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**(1994) 05 GAU CK 0012**

**Gauhati High Court**

**Case No:** Criminal Appeal No. 95 (J) of 1992

Prabin Bora

APPELLANT

Vs

State of Assam

RESPONDENT

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**Date of Decision:** May 31, 1994

**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 302, 303, 304

**Citation:** (1994) 2 GLR 334

**Hon'ble Judges:** M. Sharma, J; J. Sangma, J

**Bench:** Division Bench

**Advocate:** A.K. Bhattacharya and J. Bora, for the Appellant; S.K. Noor Mohammad, Public Prosecutor, for the Respondent

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### **Judgement**

J. Sangma, J.

The learned Sessions Judge (H.M. Barkakati) of Dhemaji by his judgment dated 7.7.92 in Sessions Case No. 74 (DH)/90 convicted and sentenced the Appellant (Prabin Bora) u/s 302 IPC to RI for life and fine of Rs. 5000/-, in default, RI for one year. He is now serving the sentence in jail.

2. The case for the prosecution was this. At 6 p.m. on 2.11.88 one Dumai Bora of village Dapathar Majgaon gave FIR at Silapathar PS stating that at 3 p.m. his sons Dilip Bora and Prabin Bora quarrelled and Dilip Bora died in the hand of Prabin Bora, On this FIR, Silapathar PS registered case against Prabin Bora as accused. S.I. AGM Jahangir investigated the case. As the Appellant also surrendered at the PS, the I/O arrested him at the PS. He then went to the place of occurrence and prepared inquest report and sent the dead body to doctor for post mortem. He made seizures of articles and examined witnesses. During investigation a magistrate recorded confessional statement of the accused on 4.11.88. On completing investigation the I/O submitted charge sheet u/s 302 IPC against the Appellant. The Judicial Magistrate, Dhemaji, then committed the case (GR Case No. 724/88) to the Sessions Court for trial.

3. On 25.10.80 the learned Sessions Judge framed charge u/s 302 IPC, As the Appellant pleaded not guilty, the prosecution examined 6 PWs but not the informant (Dumai Bora) who was father of the deceased and the Appellant. The prosecution did not also examine the magistrate who recorded the confession and did not exhibit the confessional statement. PWs, 1 and 2 were declared hostile and cross examined by prosecution and the defence. The appellant was then examined u/s 313 Code of Criminal procedure. He denied the question put by the trial court and said that he lived with his father and the deceased lived separately from them. He did not examine witness for defence.

In his finding the learned Sessions Judge recorded this:

The deceased quarrelled with his father and assaulted him. Accused, who saw the assault on, his own father, tried to pacify the deceased but could not. Then he took the axe lying near the courtyard and dealt a blow on his abdomen. Deceased fell down and accused dealt more blows on the deceased out of anger. As a result the deceased lost his life. Both father and son (accused) rushed to the PS. Accused surrendered and father lodged FIR. So, the I/O arrested him at the PS even before investigation.

4. Though the prosecution did not exhibit the confessional statement of the Appellant, learned Sessions Judge made use of it in aid of the prosecution and found that the confession was voluntary and it was corroborated by FIR (Ext, 6) and other circumstantial evidence including that of the doctor of post mortem who gave the opinion that death was (sic) to the injury sustained. Thus he held that the Appellant was guilty of the murder and accordingly convicted and sentenced him u/s 302 IPC as aforesaid.

The unexhibited confessional statement is this.

Last Wednesday afternoon while I was attending a nature's call in the backside of our house I heard a commotion in the front side and I came there. There I saw that my elder brother Dilip Bora was holding the neck of my father and steering him. I tried to separate my brother when he dealt a blow on my hand. Then I picked up an axe that was lying nearby and hit him with the blunt end of the axe. Then I hacked him in the waist with the axe. My brother fell flat when, out of rage, I dealt another blow in his chest, Immediately, thereafter I presented myself in the Silapathar police station with the axe in hand.

5. In the FIR the informant (Domai Bora) stated that "a quarrel took place between my sons, Dilip Bora and Prabin Bora following which Dilip died in the hands of the other". PW. 2 (Atul Gogoi) stated that on being called by Prabin Bora's wife he went to their house and there he saw Dilip punching and blowing his father and that he separated and took Dilip, who was drunk, away. PW. 3 (Saten Hatimuria) stated that he saw the Appellant in the thana and heard from people that death occurred to Dilip Bora as he had quarrelled with his father after consuming liquor. PW. 4 (Khargeswar Gogoi) stated thus:

Dilip struck his father thrice. We could not bear Dilip's excesses. He used to create noisy scenes by taking liquor. Prabin and his father lived together. Dilip lived separately at

some distance.

6. So, from the confessional statement and the deposition of PWs it has clearly come out in evidence that the Appellant, who is younger brother of the deceased and was aged only 23 years, had acted to save the life of his father and of his own and on the spur of the moment he could not check his impulse and reason what would be minimum blow which was needed to prevent the aggression of the deceased who was drunk and violent. After the occurrence the appellant's conduct was apologetic because he on his own went to the PS and surrendered himself.

7. Mr. A.K. Bhattacharyya, learned Counsel for the Appellant submitted that in view of the confessional statement and the evidence of PWs the Appellant, could not have been convicted u/s 302 IPC. Mr. Noor Mohammad, learned PP, also has not been able to strongly support the conviction u/s 302 IPC.

8. We are of the view that where an accused confesses and also explains the circumstances which mitigated the gravity of his action, the trial court should not ignore that part and if such mitigating circumstances are proved it should take that aspect into consideration in convicting the accused. In the instant case we find on the evidence that it was not a case for conviction u/s 302 IPC and at best the accused could have been convicted only u/s 304 Part II IPC.

9. Accordingly we alter the conviction u/s 302 to section 304 Part II IPC. Before conviction the Appellant was in hazot from 3.11.88 upto 28.1.89 (86 days) and from conviction he served in jail from 7.7.92 till today (31.5.94). So, we reduce the sentence to the period undergone and direct that he be now released from jail. The fine is set aside.