

(1988) 02 GAU CK 0011**Gauhati High Court****Case No:** Criminal Appeal No. 14 of 1986

Jogen Boruah

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: Feb. 5, 1988**Acts Referred:**

- Criminal Procedure Code, 1973 - Section 313
- Criminal Procedure Code, 1973 (CrPC) - Section 313

Citation: (1988) 1 GLJ 314**Hon'ble Judges:** B.L.Hansaria, J and J.Sangma, J**Bench:** Division Bench**Advocate:** T.C.Majumdar, K.P.Sharma, D.C.Mahanta, A.Mannan, Advocates appearing for
Parties**Judgement**

Hansaria. J .

1. The appellant has been found guilty under section 302 JPC and he has been sentenced to undergo R.I. for life. The allegation against him is that on 15.8.83 he had intentionally caused the death of Deba. This had been done around 3.30 p m. The matter was brought to the notice of the police next day morning by PW.3, Dimbeswar, father of the deceased, whereupon investigation of the case was taken up and on close of the same the appellant was sent up for trial under the aforesaid section of law. During trial, the prosecution examined 11 witnesses. On being satisfied about the guilt of the accused, the learned trial court convicted and sentenced the appellant as aforesaid. Hence this appeal.

2. Shri Mazumdar appearing for the appellant has taken us through the entire materials on record which shows that PW. 2. Bagen, PW. 5 Sunanda, PW. 6, Dandi, PW.7. Aswini and PW. 10, Rusheswari had deposed that they had seen the occurrence. PW. 1 is the doctor who held the autopsy on the dead body. PW. 3 is the informant. PW. 4 is the witness to the inquest. PW. 8 had accompanied the dead

body when the same had been sent for postmortem examination. PW. 9 is the Investigating Officer and PW.H is the scribe of the ejahar.

3. The evidence of PW. 1 shows that the autopsy was held m 16. 8.83 and the surgeon had found two external injuries: (1) one cut injury 6"x 3" over the right side of the neck; and (2) one penetrating injury 1"X1/2" x 2" on the left side of the chest. PW. 1 had: noticed the stomach empty and according to him injury No. 1 was caused by a single stroke.

4. PW. 2 Bagen who is a covillager of Deba had stated that on the day of occurrence after coming out of his house at about 2.30/3.00 p.m. when he reached the railway track he saw the accused coming along the track with a mechidao and a spear. He saw the accused reaching in front of the house of Deba. This had been seen from a distance of about 4/5 nals (1 nal=12 feet). He saw Deba coming out of his house and the accused then piercing Deba with a spear and giving dao blows on the neck. Out of fear the witness did not proceed further. On Deba's wife raising hue and cry, neighbouring people came. The witness had also seen PW.5. Sunanda and PW.6, Dandi near the place of occurrence. In cross examination the witness stated that he had seen one dao blow having been dealt.

5. The next eye witness is PW. 5 Sunanda who is a brother of the deceased. On the day of occurrence this witness had gone to Dbemaji to participate in the Independence Day celebration. He came back to the village around 2.00 p.m. and arrived near the Saturday market where the occurrence had taken place at about 2.30 p.m. As soon as he reached near Deba's house, he saw the accused in front of Doha's house armed with a spear and a dao. He further saw Deba coming out of his house and the accused immediately piercing Deba with the spear, On this Deba fell down and the accused thereafter Parted nocking Deba with a dao. On seeing this, the witness ran towards his house. Reaching home the witness informed the members of his family about the occurrence knowing about which his father and others came to the place of occurrence. The witness sent his maternal uncle to his wife's elder brother in order to lodge information with the thana. According to this witness, Deba's wife was inside the house at the time of the occurrence.

6. P.W. 6 Dandi is another eye witness to the occurrence He was repairing his stall situated at the Saturday market on the day of the occurrence when he saw the accused coming towards the house of Deba carrying a spear and a dao. We may state here that the house of the accused is about 20/22 nal's away from that of Deba. The accused Stopped in front of the house of Deba and when the letter came out. the accused thrust the spear into Deba's chest. As soon as the spear was pulled back, Deba fell down when the accused cut Deba with dao. On seeing the occurrence, the witness went back home. In crossexamination he stated that he had seen the occurrence from near the pan shop of Aswini, PW.7. As per this witness the accused had inflicted three dao blows.

7. PW.7 Aswini has a pan shop at the Saturday market, On the day of occurrence he was busy in his shop. Deba's house is close to his "gutnti" The witness saw the accused coming hurriedly carrying a dao and. a spear in his hand and then exchanging hot words in front of Deba's house. After altercating for some time, the accused thrust the spear into the chest of Deba and after the deceased had fallen down, the accused cut him with a dao and ran towards his house. The witness closed his shop immediately and went home. In crossexamination PW. 7 had stated that he had seen a wooden sticklike object in Deba's hand. He could not however notice as to who had rushed at whom. ,The further evidence of this witness is that at the time of occurrence Deba had no shirt on his body. It was, however, not noticed by his whether he had worn a dhoti or lungi.

8. The last eye witness to the occurrence is wife of Deba, PW.10 Kuasheswari. According to her, at about 3.00 p.m. on the day of occurrence she was at home. Deba came home from Chariali. He was served with meal After he had taken his meal, the accused came armed with a dao and lathi and accosted her husband to come out. Deba came and asked if the accused would really kill him. The accused then hit Deba on the chest with spear and dealt three blows on the neck. As the witness raised hue and cry, she too was charged but she escaped herself by closing the door. The witness did not see where the accused went after the occurrence. Afterwards many people came knowing about the matter. In crossexamination the witness stated that her house is about 10 nals from the rail road and it is close by the road the assault on her husband had taken place when he had gone to the side of the road and she was then in the courtyard. According to her at the time of occurrence nobody other than her was present. Her husband at the relevant time was wearing a gamocha (towel) and an underpant. He had not put on any shirt. She admitted in crossexamination that police had not examined her. She deposed about giving of three dao blows by the accused. A suggestion was put to her that the dead body of her husband had been dumped near her house after he had been killed somewhere else and that the accused had been falsely implicated because he had kidnapped the sister of the deceased.

9. The above is the sum and substance of the evidence led in the case to prove the guilt of the accusedappellant. Let it be seen whether on the basis of materials on record and evidence led by the prosecution, the conviction of the appellant can, be uphold. We may start from the first step taken in the case which is rentable to filing of the ejahar. Shri Mazumdar contends in this connection that there was delay in lodging of the ejahar which also does not contain name of any witness and it has stated about causing death of Deba by cutting him with a dao no mention having been made about assault with spear. The contention about delay has been advanced because the occurrence had taken place on 15.8.83. at about 3.30 p.m. whereas the ejahar was lodged next day at about 7.30 a.m. The learned Public Prosecutor contends that as after all a son of the informant had been killed and a soninlaw was involved in the crime the family members took some time to compose

themselves which might have taken some time to approach the police. It is urged that the delay was in any case not inordinate.

10. We would not have given much importance to the little delay in lodging the ejahar and would have perhaps given due importance to the naming of the accused in the ejahar had there been no doubt in our mind regarding the ejahar accepted in the case being the first information to the police relating to the crime and had there been no evidence on record to doubt the due receipt of the ejahar in question by the police at about 7.30 a.m. A reference to the evidence on record however shows that Ext. 6 which was proved in the case as the ejahar (was not the first information to the police. This would appear from the evidence at PW. 3 who stated that after getting a paper written he had sent his brotherinlaw Rupeswar to the thana. In crossexamination (P.W. 3 admitted that he had sent the information to police on date of occurrence itself DTiemaji where the thana is located being only five miles away, and being connected with bus service (as appears from the evidence of PW.51 this information must have reached the thana on 15th itself. PW. 5 has also I stated that on the date of occurrence itself, he had sent his maternal uncle to his wife"s elder brother to lodge information in the thana. So shock did not stand in the way of timely information to police. These two information"s, however, are not before us. Why have these been surpassed 1 Undoubtedly, this must be motivated. This is not all. As to Ext. 6, we may refer to the evidence of scribe PW.11 who stated in crossexamination that he had written the same at about 9.00a.m. of 16th. The evidence of PW. 11 in this regard has received corroboration from PW. 3, who stated that he put his thumb impression on the paper (by which he must have meant the ejahar Ext. 6) after the police had come. This document could not have therefore been lodged in the thana at about 7.30 a.m. as is the case of the prosecution. We have also noted that the time of receipt (7.30) mentioned in the form of the ejahar is in a different ink and hand. On top of all, the statement of PW,3 in the cross examination that he did not know what was written in the ejahar robes Ext. 6 of all its value. :

11. In view of the above it has to be held that the prosecution case has a beginning which is highly suspicious and its foundation too is shaky. A question does arise at the threshold whether the prosecution is not trying to shield somebody and falsely implicate " the accused ? Otherwise, why suppressed first information and obtain a fresh ejahar after arrival at the place Of occurrence showing it s to have been received at the thana.

12. Let it be seen whether the weak foundation has been sufficiently reinforced by the evidence led in the case and suspicion stands fully removed because of what has been deposed by PWs. 2,5,6,7 and 10. We may start with PW.2, the sum and substance of whose evidence has already been noted. As he is one of the persons whose statement was got recorded by the police under section 164 Cr. P. C., it is urged by Shri Mazumdar that we should approach his evidence with caution because

of what has been stated in *Balak Ram vs. State of U. P.*, AIR 1974 SC 2165. He is apparently a chance witness inasmuch as his evidence is that on the day of occurrence he had come out of his house and reached the railway track which runs north to south near the place of occurrence. The witness stated that his house is at an interior place from the railway track. We do not find any particular reason as to why in a summer month of August the witness would have come out of his house at about 2.30 or 3.00 p. m. As per the evidence of this witness the occurrence had taken place as soon as he reached the railway track. He did not say anything about altercation between the accused and the deceased testified by PW. 7. Though PW. 5 deposed (and he is the only witness to do so.) about the presence of PW 2 at the relevant time. according to the former he had seen the later near the gumti of Aswini, PW. 7, who however is silent about the presence of PW 2. Now as per the sketch map Ext. =8 (which did not become available to us When arguments were heard, but could be located subsequently in the case diary while preparing the judgment), the gumti of Aswini is not near the railway track. In fact, house of deceased Deba intervenes the gumti and the railway track.

13. Shri Mazumdar has submitted in this connection that the ejahar did not contain the name of this witness or, for that matter, of anybody as a witness to the occurrence. We may state here about the (effect of nonmentioning of any name as a witness in the ejahar. According to us, while informing the police about any crime, more particularly about a serious crime, and that too after getting sufficient time to know as to who had witnessed the crime, names of witnesses must be incorporated in the ejahar both to facilitate investigation and to add weight to the authenticity of the information. This helps in the success of the trial also which may follow as it meets to some extent the possible allegation of the accused about producing of procured witnesses. There may be cases where some persons are named in the ejahar. In such a case if a person not named in the ejahar comes forward to depose, the court would be justified in examining his evidence cautiously?} (Where no name of anybody is given in the ejahar as a witness, there also cautious approach would be justified specially in those cases where ejahar is lodged by a person having personal knowledge of the occurrence. It would be more so in case of ejahar s filed belatedly which would give sufficient time to know if anybody had seen the occurrence.

14. Shri Mazumdar has also referred, while trying to convince us that PW.2 was not present at the site at the relevant, to the statement of PW. 10 that at the time of occurrence nobody other than her was present. We would not however, give much weight to this statement to disbelieve presence of PW. 2 at or near the spot inasmuch as at the relevant time PW. 10 was inside the courtyard because of which she might not have noted the presence of other persons on the road.

15. The position which thus emerges is that PW.2 had no particular reason to be near the place of occurrence, his presence at the spot is corroborated only by PW. 5

who too differs regarding the exact location from where P.W 2 had seen the occurrence. Nobody also has stated that PW. 2 had told him about the occurrence and finally this witness has not deposed about an important facet (altercation between the accused and the deceased and rushing towards each other) of the case. Because of all these, and because of the cautious approach which we are required to adopt for reasons, *inter alia*, that the statement of this witness was recorded under section 164 Cr. P. C. and he has not been mentioned in the ejahar as a witness, we entertain reasonable doubt about his being an eye witness to the occurrence.

16. PW. 5 is the next witness who claimed to have seen the occurrence. His statement too was recorded under section 164 Cr. P. C. His presence at the spot is supported by PW. 7. He is a brother of the deceased. Shri Mazumdar contends that keeping in view the defence of the accused that he was falsely implicated as he had kidnapped a daughter of PW. 3 Dimbeswar who is the father of this witness, we should not accept the testimony of this witness as fully correct. The learned Public Prosecutor urges that this submission of Shri Mazumdar has no force inasmuch as the occurrence of kidnapping had taken place 4/5 years before the occurrence as stated by PW. 2, whereafter three children were born out of the wedlock as appears from the evidence of PW. 3. We would not therefore accept the submission of false implication due to the incident of kidnapping, though some amount of acrimony on this account cannot be ruled out.

17. (PW. 5 is also a chance witness. His statement too was recorded under section 164 Cr. P.C. His credibility is also shaken due to his absolute silence about altercation and exchange of hot words between the deceased and the accused about which PW. 7 was deposed. It may be stated that according to PW. 7 this witness was taking betelnut near his gumti and as such he would not have missed the altercation which had taken place. It would thus show that PW. 5 had suppressed some vital facts from the Court which would have thrown some blame of assaults on his deceased brother For all these reasons, we do not think if it would be safe to fully rely on the evidence of this witness

18. We now come to the evidence of PW. 6.Y As per his evidence in the Court he had come to the Saturday market where he has a shop to repair the same. But in the statement as recorded under section 164 Cr. P. C. was that on the day of occurrence he had gone out in search of a man for making house. This would show that there is vital discrepancy in the statement of this witness relating to the reason which "had found him near the place of occurrence?" This witness did not pose about any altercation between the accused and the deceased though he too was taking betelnut near the gumti of PW. 7.

19. To persuade us to hold that is not an eye witness to the occurrence, Shri Mazumdar has contended that his evidence that the accused had given three dao blows runs counter to the medical opinion that the injury on the neck was caused by

a single stroke. In this connection we may state that Es per the inquest report, Ext. 3, there were two cut marks in the neck. The Learned Public Prosecutor contends that the opinion given by. PW. 1 that the injury on the neck was given by a single stroke should be regarded in the nature of hypothetical medical evidence and the same cannot furnish a good ground to reject direct evidence as stated in Punjab Singh v. Karnail Singh, AIR 1984 SC 1233. Our attention has also been invited by the learned Public Prosecutor to Solanki Chimanbhai v. State of Gujarat, AIR 1983 SC 484 in Para 12 of which it has been stated as below :

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

20. From the evidence on record it cannot be said that the injury on the neck of the deceased could not have been really caused in the manner alleged by the prosecution. Even so, the discrepancy between the medical opinion and the evidence of this witness about giving of three dao blows cannot altogether be ignored.

21. Because of all the above we would state that according to us the presence of this witness at the spot seems doubtful. In any case, he is not a fully reliable witness.

22. We shall advert to the evidence of PW. 7 after we have dealt with the testimony of PW. 10 who is the wife of the deceased. Shri Mazumdar contends that as PW. 10 had not been earlier examined by the Investigating Officer, we may not accept the statement made by her for the first time in the Court as the accused was deprived of knowing the version of this witness given immediately after the occurrence which would have enabled the defence to discredit her in case of contradiction. Though this submission made by Shri Mazumdar has force, we may observe that the learned Sessions Judge on being requested to allow the prosecution to examine PW. 10 despite she being not a chargesheeted witness, the learned Judge rightly allowed the prayer inasmuch as a Court has also a duty to see that important witnesses are examined in a case. But then there should be no denial that the evidence of such a witness has to be scrutinised very carefully. Shri Mazumdar contends that PW. 10 is not fully reliable witness and to satisfy our mind in this regard has drawn our attention to the evidence of PW. 1 that he had found the stomach of the deceased empty "whereas the evidence of PW. 10 is that attack on her husband had taken place after he had taken his meals. But then PW. 10 stated in crossexamination . that before the occurrence had taken place her husband had just begun taking his meals but could not finish the same.

23, Therefore, we do not think if we should doubt about the testimony of PW. 10 on the first ground mentioned by Shri Mazumdar. This witness also stated about giving of three dao blows on the neck of the deceased, and as the same runs counter to the medical opinion already noted, the same can be said to have introduced some infirmity in her evidence?) But then what has created serious doubt in our mind about her being an eye witness is her evidence that when assault on her husband was taking place she was in the courtyard. If the assaults would have really taken place in front of her house as deposed by her it would have been definitely possible for the witness to see the assault. May be it stated here that according to all the witnesses, Deba had fallen down in at the place he was pierced by the spear and so we have to take that the assaults had taken place where his dead body was found. The sketch map, Ext. 8, shows that the dead body of Deba was found at a distance of about 30 feet away towards the east of the house. (The sketch map further shows that in between the house of the deceased and the spot where the dead body was found is located a gumti, perhaps belonging to PW. 7. This gumti would have blocked "the vision of PW. 10 from seeing the assaults on her husband at the place where his dead body was found as she was then in the courtyard of her house as per her evidence.

24. In view of what has been stated above we would feel hesitant to regard PW. 10 as an occult witness to" the occurrence. This leaves for consideration the evidence of PW. 7. His presence near the spot is not fortuitous inasmuch as he has a gumti close by. The occurrence having taken place on Monday, his presence in the shop is also natural. The house of the deceased is also nearby. He has not minced words and has stated that after the accused came hurriedly, he exchanged hot words with the deceased in front of the latter's house. After some altercation the accused thrust a spear into the chest of the deceased and thereafter dealt dao blows where after the accused ran away towards his house. The witness thereafter closed his shop and went home. On crossexamination the witness stated that at the time of altercation he had seen a wooden sticklike object in the hand of the deceased and he could not see as to who had rushed at whom.

25. The only criticism made of this witness by Shri Mazumdar is that he had acted against normal human conduct which in a case of the present nature would have required giving of assistance to the injured instead of fleeing away from the place of occurrence. As, however, the witness was confronted with the accused who was armed with a spear and a dao as would think the normal human instinct of saving himself from danger might have impelled the witness to leave the scene of occurrence lest he might himself become a victim of assault.

26. From what has been stated above we are satisfied that (P.W.7 is a witness on whose evidence reliance can be placed. The question is whether we would be justified in finding the accused guilty by solely relying on the evidence of this witness. (In law there is no bar in returning a verdict of guilt on the testimony of a

sole eye witness provided the Court regards him as honest and truthful. In this connection, the learned Public Prosecutor has referred us to *Ramji Surjya v. State of Maharashtra*, AIR 1983 SC 810. This decision has however stated that prudence requires that some corroboration should be sought from other prosecution evidence in support of the testimony of a solitary eye " witness particularly where such witness also happens to be closely related to the deceased and the accused are those against whom some motive or illwill is suggested. (PW.7 however is neither closely related to the deceased, nor is there anything on record to show his illwill towards the accused"

27. Shri Mazumdar has however a serious objection in placing reliance on the evidence of PW. 7 to find the accused guilty because he has not given the opportunity to have his say on the evidence of this witness when the accused was examined under section 313 Cr.P.C. by the learned trial court. In this connection he referred to paras 142 and 144 of *Sharad v. State of Maharashtra*. AIR 1984 SC 1622. The 313 examination shows that the accused was asked only three questions. We may note these questions and the answers given by the accused :

Q. PW. Kusheswari has said that you called her husband out; that first you thrust him in the chest with a spear and then you dealt three dao blows in his neck as he (her husband) fell down as a result of which he died what do you say ?

A. I did not kill him.

Q. Then why this case has been filed against you ? A I kidnapped the daughter of Dimbeswar and I have been implicated in this case out of that grudge.

Q. Did you commit crime ? A. I did not commit crime."

28. The above shows that the evidence of PW.7 was not put to the accused and indeed the examination was not at all satisfactory and happy. The learned Public Prosecutor however, contends that the failure of the learned trial court to ask the accused what he wanted to say regarding the evidence of PW.7 caused no prejudice to him, which is the test to ascertain if any grievance can be made relating to any lapse in this regard, inasmuch as PW.7 had virtually deposed about the occurrence what PW Kusheswari had testified. We would only partially agree with the learned Public Prosecutor inasmuch as we do not know what the accused would have stated if he would have been asked about the altercation between him and the deceased about which PW.7 deposed and about PW Kusheswari was silent.

29. Shri Mazumdar finally submits that as nothing was noted by the Investigation Officer in his diary or inquest report about funding of blood marks where the dead body was found, the same shows that the death of Deba had taken place somewhere else and his dead body was dumped where it was found by the Investigating Officer. The learned Public Prosecutor refers, to counter this submission, to the oral evidence of the 1.0. that the dead body was found lying in a

pool of blood. Shri Mazumdar would not like us to rely on the oral evidence in the absence of supporting note in the diary or inquest report. We do not think if merely because of the aforesaid omission of the 1.0, we can not accept this submission of Shri Mazumdar. It is worth pointing out that this suggestion had been given only to PW. 10 who was examined after the 1.0. had given his evidence.

30. To sum up, we have our doubt about the presence of PWs. 2 and 6 at the place of occurrence at the relevant time. Even if the presence of PW.6 is accepted, he is not fully reliable witness. PW.5 has suppressed truth and we cannot rely on his fully. PW. 10 could not have seen the assault herself. Though PW. 7's evidence inspires confidence, an infirmity was caused in the trial by not allowing the accused to have his say on his evidence. This being the position, we cannot say that the prosecution has succeeded in removing the suspicion of false implication which has been created in our mind because of the various factors relating to lodging of the ejahar about which we have referred earlier. In any case, our conscience do not permit us to see the accused behind the bar for his entire life on the basis of the evidence found acceptable by us. We would, therefore, set aside his conviction under section 302. There is no other section of law under which he can be reasonably found guilty on the strength of materials on record. We therefore order for his acquittal. Let him be released from jail forthwith.

31. In the result the appeal is allowed as aforesaid.