(2008) 06 GAU CK 0044

Gauhati High Court

Case No: None

Mazir Uddin and Another		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: June 13, 2008

Acts Referred:

- Penal Code, 1860 (IPC) - Section 120B, 302, 34

Citation: (2008) 3 GLT 12

Hon'ble Judges: Hrishikesh Roy, J; Aftab H. Saikia, J

Bench: Division Bench

Judgement

Hrishikesh Roy, J.
Heard Mr. N. Choudhury, learned Counsel appearing for the appellants. Also heard Mr. K.C. Mahanta, learned PP.

2. This appeal is presented against the judgment and order dated 23.11.04 in Sessions Case No. 34/02, rendered by the learned Sessions Judge, Karimganj, whereby two accused appellants Mazir Uddin and Kabir Uddin have been convicted for murder of Reaz Uddin under Sections 302/34 IPC and have been sentenced to suffer rigorous imprisonment for life and a fine of Rs. 5000/- each, in default, to simple imprisonment for further one year.

3. In the instant case the prosecution adduced as many as eight witnesses whereas only one defence witness was presented before the Trial Court.

4. The prosecution case is that on 21.09.1999, Reaz Uddin (deceased) after attending a meeting for settling certain dispute was proceeding towards his house along with others when the accused Mazir Uddin & Kabir Uddin attacked Reaz Uddin with sharp weapons. Reaz Uddin shouted & cried for help and the informant went towards the spot. The informant is the brother of the deceased. As the condition of Reaz Uddin was serious, he

was taken to Nilam Bazar Hospital and police was informed. The statement of the injured Reaz Uddin was taken and having seen his condition deteriorating fast he was sent to Silchar Medical College Hospital for treatment but he died.

5. On receipt of an FIR from PW-1 a case under Sections 120(B)/302 IPC was registered and after completing investigation, charge sheet was submitted against four accused including the two appellants. The accused pleaded not guilty and accordingly the case was tried.

6. PW. 1, Abdul Khalique is the informant in the case and was the elder brother of the deceased Reaz Uddin. He stated that after hearing "hullah" he reached the place of occurrence. When asked, PW-1 was informed by the injured Reaz Uddin that the accused Mazir Uddin injured him by dagger stabbing from back side. He further stated that the other accused persons at that point of time was at some distance. This witness stated that when he reached the place of occurrence he found appellant Mazir Uddin and Kabir Uddin running away with daggers in their hands. PW-1 also deposed that they carried the injured to Nilam Bazar Hospital where Reaz Uddin''s dying declaration was recorded by the Doctor.

7. PW. 2, Inchan AH was an eye-witness of the incident. PW-2 stated that he met the two accused at Yakub Ali''s shop. There accused Mazir Uddin called aside the deceased and made him sit on the bench and offered him cigarette. That time the accused No. 2 Kabir Uddin was standing near accused No. 1. After finishing his smoke the deceased and the accused No. 1 left the shop and PW-2 and accused appellant No. 2 followed them, as their houses were located in the same direction. The witness further states that after they had gone some 8/10 "nals", accused Mazir Uddin took out a dagger from his waist and stabbed Reaz Uddin in the lower part of his left back. Reaz shouted and so did PW-2. Then Mazir Uddin pulled the dagger out and threatened to stab PW-2 with the dagger. The eyewitness also deposed that accused appellant No. 2 Kabir Uddin did not give any threat. Then the accused appellants No. 1 and 2 went towards the east.

8. PW.-3 was the Medical Officer posted at Nilam Bazar Primary Health Centre where the deceased was rushed immediately after suffering the injury. PW-3 recorded the dying declaration of the deceased Reaz Uddin as follows:

I asked the injured Reaz Uddin by whom he was injured? He replied that the stab injury was done on him by Sri Mazir Uddin S/o Sri Arzid Ali of village-Dalgram P.S. & District-Karimganj and his brother Kabir Uddin S/o Sri Arzid Ali of vill. - Dalgram P.S. & Dist.-Karimganj. Was also with him.

The dying declaration was recorded by PW-3 in presence of PW-7 (I.O. of the case) and two other witnesses.

9. PW. 5 Abdul Gaftir reached the place of occurrence after hearing commotion in the house of the deceased. On his way PW-5 heard from others that appellant No. 1 Mazir

Uddin had stabbed Reaz Uddin and that appellant No. 2 Kabir Uddin was with him. He saw Reaz Uddin lying in an injured condition while being taken to the hospital on a pushcart. PW-5 informed that the injured Reaz Uddin on being asked had told him that it is the accused appellant Mazir Uddin who had stabbed him and that accused appellant Kabir Uddin was with him. PW-4 also reached the hospital and he corroborates the. statement of the doctor (PW-3) that the statement of the injured Reaz Uddin was recorded in the hospital and he was present during that time.

In his cross-examination, PW-5, however, told that he had not told anyone earlier that the deceased had informed him about the assailants or that he was present at the time of recording of the dying declaration.

10. PW-7 Surat Ali Sheikh was the Investigating Officer of the case who was also the witness to the dying declaring recorded by the medical officer (PW-3). He deposes that on getting information he rushed to the Nilam Bazar Primary Health Centre where he found the injured lying in a pushcart with injuries on his back and belly. He further stated that the deceased was unable to speak. He arranged for the medical treatment of the injured Reaz Uddin and also for recording his dying declaration. Accordingly dying declaration (Ext.-2) was recorded by the doctor and he signed as one of the witnesses to the dying declaration where the injured stated that appellant No. 1 Mazir Uddin had stabbed him and appellant No. 2 Kabir Uddin was present with him.

In his cross-examination, PW-7 stated that at first he questioned the injured and only thereafter he had arranged for recording his dying declaration.

11. PW-8 Dr. Madhav Ch. Rajbangshi is a witness introduced by prosecution to prove the postmortem report prepared by one Shri R.C. Brahma according to which the following injuries were found on the body of the deceased:

Perforating wound over the back i.e. (1) entry would of size 3 cm ■ 2 cm located over the left 11th rib. 10 cm to the left of spinal (2) Exit wound of size 3 cm ■ 2 cm in front of chest below 12th rib. 12 cm from midline towards left. Franersing through the abdominal cavity by cutting through the ribs.

12. According to the medical opinion death occurred due to haemorrhage and shock resulting from perforating wounds, which are antemortem and homicidal in nature.

13. D.W.-1 Eafush Ali reached the place of occurrence soon after the incident and he found the deceased Reaz Uddin lying down in an injured condition. He stated that although he spent about five minutes time at the spot, the injured did not tell him anything.

14. Appearing for the appellants, Mr. N. Chdudhury, learned Counsel submits that although some evidences have been found against the accused appellant No. 1 Mazir Uddin, no evidence whatsoever is found against the accused appellant No. 2 Kabir Uddin

and accordingly the conviction under no circumstance can be sustained against accused No. 2 Kabir Uddin.

The learned Counsel further submits that the conviction against the appellants are sought to be sustained only on the basis of the evidence of the eyewitness (PW-2) and also the dying declaration recorded by PW-3. The learned Counsel submits that the doctor who recorded the dying declaration did not indicate in his report that the injured was in a fit condition to give a declaration. The learned Counsel also refers to the evidence of the I.O. (PW-7) who stated that when he found the injured lying on a pushcart in the primary health center, the injured was unable to speak.

On the basis of these two factors, the learned Counsel contends that the dying declaration cannot be relied upon to convict the appellants.

Mr. N. Choudhury, learned Counsel for the appellants also contends that the presence of PW-2 Indian Ali, the eyewitness at the place of occurrence cannot be believed as the D W, who was with the injured for some time, did not indicate the presence of anyone including PW-2 at the place of occurrence.

15. To pursuade the Court to not to rely upon the dying declaration for upholding the conviction, the learned Counsel for the appellant relies upon" the Supreme Court decision reported in Paparambaka Rosamma and Others Vs. State of Andhra Pradesh, Where the Supreme Court held that since the prosecution in that case had solely relied upon the dying declaration, it was necessary to prove that the dying declaration was genuine, true and free from all doubts and that the same was recorded in a fit state of mind of the injured. In the absence of medical certification that the injured was in a fit state at the time of making a declaration, the Supreme Court considered it unsafe to accept the dying declaration to have been made in a fit state of mind.

16. In the case before us, the prosecution case does not rely solely on the dying declaration, unlike in the case of Paparambaka Rosamma and Ors. v. State of A.P. (supra) since the statement of the injured made in the dying declaration stands fully corroborated by other evidence particularly the evidence of the eyewitness PW-2.

17. The principles governing acceptance of dying declaration for maintaining a conviction in criminal cases have been enunciated in several cases and it might be useful to note the relevant observations made by the Supreme Court in Sunder Lal Vs. State of Rajasthan, the Supreme Court has indicated that dying declaration is only a piece of untested evidence and must, like any other evidence, satisfy the Court that what is stated therein is the unalloyed truth and that it is absolutely safe to act upon it. If after careful scrutiny, the Court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, even if there is no corroboration, dying declaration can be made the basis for conviction.

18. In the present case while the doctor who recorded the dying declaration of the injured did not indicate the state of health condition of the injured, but it must also be considered that the doctor in the primary health center had immediately decided to send the injured for better treatment to the Silchar Medical College and under such circumstances it would not be unreasonable for the doctor at the Primary Health Center, to have not bothered with a detail medical examination of the injured as the anxiety must be to send him to the Silchar Medical College without unnecessary delay so that the life of the injured can be saved. The doctor was an independent witness who had nothing to do with the assault on the deceased and there is no reason not to accept the dying declaration recorded by PW-3, to be truthful and voluntary.

19. It must also be noticed that the PW-2, who was an eyewitness to the stabbing of the injured by the appellant No. 1 Mazir Uddin, fully corroborates the dying declaration evidence recorded by the doctor and under such circumstances, this Court is of the firm view that the evidence of dying declaration is truthful, voluntary and believable and can be relied upon to support the prosecution case.

20. The evidence of PW-2 is also cogent and appears to be truthful as he was with the accused and the deceased for quite sometime prior to the incident and was walking along with appellant No. 2 just behind the appellant No. 1 and the deceased and saw the assault on the deceased by the appellant No. 1. He had full opportunity to observe the appellant No. 1 giving a stab blow with a dagger and had the full opportunity to see appellant No. 2 and he indicated that appellant No. 2 had no hand in the assault and it was only the appellant No. 1 who gave a dagger blow to the deceased and threatened also to stab the PW-2. The evidence of this eyewitness is corroborated on all material aspects by the injury evidence on the deceased as well as the dying declaration recorded by the doctor. The DW does not talk of presence of anyone at the time when he was with the injured. But it is evident that DW was not with the injured during the entire period after the incident. Therefore, the absence of PW-2 can''t be accepted on the careful consideration of D W''s evidence. We find the evidence of PW-2 to be truthful and genuine.

21. Under such circumstances, we are of the considered opinion that the conviction of appellant No. 1 Mazir Uddin requires no interference.

22. However, from the very same evidence on the basis of which conviction of appellant No. 1 Mazir Uddin has been upheld, it is clearly revealed that appellant No. 2 Kabir Uddin had no hand at all in the stabbing injury inflicted on the deceased Reaz Uddin and appellant No. 2 can perhaps be described as a by standar who fled the scene after the incident as it was his brother Mazir Uddin who made the assault on the deceased.

Under such circumstances, we do not find any material evidence to uphold the impugned conviction against the appellant No. 2 Kabir Uddin.

23. In view of the above conclusion, we affirm the conviction and sentence on appellant No. 1 Mazir Uddin. We, do however, interfere with the guilty finding against appellant No. 2 Kabir Uddin and accordingly set aside Kabir Uddin''s conviction ordered by the impugned judgment dated 23.11.04. The Criminal Appeal accordingly stands partly allowed as aforesaid.