(1983) 06 GAU CK 0008

Gauhati High Court

Case No: None

Bhanda Garh		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: June 30, 1983

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 100, 291, 293, 313
- Evidence Act, 1872 - Section 114, 27, 4, 45
- Penal Code, 1860 (IPC) - Section 302

Citation: (1984) CriLJ 217

Hon'ble Judges: D. Pathak., C.J; T.N. Singh, J

Bench: Division Bench

Judgement

T.N. Singh, J.

The presumption of innocence is a fundamental tenet of our criminal jurisprudence. It has, too, its own basic facet. It is this facet which is manifested in the anxiety of the Courts to ensure a fair trial based on fair procedure. The accused is entitled to the benefit of doubt based not only on the evidence produced in the case but based also on infraction of any procedural safeguard enjoined by law in the matter of conduct of investigation as well as prosecution. It is the duty of the Court to see if the evidence produced in the case is tainted in any manner, factually or legally and in a case where the accused is indicted on a charge of murder exposing him to the extreme penalty, this duty assumes signal significance. Indeed, in several decisions of the apex Court the danger of adopting a computarised approach in such cases has been vocally projected. We have been invited to make this prefatory remark in this case because of the strong plea forcefully pressed by the learned Public Prosecutor imploring us to uphold [(he conviction ignoring what he has termed minor discrepancies in the evidence and minor procedural infractions. Before we turn to the facts of this case we might as well add that it is this plea which provoked us more particularly to subject the evidence in the case to microscopic examination

and also to consider the effect of all the procedural infractions which came to our notice in this case.

2. On 29-3-79 at 11 A.M. P. W. 1 Jag-dish Gowala lodged an FIR that the dead body of his brother Dilip Gowala was lying by the side of the road at Line No. 14 of Lembuguri Tea Garden with a "piercing" injury in the chest. In view of the cryptic report he was questioned by the Officer-in-Charge of the Police Station. The questions as well as the answers are recorded on the body of the FIR itself. In reply to the query as to the cause of the death the informant stated that on the preceding night at about 7 P. M. his brother had gone to the residence of Ganesh, a co-villager, to recite Kirtan there but he did not return. In the morning at about 4 A. M. another co-villager, Giridhari, came to his house and informed him that "somebody" had killed his brother. He further stated that he did not know who killed him. Be it noted that Ganesh above-mentioned was examined as P. W. 2 but his name was noted as Dhansa.

3. During the course of investigation which was taken up by P. W. 6 he visited the place of occurrence on the same day and held inquest over the dead body which was identified by the informant. Thereafter, ha sent the dead body for post-mortem examination. On 1-9-79 he arrested the appellant Bhanda at his residence. As he saw injuries on his person he sent him for medical examination. On the same day he seized one dagger and one half sleeve cotton shirt stained with blood. These were, according to the seizure lists, produced by the accused. These were sent through the Court for chemical examination and in due course Teport of the Sexologist was received in respect thereto which was placed on record. On completion of the investigation charge-sheet was submitted against the appellant u/s 302, I. P. C. naming therein as many as 12 witnesses who were expected to prove the prosecution case. Among others two persons, Giridhari and Yudhistir, by name, also figured in the charge-sheet. On the basis of the charge-sheet the appellant was committed to the Court of Session to stand trial u/s 302, I. P. C.

4. During the course of trial the prosecution examined only 6 witnesses including the Autopsy Surgeon, Dr. B.K. Bora (P. W. 4) and the Investigating Officer, Mr. N. C. Rajguru (P. W. 6). P. W. 1 is the informant but the details of the prosecution case can be gathered more particularly from the three witnesses, namely, P. Ws. 2, 3 and 5. However, before discussing their evidence we may say, shortly put, the case against the appellant was that he had stabbed Dilip when he was returning with him from the Kirtan held at the place of P. W. 2 as a result of which Dilip died. In his statement u/s 313, Cr. P. C. the appellant denied the allegation but the adduced no evidence in support of his story that he was assaulted by Dilip when they were returning from Kirtan; that he fled away and did not know what (happened to Dilip. The learned Sessions Judge accepted the prosecution case and convicted the appellant u/s 302, I. P. C. and sentenced him to rigorous imprisonment for life against which this appeal is preferred from jail, for his defence we appointed Miss Usha Barua to represent

him at State expenses in this Court.

5. Let us now discuss the evidence in the case. P. W. 1 has deposed that his neighbours Giridhari and Yudhistir came and informed him in the early morning on the following day of the occurrence that his elder brother Dilip was killed by "somebody" and was laid near the Church of Lembuguru Garden. On reaching the place of occurrence he saw the dead body lying there which had a "piercing" wound in the chest. He has also deposed that the appellant was a co-villager and that he was arrested by the police few days after the occurrence. P. W. 2 Dhansa is the person at whose house the Namkirtan was performed. He has stated that many people, including the appellant and Dilip (the deceased) besides the two witnesses, Tiali (P. W. 3) and Chanchal (P. W. 5) and one Yudhistir, attended the Kirtan. It is his categorical evidence that the deceased and the appellant came to the Kirtan when it was going on but after their arrival P. Ws. 3 and 5 and also Yudhistir left the place. The appellant and the deceased went later but it was the appellant who was anxious to go home and he took away deceased with him by holding his hand. The Kirtan ended, according to the witnesses, at about 10/11 P.M. The evidence of P. W. 3 is that he went to the Kirtan held at the place of P. W. 2 in the company of Yudhistir and Chitta and they were there till about 9.30/10 P. M. participating in the Kirtan and that the three of them also left for their home together. According to this the deceased, the appellant P. W. 5 and one Haripada were seen coming together to the Kirtan. After a while the deceased, P. W. 5 and Haripada, left the place and joined their group. The appellant remained there singing Kirtan. After they proceeded some distance Dilip went back to the Kirtan to bring the appellant. This witness further stated that he heard an altercation between the appellant and the deceased and also noticed that the deceased was pushing the appellant to come with him. According to him the appellant, went ahead and the deceased followed him. However, he has further deposed that (he heard P. W. 5 shouting loudly "brother dagger, dagger" and at the same time he saw the appellant chasing the deceased who fled away. His further evidence is that he did not see what the appellant had in his hand but he saw him hitting Dilip with something. Dilip fell down and cried out "Oh". The witness thereafter fled away and with him the other persons of the group also fled away. He has also deposed that he told one Bikhhari about the occurrence that very night. In the cross-examination he has further admitted that both the appellant and the deceased were behind the group at a distance of about 30 ft. and further that there was darkness at that place. The evidence of P. W. 5 is that he went to witness the recitation of Kirtan at the house of P. W, 2 in the company of Dilip and the appellant. It is his evidence that he left the place to go home together with P. W. 3, the appellant, Dilip as well as Yudhistir. It is his further evidence that quarrel took place on the way between the appellant and Dilip and that when he intervened the appellant he drew out a dagger and gave him a kick. He cried out "brother Tiali, dagger, dagger". Thereafter, according to him, the appellant stabbed Dilip in the chest and Dilip fell down. Then all of them went away. In cross-examination he

admitted that as a result of the kick he fell down but he immediately got up and ran away. He did not notice what Dilip was doing but Dilip had nothing in his hand. He also admits that it was dark night when the occurrence took place and has deposed that the dagger which he saw in the hand of the appellant was not shown to him in the Court when he gave evidence. This is so far as the ocular evidence in the case is concerned and before we turn to discuss the value and effect of this evidence we may refer briefly to the medical evidence of P. W. 4 who carried out the autopsy on the dead body of Dilip. He found the following injuries and in his opinion death was due to shock and haemorrhage resulting from the injuries which were all ante mortem:

1. One spindle shaped stab wound 6 c. m. lateral to the mid line and on the 3rd inter costal space of the left side, size 3 X 5 cm. The depth of the wound is 12 c. m. directing towards heart and involving left ventricle, size 2.5 X 5 cm.

2. One stab wound of 1 X 5 c. m. size over the sternum at the level of 4tlh cartelege

6. We have meticulously sifted and scanned the evidence of the two eye-witnesses, P. Ws. 3 and 5, which we have reproduced above. In our opinion, it will not be safe to place any reliance on their testimony which suffers from intrinsic infirmity in each case as well as from mutual contradictions. Three witnesses have given different and materially discrepant versions on different points. But the most material point to be noted is that if P. W. 2 is to be believed, and there is no reason to disbelieve him, P. Ws. 3 and 5 had left the place earlier in the company of Yudhistir and there could be therefore no occasion for them to witness the occurrence as deposed to by them. Another point to be noted in this connection is that the evidence of P. W. 2 belies that of P. W. 3 shaking the substratum of the prosecution case. If Dilip was hesitant, and not the appellant, to leave the Kirtan, as deposed to by P. W. 2 it would be Dilip who will have reason to be offended and for that matter teaching the appellant a lesson as is the case of the appellant, disclosed in his statement u/s 313, Cr. P. C. If the appellant was not hesitant there was no reason for him to be the aggressor and to commit the crime. That apart, P. Ws. 3 and 5 also do not corroborate each other and they give different versions of the manner in which the appellant, the deceased, the two witnesses and Yudhistir left the Kirtan to go home. Indeed, the evidence of P. W. 3 is intrinsically unreliable. His version of the prosecution story is slip-shod and it bristles with inherent improbabilities. Even on its face value his evidence cannot also be accepted as that of an eye-witness inasmuch as he did not see any dagger in the hand of the appellant and did not also see the deceased being stabbed therewith. In any case, if whatever he witnessed was true, as a co-villager he should have reported the same to the family of the deceased. On the other hand his evidence is that he spoke about it only to one Bikhhari and not even to Giridhari although the latter informed him that Dilip had died. The informant P. W. 1 has repeatedly stated that it was Giridhari from whom he had got the information about his brother being killed by "somebody". In so far

as the evidence of P. W. 5 is concerned although (he had deposed as an eye-witness to the occurrence his evidence cannot be accepted without a grain of salt. His evidence is also riddled with inherent improbabilities. His evidence that the appellant gave him a kick is not supported by P. W. 3 and it appears to us that this embellishment is distinctly motivated to implicate the appellant by showing that he had a dagger with which he had threatened his witness also. Further, as we have seen, in the face of his admission in cross-examination that he got up and ran away after he was kicked by the appellant, his further story that he witnessed the appellant stabbing the deceased in the chest cannot be accepted. That apart, his evidence also suffers from the same fatal infirmity which afflicts that of P. W. 3 in that he did not also, as was expected of him as a co-villager, inform the members of the family of the deceased about the occurrence. Indeed, he does not say that he informed anybody. We have no hesitation, therefore, to reject the testimony of P. Ws. 3 and 5 and to hold that the occular evidence in the case does not support the prosecution story.

7. We may now refer to the other evidence relied on by the prosecution in this case. The pivotal supporting evidence is that of discovery made u/s 27 of the Evidence Act which is sought to be proved by the I.O., P. W. 6. He has proved appellant''s statement that "He has kept the dagger with which he murdered Dilip under a plantain tree in the back side of his house to the east". Although a part of the statement which amounts to confession is inadmissible the remaining part could have been saved by Section 27 if the discovery made pursuant to the statement had been proved in the case. Unfortunately neither the dagger nor any other articles which were seized in the course of investigation have been brought on record. In our opinion by | merely exhibiting the relevant seizure lists the requirement of law is not fulfilled; the fact of discovery must be proved like any other fact to invoke the and of Section 27 by producing in Court the articles discovered pursuant to the information gathered from the statement of the appellant. Further, although Exts. 6 and 7, the relevant seizure lists are said to have been witnessed by P. W. 1, surprisingly, for reasons best known to the prosecution, his signatures thereon have not been proved which afflicts the fectum of the seizure in the manner stated therein. It is true that Section 100 (5), Cr. P. C. contemplates that any person witnessing a seizure shall not be required to attend Court. In this case, however, one of the witnesses (P. W, 1) already having been summoned in terms of the same provision, it was incumbent upon (he prosecution to have the seizure proved by the witness. In this view of the matter we have no hesitation to hold that the prosecution is not entitled to rely on the circumstance of the alleged discovery in support of their case,

8. For the same and similar reasons we are of the opinion that the other circumstances relied on in this case by the prosecution cannot be invoked by them to support its case. Report of the Serologist has been proved in this case as Ext. 9 but in total disregard of the legal requirement. The aid of Section 293, Cr. P. C. could

be invoked to dispense with his presence as a witness in the Court if the identity of the articles sent to him for examination had been established but as we have seen, the articles seized and sent to (him for examination are not produced in the Court.

9. We are also of the opinion that the injury report Ext. 5 cannot be admitted in evidence and relied on by the prosecution because the Doctor who examined the appellant was not put in the witness box. Unlike, in the case of the Serologist, examination of a medical witness, except in a case covered by Section 291, Cr. P. C. is not dispensed with by law. As an expert his evidence is relevant u/s 45 of the Evidence Act but by virtue of Section 4, he is required to state his opinion as a witness in the Court. It is true that in his statement u/s 313, Cr, P. C. the appellant gave the story that he was assaulted by the deceased with lathi but in the absence of proof of the injuries it cannot be said that these could be connected to the statement of the appellant. Further, as we have already seen, the prosecution''s own case is, as deposed to by P. W. 3 in categorical term, Dilip was bare handed. In any case, we are of the view that the injuries, even if proved, would not have lent any support to the prosecution case.

10. In our opinion, the most material lapse of the prosecution which has shaken the substratum of the case is that it has withheld the two charge-sheeted witnesses, Giridhari and Yudhistir, and has given no explanation for non-examination of these two witnesses. It cannot be denied that in the peculiar circumstances of the case these witnesses were the most material witnesses inasmuch as Giridhari. was the only man who had given information to P. W. I on the basis of which the FIR in this case was lodged. Yudhistir would also have been an equally important witness inasmuch as he was the person who was in the group which attended the Kirtan and according to the evidence of both P. Ws. 3 and 5 he was also an eye-witness of the occurrence. We have, therefore, no hesitation in this case to draw inference against the prosecution u/s 114(g) of the Evidence Act for non-examination of not only these two witnesses but also Bikhhari who, if examined, in our opinion, would have given lie to the prosecution case.

11. Mr. C.R. Dey, the learned Public Prosecutor tried to persuade us to accept the position that these lapses on the part of the prosecution should be skipped over considering the omissions as constituting an irregularity not affecting the merit of the trial. We are unable to accept his submission. In our opinion, the consequences of these lapses have a serious effect on the trial be-cause non-compliance with the provisions of the Code of Criminal Procedure and the Evidence Act referred to above has occasioned a failure of justice in the case. In our view not only the cumulative effect of these lapses but each of them taken separately manifest the prejudice caused to the appellant although we preferred to base our decision in this appeal on factual, not legal, aspects of the case. Reliance, in our opinion, by Mr. Dey, on the decision reported in Masalti Vs. State of U.P., is misplaced. The duty of the prosecution to lay all materials available to it before the Court was stressed in that

case. Although each and every witness was not to be examined, material witness could not be withheld; neither the reason for non-production thereof could be withheld from the Court.

12. In the result we find that the prosecution has failed to prove in this case that it was none else than the appellant who was the author of tlhe crime. Although the death of Dilip as a result of the injuries, proved by the autopsy Surgeon, has been established it has not been proved that it was the appellant who caused the same. Indeed, it would have been a case for a clear acquittal but for the statement u/s 313, Cr. P. C. in which the appellant admitted being in the company of the deceased at the relevant time. In our opinion it has not been proved beyond reasonable doubt that the appellant caused the injuries found on the body of the deceased and he cannot, therefore, be convicted under.S. 302. I.P.C.

13. Accordingly, we allow the appeal and set aside the conviction and sentence passed by the learned Sessions Judge, The appellant, wiho is in jail, shall be set at liberty forthwith unless required in connection with any other case.

D. Pathak, J.

14. I agree.