part of sentence u/s 307 IPC imposed by the learned Sessions Judge is maintained.

36. Subject to modification of sentence this appeal fails and stands dismissed.

37. Before parting with the case, we would like to put on record our appreciation to Mr. Kamal Agarwal and Mr. Moinul Hoque Choudhury the learned Amicus Curiae for rendering their valuable help and assistance towards arriving at the decision above mentioned. Both the learned Amicus Curiae shall be entitled to their professional fees which is fixed at Rs. 2500.00 each.

Send down the LCR forthwith.