

(2004) 03 GAU CK 0042

Gauhati High Court

Case No: Criminal Death Ref. No. 2 of 2003 and Cri. Appeal No. 5 (J) of 2003

State of Assam

APPELLANT

Vs

Holiram Bordoloi

RESPONDENT

Date of Decision: March 9, 2004**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 299, 313, 366
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 326

Citation: (2005) CriLJ 1020 : (2004) 2 GLT 1113**Hon'ble Judges:** P.G. Agarwal, J; I.A. Ansari, J**Bench:** Division Bench**Advocate:** P. Mahanta, Amicus Curiae, for the Respondent**Final Decision:** Dismissed

Judgement

P.G. Agarwal, J.

Criminal Death Reference No. 2/2003 and Criminal Appeal No. 5(J)/2003 have arisen out of the judgment and order, dated 5-5-2003, passed by the learned Sessions Judge, Morigaon, in Sessions Case No. 47(A)/1999 whereby the accused Holiram Bordoloi was convicted under Sections 302/148/436/326 read with Section 149, IPC and sentenced to death.

2. The reference has been made u/s 366, Cr.P.C. and the accused-appellant has filed the appeal from jail. Both the matters are heard analogously and disposed of by this common judgment and order.

3. Learned public prosecutor was absent, when the matters were called for hearing.

4. We have heard Mr. Probin Mahanta, learned amicus curiae, appearing for the accused-appellant.

5. The incident took place on 26-11-1996. GR Case No. 731/1996 was registered and the police submitted charge-sheet against as in any as 18 accused persons. The present accused-appellant could not be apprehended during investigation and the charge-sheet was laid by the police showing him as absconder and, later on, the Court also declared him as absconder and evidence against him was recorded u/s 299, Cr.P.C. During trial, another accused was also found absconding. The trial in Sessions Case No. 47/1999 was concluded and the accused persons were convicted and sentenced accordingly vide order, dated 29-8-2002. We have been informed at the Bar that no. appeal has been preferred against the said order.

6. Subsequently, the present accused-appellant, Holiram Bordoloi, was apprehended and; thereafter, charges under Sections 147/148/436/302/326/448, IPC read with Section 149, IPC were framed against him. During trial, the prosecution examined as many as 10 witnesses and, on conclusion of the trial, the accused-appellant was convicted and sentenced as aforesaid.

7. The prosecution's allegation, in short, is that on the previous night of the incident, there was pelting of stones on the house of Narayan Bordoloi and the wall of the house, which was made of bamboo and plastered with mud, was damaged. On the fateful day, in the morning hours, the accused persons armed with deadly weapons and led by accused-appellant, Holiram Bordoloi, came to the scene of occurrence, when PW-1 (Budheswari Bordoloi), her husband, Narayan, brother-in-law, Padum, son, Nayanmani, aged about 6 years, daughter Chitrlekha, aged about 8 years, and another son Nabin, aged about 16 years, were inside the house. The house was bolted from outside and, thereafter, set on fire. The young boy, Nayanmani, managed to, somehow, come out of the burning house, but the accused persons caught hold of him and threw him back into the burning house, PW-1 Budheswari, PW-3 Nabin and PW-4 Chitrlekha, however, succeeded in making good their escape, but PW-3 Nabin was assaulted by one of the members of the group and PW-1 and PW-4 sustained burn injuries. In the said fire, Narayan and his son, Nayanmani, died as a result of burn injuries. The miscreants, thereafter, picked up Nagarmal, brother of deceased Narayan, and hacked him to death in front of the house of the accused-appellant, Holiram.

8. In the present case, there is oral as well as medical evidence on record regarding the death of Narayan, Nayanmani and Nagarmal. Inquest was conducted by the Investigating Officer, namely, PW-9 (Prabodh Saikia). Exhibits 5, 11 and 12 are the inquest reports and Exhibits 1, 2 and 3 are post-mortem reports, which were brought on record through PW-5 (Dr. Madhab Chandra Dutta). It may be mentioned that post-mortem examination was conducted by Dr. Ranjit Kumar Barkataky, but due to demise of said Dr. Barkataky, PW-5 Dr. Madhab Chandra Dutta, who was acquainted with the hand-writing and signature of Dr. Barkataky, has deposed before the Court and proved the post-mortem reports. We also find that the medical evidence of PW-5 has not been challenged by way of cross-examination.

9. The post-mortem reports reveal as follows :

(1) NAYANMANI BORDOLOI

A completely burnt dead body present for examination. All the internal organs are charred, stain of smoke and shoot present inside the air way. The burnt injuries were ante-mortem. The cause of death was burnt as opined by Dr. Borkataky which was ante-mortem.

(2) NARAYAN BORDOLOI

A completely charred body present for examination. Both the lower limbs below the knee absent and both the upper limbs absent below the elbow joint. There is stain of smoke and shoot present inside the air way. The burnt was ante-mortem. Cause of death is due to burnt which was ante-mortem.

(3) NAGARMOL BORDOLOI

An adult male person (a part of the PM report is torn) body present for PM examination. Rigor mortis present in the lower limbs, eyes are semi-opened, mouth closed, both the upper limbs are cut except a little tag of skin below the elbow joint. There is a deep cut injury on the lateral aspect of the right thigh. The wound is oblique, size 30 cm. x 3 cm. x 6 cm. deep, one cut mark present below the left eye, size 2.5 cm. in length, skin deep. All injuries were ante-mortem. Cause of death is shock due to haemorrhage caused by the deep cut injuries caused by sharp-cutting weapon.

10. The eye-witnesses to the occurrence as well as other villagers, who came to the place of occurrence subsequently, have stated that the dead bodies of Narayan and his son, Nayanmanl, were found lying at the burnt structure of the house, whereas the dead body of Nagarmal was found on the roadside in front of the house of the accused-appellant Holiram.

11. On perusal of the inquest report and the post-mortem report in respect of deceased Nagarmal, we find that doctor had not recorded all the injuries found on the person of the deceased Nagarmal. The police officer had found grievous injuries on the forehead, heady below the left eye and other parts of the body.

12. Now, coming to the evidence of the eye-witnesses, we find, that PW-1 Budheswari was an inmate of the house where the incident took place, She was inside the house, when the attack commenced. She has deposed that the appellant, namely, Holiram, was armed with dao and jathi and it was he, who was issuing directions to the other members of his group. She had seen one of the accused persons, Bhalau, setting the house on fire from the side of the cook shed but prior to that the members of the attacking group had pelted brickbat. Door of the house was tied from outside. PW-2 Padum made good his escape by breaking a portion of the wall and he was followed by PW-3 Nabin. However,

accused Chatna assaulted Nabin with a pointed weapon causing injury on the chest. PW-4 Chitralekha helped her mother PW-1 in getting out of the house and in the process both PW-4 Chitralekha and PW-1 Budheswari sustained burn injuries. PW-1 has stated that subsequently she became unconscious and, later on, came to know that her husband and son died as a result of the fire and Nagarmal was forcibly taken out of the house by accused Holiram and cut into pieces.

13. PW-2 Podum Bordoloi, is the younger brother of deceased Narayan and his house is situated at a distance of 4 nals (48 ft.) from the house of PW-1. While he was outside his house, a group of 17 persons surrounded the house of PW-1 and started pelting brickbat and out of fear, he entered into the house of PW-1. Thereafter when the house was set on fire, PW-2 made good his escape and he did not know about the subsequent occurrence.

14. PW-3 Nabin Bordoloi, is the eldest son of PW-1 and he also supported the prosecution version of the occurrence as stated above. This witness further states that when he managed to come out of the house, accused Chatna assaulted him with a pointed spear causing injury on his chest. He also sustained some burn injuries.

15. PW-16 Dr. Sushil Das, who examined PW-3 Nabin, found the following injuries :

1. Incised wound at anterior axillary line at the level left nipple with size 1" X 1/2" with active bleeding.
2. Suprficial burnt injury left upper part of back of chest.

Thus, we find that the evidence of PW-3 Nabin that he sustained injuries in the above incident is supported by other witnesses as well as medical evidence on record.

16. PW-4 Chitralekha was aged about 10 years at the time of incident and she was with her family members inside the house, when the incident took place. She also sustained some burn injuries, which was noted by the trial Court. This witness also deposed that her brother, Nayanmani, managed to come out of the house, but the accused Holiram caught him and threw him back in the midst of fire.

17. PW-6 Binapani is the wife of deceased Nagarmal and she has deposed that when the mob came to the house of PW-1, she and her husband entered into their house to save their lives. The mob surrounded the house of PW-1 and set the house on fire. This witness also states that when deceased Nayanmani came out with burn injuries, the accused-appellant caught hold of him and threw him back to the fire and as a result thereof, Nayanmani died. This witness stated about the escape of PW-1, PW-2, PW-3 and PW-4 and also about the injuries caused by accused Chatna on PW-3. This witness further states that deceased Narayan was not allowed to come out of the house by the accused persons as a result of which he died inside the house. After the occurrence was over at the house of PW-1, the mob, according to PW-6, came to the house of this

witness and demanded her to handover her husband, but though she resisted, she was unsuccessful and the accused persons dragged out her husband, Nagarmal, by breaking open the door and one Khageswar assaulted her husband. Thereafter, the accused persons took her husband to the house of accused Holiram and when she followed, she was restrained. She further states that she saw the accused Holiram cutting her husband into pieces. This witness categorically states that as per the direction of accused Holiram, a piece of wood was brought and her husband was put on the said wood and, thereafter, cut into pieces and when her husband asked for water, one of the accused Abdul (since dead) urinated on the face of the injured Nagarmal. PWs-7 and 8 are co-villagers, who also supported the case of prosecution as stated above.

18. In this case, we find that although the prosecution witness have been cross-examined, all of them withstood the cross-examination well and the defence has failed to make any dent in their testimony. In some cases, we find that there was no meaningful cross-examination and the witnesses were asked some questions on unrelated matter to disturb the Court's evidence. Further, the presence of the witnesses at the scene of the occurrence was quite natural as they were occupants of the house, where the occurrence took place, or of the neighbouring houses. Moreover, the incident took place in the morning hours and, hence, naturally the inmates were expected to be present in their house. The fact that PW-1, PW-2, PE-3 and PW-4 were present at the scene of occurrence and sustained injuries in the occurrence is not really in dispute.

19. On consideration of the oral, documentary and the medical evidence on record, we concur with the findings of the learned trial Court and this is a case of homicide, wherein as many as three persons were put to death and some other persons sustained injuries. The evidence on the record also show that it was a handy work of a group of persons, who were the members of unlawful assembly and the present appellant, Holiram, was the leader. So far as the other members of the assembly are concerned, we are, in this appeal, not concerned with the roles performed by them as they were convicted by another judgment passed earlier and the said judgment is not challenged before us. So far as the participation of the appellant, Holiram, is concerned, all the eye-witnesses have categorically deposed about his presence and the leading part played by him. The trial Court has also held that he was a kingpin and it was he, who had brought the group by giving the money and by serving them liquor, etc. In view of the evidence on record, we have no hesitation whatsoever to hold that the accused-appellant Holiram was the leader of the gang and the entire incident took place at his behest and direction.

20. In view of the tell-tale materials, the conviction of the appellant-Holiram under Sections 148/302/326/436 read with Section 149, IPC cannot be held to be unjust. In this case, the trial Court has awarded the sentence of death stating thus :

"Here, it may be stated that first of all, accused was the ring-leader of the gang who ever committed most heinous, brutal, primitive, barbaric, inhuman and horrific offence by keeping family members of deceased Narayan Bordoloi inside the house with his wife,

minor sons and daughter, younger brother tying the door from outside set fire on the house at the broad day light. Though one son, wife and one daughter of deceased Narayan Bordoloi escaped with severe burn injuries, but Narayan Bordoloi and Nayanmani Bordoloi could not escape and when Nayanmani Bordoloi came out from the midst of fire, this accused along with peon Bordoloi again threw the six year aged Nayanmani to the midst of fire, where Nayanmani embraced his death and Narayan Bordoloi was further put into fear not to come out and, as a result, Narayan Bordoloi burnt in such a manner that both his upper and lower limbs were parted with at their respective joint and elbow joint.

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Holiram Bordoloi was the leader of the entire gang of people and Holiram Bordoloi engaged these people by paying his pocket and providing drinks to aid in commission of this offence. Thus, the accused deserves punishment for every separate offence as I have mentioned above. The offence was committed in such a manner that it was even pre-historic and in 21st century in the civilized society, it is rarest among the rare cases that in broad day light as many as more than 20 co-villagers attacked a family with cool brain, previous plan and one after another total three persons were murdered. Considering the heinousness, brutal, horrific and diabolic act of the accused, in my view, instead of separate punishment for each section of law, the accused deserves the capital sentence."

21. Now coming to the question of sentence/confirmation of capital punishment, we may recapitulate the observations of the Apex Court in the case of [Lehna Vs. State of Haryana](#), wherein the Apex Court observed as follows:--

"The other question of vital importance is whether death sentence is the appropriate one. Section 302, IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the Court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for "special reasons" as provided in Section 354(3).

This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute-book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors. Criminal justice deals with

complex human problems and diverse human beings. A Judge has (to) balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed."

22. In the case of [Bachan Singh Vs. State of Punjab](#), the Apex Court laid down the following guidelines for consideration where the question of death sentence arises--

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".
- (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
- (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

23. In the case of [Machhi Singh and Others Vs. State of Punjab](#), the Apex Court provided as follows (Para 34 of Cri LJ) :--

"The following questions may be asked and answered as a test to determine the "rarest of the rare" case in which death sentence can be inflicted;

- (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
- (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

24. In [Lehna Vs. State of Haryana](#), the Apex Court further provided as follows:--

"In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining may entertain such sentiment in the following circumstances;

- (1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed of a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of "bride burning" or "dowry death" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

25. In the background of the above decisions, let us find out the aggravating circumstances and the mitigating circumstances appearing against the present accused-appellant.

AGGRAVATING CIRCUMSTANCES

(1) This is a case of cold-blooded murder.

(2) Two victims were burnt to death by locking the house from outside.

(3) One of the victims was a young boy, aged about 6 years, who, somehow, managed to come out of the burning house, but he was mercilessly thrown back to the fire.

(4) The victims did not provoke or contribute to the incident.

(5) One of the deceased persons was forcibly brought out from his house in spite of protest by his wife and, thereafter, killed in a dramatic manner in the broad day light in the presence of people.

(6) The entire incident took place in the broad day light and the crime was committed in a most barbaric manner to deter others not to challenge the supremacy of the appellant in the village.

(7) The entire incident was pre-planned by the accused-appellant Holiram. MITIGATING CIRCUMSTANCES :

On perusal of the evidence on record or the statement recorded u/s 313, Cr. P.C., we find absolutely no mitigating circumstances in favour of the accused person. It is, nowhere, claimed that the deceased persons had provoked the accused persons or there was any strong motive for commission of heinous act. However, it is in the evidence of PW-6 that there was a minor altercation on the previous evening. The facts of this case depict a feudal character of the gang leader, i.e. appellant-Holiram Bordolie, who was a defence personnel and at the relevant time, he was on leave and staying in the village. The crime was cleverly pre-planned and committed in a brutal and dramatic manner. The nature/manner in which the crime was committed is identical with the facts of *Om Prakash v. State of Uttaranchal*, reported in 2003 Cri LJ 483 : (AIR 202 SCW 4917). Two persons were burnt alive in the house and the young boy, when he managed to escape, he was caught and thrown back to the fire. Other victim, Nagarmal, was pulled out from his house and he was cut in such a cruel manner that both of his arms were amputated as if the accused was trying to re-enact the scene played in the famous Hindi movie "Sholey".

26. In the case of [State of Rajasthan Vs. Kheraj Ram](#), the Apex Court upon a consideration of the guidelines in [Machhi Singh and Others Vs. State of Punjab](#), observed as follows (Para 32 of Cri LJ) :--

"In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances :

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revealing or dastardly manner so as to arouse intense and extreme indignation of the community (SCC pp. 487-88, para 32-33)

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person vis-a-vis whom the murder is committed in the course for betrayal of the motherland. (SCC p. 488, para-34)

(3) When murder of a member of Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. (SCC p.488, para 35)

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed. (SCC p. 488, para 36)

(5) When the victim of murder is an innocent child, or a helpless woman or an old or infirm person or a person vis-a-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community. (SCC pp. 488-89, para 37).

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so."

27. This Court in case of *Tadon Tatik v. State of Arunachal Pradesh* (Criminal Appeal No. 13 of 2002) observed and held as follows :

"In the present case, we find that only aggravating circumstances which justify imposing sentence of death is that all the victims are innocent children of the accused. However, this is not a case of pre-plan and meticulous exercise of murder as the accused soon after the incident came out of the room and made a clean breast of everything. He even cut his own finger and dictated a letter for sending it to his wife so that she can use it for the purpose of divorcing him. The accused, thereafter, went to the police station and surrendered himself. All these things go to show that the accused person at no point of time tried to seal himself or hide his guilt."

28. In the case at hand, we find that there are only aggravating circumstances which prompted the trial Court to impose the sentence of death. It seems that the accused was not repentant at all inasmuch as soon after the occurrence, he absconded and he was apprehended long thereafter. This is a case, where our compassion or sympathy, in spite of our best efforts, cannot be swerved in favour of the accused-appellant. It is also submitted that as the co-accused have been awarded life sentence only, there is no reason to treat the appellant differently. As stated above, for a minor incident of previous evening, the accused-appellant collected a gang (on promise of liquor and money) and led them. He was the kingpin of the entire show and it was he, who alone decided as to how the innocent, unarmed family members are to be terminated or lynched. He acted in a barbaric manner and his act of throwing back of six year old Nayanmani and killing of Nagarmal was revolting and cruel. The co-accused were following his direction and they were convicted mainly with the aid of Section 149, IPC. Hence, we find no force in the plea that the appellant is to be treated alike.

29. The learned counsel for the appellant has also drawn our attention to the following observations of the trial Court ;

"Accused-Holiram Bordoloie had his dual wild blood in committing such offence, because first of all, he is a tribal one and secondly he was a defence personnel, for which he did not feel at all to kill one after another persons..... it may be also stated here that there prevails a saying that village Gakhajua is a dangerous village. So such a dangerous

village, it is not impracticable in happening such tremendous occurrence. Even in the broad daylight, people fear to go through the village at their need due to fear of the said villagers."

In our considered view, the above observations were unwarranted and uncalled for. The entire village or community cannot be shown in bad light due to a particular incident. These were also irrelevant. We, therefore, direct that the above observations shall stand expunged from the impugned judgment.

30. Accordingly, we dismiss the appeal filed by the accused-appellant against his conviction and sentence and we answer the Reference confirming the sentence of death imposed by the trial Court. Both the Criminal Appeal and the Criminal Death Reference shall stand disposed of accordingly.

31. Send back the LCR.