(1997) 02 GAU CK 0008

Gauhati High Court

Case No: Criminal Appeal No. 166 (J) of 1995

Lal Kalandi and Another		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: Feb. 5, 1997

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 154, 161, 162
- Penal Code, 1860 (IPC) - Section 100, 302, 34, 341

Citation: (1997) 1 GLR 311

Hon'ble Judges: V.D. Gyani, J; S.L. Saraf, J

Bench: Division Bench

Advocate: G. Deka, for Amicus Curiae, for the Appellant; P.P., for the Respondent

Final Decision: Allowed

Judgement

1. The Appellants stand convicted u/s 302 read with Section 34 IPC and sentenced to undergo imprisonment for life by Sessions Judge, Karimganj in Sessions Case No. 3/95 vide judgment dated 5.9.95.

2. The deceased Sudhir Kalandi and the present Appellants are brothers. On the fateful day, i.e. 22nd September, 1993 around 8/9.00 A.M. when Sudhir left his house informing his wife that he was going to his elder brother. He was allegedly attacked by the accused with a Dao causing him as many as 7 incised wounds as noted below:

(1) Three transverse cut over dorsum of the left hand each about 3" long cutting bone. They were incised wound with clean edges and dark blood in the bases.

(2) Incised wound one and half inch over left mandible.

(3) Skin deep incised wound extending from left car lobule to angle of mouth.

(4) Five incised wounds in the scalp measuring 1", 3'', 2", 1" and 1" respectively and all were periostial except one in vault cutting the bone and others situated in the left parietal, occipital, right parietal and temporal region. Beses contained dark blood.

(5) Three inches long transverse incised wounds cutting left tibia in the upper part.

(6) 1" incised wound on right mid tibia. It was bone deep.

(7) Triangular wound with clean edges on left mid thorax. It was one Inch long.

His wife Mina having come to know about the attack lodged an ''Ejahar'', Ext, 1 at Patharkandi Police Station, which resulted in registration of a case u/s 341/302/34 IPC. Prior to it a G.D. Entry No. 191 dt. 22.9.93 was made by the I.O., P.W.-9, who proceeded to the spot, held inquest and sent the dead body to Civil Hospital for postmortem examination. It was at this time of his visit to the place of occurrence that the written ejahar, Ext. 1 was given to him by P.W.-1, Mina Kalandi. It is palpably hit by Section 162 Code of Criminal Procedure. The investigation had in fact commenced in pursuance to the G.D. Entry No. 191 as admittedly made by the I.O., P.W.-9, who had infact taken steps for investigation before receiving the Ejahar, Ext. 1, from P.W.-1. This Ejahar cannot therefore be treated as FIR within the meaning of Section 154 Code of Criminal Procedure, and the G.D. Entry has not seen the light of the day. It was not produced at the trial. On completion of investigation the accused were arrested along with the younger brother of Haria Kalandi, from whose house a Dao and Iron rod were seized at the instance of the Lal Kalandi, Haria has been discharged. In all 9 witnesses were examined by the prosecution to prove the charge. Out of these witnesses P.W.-3 is the Scribe of the FIR while P.W.-4 is the Medical Officer who performed autopsy and P.W.-9 is the I.O. P.W.-7 is the Judicial Magistrate who recorded the confessional statements of accused Appellant Lai Kalandi. P.W.-5 Swapan Kumar Dutta is a contesting witness to the seizure of weapons. Going through the impugned judgment it would be seen that according to the learned trial Judge, P.W.-1 Nil Kanta Mura, P.W.-3 Madhusudan Kanu, P.W.-6 Prahlad Teli (declared hostile) and P.W.-8 Dulal Kalandi are all important witnesses. Apart from the evidence of these witnesses, the confessional statement, Ext. 4, as recorded by the P.W.-7 has been relied upon by the trial court for passing the order of conviction. Going through the statement of the accused as recorded by the trial court, which is highly perfunctory, the defence stand was one of plain denial and denouncing the prosecution case as falls (sic, false), The trial court however found the accused guilty of offences charged and sentenced them to undergo life imprisonment. Hence this appeal from jail by both the accused.

3. Since they were unrepresented and unassisted, Ms. G. Dcka was appointed Amicus Curiae. She has accordingly appeared and argued the appeal raising the following points:

(1) that the trial court has failed to consider the impact of discharging me accused Haria on the prosecution case as a whole;

(2) an adverse inference should have been drawn against the prosecution for non-production of the G.D. Entry, which was in fact me earliest version of the prosecution case which has been willfully suppressed. The trial court was palpably wrong in liberally making the use of the case (sic) statement in support of its own views discarding the statements made by the witnesses before the Court. The trial Court was in error in seeking corroboration of a hostile witness P.W.-6 from another informed witness P.W.-8. Trial Court''s approach to appreciation of evidence is extremely purfunctory. The inherent infirmities in the evidence of P.W.-8 and P.W.-6 has gone unnoticed. The trial court was equally wrong in seeking corroboration of the retracted confession from the evidence of a hostile witness P.W.-6 and informed witness P.W.8.

4. Learned Public Prosecutor appearing for the Respondent State, on the other hand, argued that notwithstanding the infirmities as pointed out by the learned Amicus Curiae, the prosecution has proved its case and no interference is called for. It can not be disputed that the investigation had in fact commenced in pursuance to G.D. Entry 191 dt. 22.9.93 and it was at the time of the visit of the I.O. to the place of occurrence, mat the ''ejahar'', Ext. 1, was handed over to him by Mina, P.W.-2. It is apparent hit by Section 161. It was nothing but a statement made to the police during the course of investigation. It should not have been admitted in evidence and must held to be inadmissible, it can not be treated as an FIR within the meaning of Section 154 Code of Criminal Procedure. The trial court was palpably wrong in treating it to be so. The importance of earliest version of the prosecution case can not be overstated. There is not a whisper in the evidence of P.W.-9, the I.O. as to what prevented him from producing the G.D. entry before the Court, why suppressed the earliest version? It was the duty of the Public Prosecutor to have seen to it that the G.D. Entry was produced before the trial court. If the Prosecutor failed, it was the duly of the Court to direct its production. A criminal trial is not a game of hide and seek a fair trial is the right of the accused and suppression of earliest version of the case by the prosecuting agency deserves to be condemned in no uncertain terms. As has been pointed out by the AIR 1945 18 (Privy Council) the object of the FIR is to obtain early information of alleged crime activity and to record the circumstances before there is time put for them to be affected and embellished. The learned trial Judge has completely overlooked this prime object of the FIR u/s 154 Code of Criminal Procedure. The trial court contrary to the statutory prohibitions contained in Section 162 Code of Criminal Procedure. has very liberally and freely used the case diary statements of witnesses, Coming to the evidence of P.W.-6 and 8, so heavily relied upon by the trial court, learned Amicus Curiae pointed out that P.W.-6 is a hostile witness. While agreeing to the proposition that the testimony of a hostile witness is not to be out rightly rejected, learned Counsel argued that there is no corroboration from reliable quarters of his evidence. The

learned trial court has approached his statement from a very narrow angle restricting himself to the examination-in-chief. It is a cardinal rule of appreciation of evidence that the statement as a whole ought to be read and not merely a part thereof. The cross-examination also forms part of the statement and can not be lightly brushed aside. P.W.-8 is the witness who testified to the effect that accused Lai Kalandi assaulted Sudhir with a Dao but this statement is not supported by medical evidence. He has further testified that accused Manto also dealt few blows with a blunt weapon but there is no corresponding injury found on Sudhir. The medical evidence docs not support this allegation. There is no a single injury found on Sudhir which can be attributed to a blunt weapon. Even according to the learned trial Judge, "Mantu Kalandi did not cause these injuries, but he shared the intention of Lai Kalandi by inflicting few blows with blunt weapon." If it was so, then naturally some injuries caused by blunt weapon should have been found on Sudhir''s body but there is none.

5. The trial court has noted and rightly so, that P.W.-8 is the solitary eye witness. No doubt conviction can be based on the testimony of a solitary eye witness but such testimony must be free from any infirmity. The learned Judge has imposed the circumstances as narrated by P.W.-8 in which Mantu is said to have assaulted Sudhir. Admittedly he was not present, he came running and the witnesses stated:

Accused Montu Kalandi came running to the place of occurrence, as if to get hold of (somebody), Brandishing the rod Sudhir tried to assault Lai and at that time Montu got hold of the rod. Then Sudhir fell down. Montu dealt few blows on Sudhir. I left the place after Lai had hacked Sudhir.

In his examination-in-chief P.W.-8 has stated:

I heard a noise in the house of Lai Kalandi. Then Sudhir Kalandi came running from Lai Kalandi''s house and accused Lai Kalandi was running after him. Lal Kalandi had a bleeding injury in the forehead. Sudhir was holding an iron rod. Accused Lal Kalandi had a dao, Sudhir Kalandi brandished the rod and Lal Kalandi dealt a dao-blow on the former.

6. Now adverting to the confessional statement as made by the accused Lal Kalandi, which has also been relied upon by the learned trial court for basing an order of conviction, the accused Lai Kalandi has suited as follows:

At 8 or 9 A.M. on Wednesday Sudhir Kalandi assaulted me above the eyes with an iron rod when I was sleeping. Then I hacked Sudhir at the neck with ''dao'' in the field in front of my house, Sudhir died instantly. On that very day at night I surrendered in the police station and handed the dao over to the police, I have confessed it willingly.

7. There are two significant facts merging from his statement, Firstly, there is absolutely no reference to Montu or any over-act attributed to him inflicting any

injury to Sudhir. The learned trial Judge has noted that this confessional statement is corroborated by the evidence of P.W.-8. It is palpably wrong there is no corroboration so far Montu is concerned. The overact attributed to him by P.W.-8 is belied by the medical evidence and the confessional statement does not refer at all, to Montu. The earliest version of the prosecution case as given out in the Ejahar, Ext. 1, by none else then the wife of the deceased Mina Kalandi, P.W.-2 does not at all attribute any overacts to Montu Kalandi although he is named therein. In this stage of evidence, it is difficult to support the trial court''s finding that Appellant Montu also shared the common intention along with Lai Kalandi by inflicting few blows with blunt weapon. Now, common intention is not to be readily inferred unless circumstances established by the prosecution warrant such an interference. The discrepant vide does not warrant any such inference. On the other hand, even according tit P.W.-8 it was the (deceased Sudhir Kalandi who brandished the iron rod he was having and it was upon such brandishing of iron rod that Lai Kalandi dealt a Dao blow. The accused in his confessional statement as already reproduced above has categorically stated that it was Sudhir Kalandi who had assaulted him with a iron rod on his eye brow while he was asleep. A confessional statement is to be accepted or rejected as a whole it can not be made use of in a piece-meal manner. P.W.-8 the star witness of the prosecution in his examination-in-chief has stated that accused Lal Kalandi had a bleeding injury on his forehead that fully corroborate the confessional statement of the accused. It was not merely a case of reasonably apprehended grievous hurt, a grievous hurt was actually inflicted and it was the deceased who was brandishing the iron rod. In such circumstances, as rightly urged by the learned Amicus Curiae, a right of private defence had in fact accrued to accused Lai Kalandi. The trial Court has completely ignored this aspect of the matter from its consideration. The submission made by the learned Amicus Curiae in face of the evidence available on record deserves consideration.

8. A mere reading of Section 100 IPC would have revealed the circumstances in order of extent to which the right of self-defence could be exercised. it was the deceased who having assaulted accused Kalandi with a iron rod took to his heels and while running brandishing the rod it is the prosecution case and the witnesses have testified that he was being chased by the accused. It is in the evidence of P.W.-8 that another brother, co-accused Montu intervened only when the deceased was about to attack. In such circumstances a reasonable apprehension of causing grievous hurl is pre-eminently established. In fact it had actually been caused to the accused Kalandi. The right of self-de fence can not be weighed in golden scale.

9. In view of the foregoing discussion, the Appellants'' conviction as recorded by the trial court can not be upheld. The prosecution has failed to bring home the charge to the accused. Their conviction as recorded by the trial court is liable to be set aside. It is accordingly set aside and the accused-Appellants are acquitted of the, charges framed against them. The appeal stands allowed. The Appellants be set at liberty forthwith.