
(2009) 09 GAU CK 0042

Gauhati High Court

Case No: None

Sundiplal Sit Boriak

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: Sept. 24, 2009

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302, 34, 448

Citation: (2010) 2 GLR 771

Hon'ble Judges: Jasti Chelameswar, C.J; Hrishikesh Roy, J

Bench: Division Bench

Judgement

Hrishikesh Roy, J.

Heard Ms. A Devi, learned amicus curie for the appellant. Also heard Mr. Z. Kamar, learned Public Prosecutor, who represents the State.

2. This appeal is presented against the judgment and order dated 31.3.2004 in Sessions Case No. 138/2003 rendered by the Addl. Sessions Judge (Ad hoc), F.T.C., Biswanath Chariali, whereby the appellant is found guilty of murder and has been convicted u/s 302 of the IPC. The sentence of life imprisonment and a fine of Rs. 5,00 and in defaults further imprisonment for 15 days, inflicted by the learned trial court is also under challenge in this appeal.

3. The case revealed from the FIR filed by the PW1, Smt. Sukumoni Mura indicates that at about 6 P.M. on 15.10.2000, the accused Sundilal Sit Boraik (Appellant) and one Puran Mahali came to the house of the deceased who is the step father of the informant and consumed liquor in the deceased's house. As the informant's father become intoxicated and started making noises, the informant out of fear left her house to spend the night at the nearby "Namghar" (Community Prayer House) and slept there. In the morning when the informant returned home, she saw the house door open and found her father Dusura Samra Mohali lying dead with a dao in a hacking position struck near the deceased's ear. The informant suspected the

involvement of Sundiplal Sit Boriak and Puran Mahali in the murder of her step father.

4. The aforesaid FIR was lodged in the Ginjia Out Post at about 9 A.M. on 16.10.2000 and after recording the G.D. Entry No. 227 in the said Out Post, the Ejahar was forwarded to the Officer-in-charge of the Behali Police Station for registering a case. Accordingly the Behali PS. Case No. 129/2000 under Sections 448/302/34 of the IPC was registered.

5. PW7 Basanta Borah, ASI of Police was assigned the task of investigating the case. He visited the place of occurrence ("the P.O."), conducted inquest on the dead body, sent the dead body for post mortem examination and seized the dao found on the body of the deceased.

It appears from the evidence of the I.O., that on 19.10.2000, the accused/appellant Sundilal Sit Boraik surrendered to the police and confessed to have kitted the deceased along with the other accused. The I.O., then sent the accused to the court of Magistrate for recording his confessional statement but it was deposed that the accused declined to make any confession in the court.

6. Charges were framed against the accused Sundiplal Sit Boriak and Puran Mahali of committing murder of Dusura Samra Mohali and the case was committed for trial to the Sessions Court. In the trial 7 witnesses appeared on behalf of the prosecution, while none were presented by the defence. However, 3 court witnesses were examined by the learned trial court. There is no ocular evidence in the present case and the conviction is based entirely on circumstantial evidence.

7. PW1 Smt. Sukumoni Mura who is the step daughter of the deceased stated that on the date of occurrence, i.e., on 15.10.2000 which was a Sunday, Sundiplal Sit Boriak, Puran Mahali and Padu Nayak came to her house when she and the deceased were present, while her mother was not at home. She stated that the liquor brought by the accused was consumed by the visitors along with her father in their house and they became intoxicated. As they became unruly after drinking, PW1 went out of her house and slept during the night in the nearby Namghar. In the morning, the witness returned home and found the dead body of her father with 3 cut injuries, one of which was on the neck area with a dao stuck on the face of the deceased.

In her cross-examination, this witness stated that after her marriage broke down and she came back to reside with her mother and father, the accused Sundiplal Sit Boriak and Puran Mahali, expressed their love interest to the PW1 and when the witness informed this to her father (the deceased), the father abused them and since then the accused stopped coming to their house.

She stated that on the date of the murder, the accused did not say anything about love to her. But as they were taking liquor, the PW1 stated that she considered it

unsafe to be with the intoxicated persons and accordingly she left for the Namghar spend the night there.

8. PW2, Sri Dikson Tanti is a neighbour who visited the P.O. and met the PW1 after learning about the incident. But he stated that the PW1 did not state anything about the persons who killed her father. This witness also admitted in his cross-examination that the daughter did not also inform about the names of the persons, who consumed liquor in her house.

9. PW3 Sri Bitu Bhakta is another neighbour of the deceased, but he did not have any knowledge about the assailants of the deceased.

PW4 Sri Phagu Boraik is a co-worker with the deceased. He stated that after the incident, the daughter did not tell PW4 anything. He further stated that he did not see the accused going into the house of the deceased and that no "nulla" was heard on the night of the incident.

10. PW5 is Dr. S.K. Saikia who conducted the post mortem on the body of the deceased and the post mortem report is Exhibit 1. The examination was carried out at 10. A.M. on 16.10.2000 and the following observations were made by the Doctor:

Average built, eyes and mouth were found closed. Rigor Mortis was absent.

One big cut wound present at back of neck transversely at hair margins about 4" x 2" x bone deep (3rd and 4th cervical vertebrae).

Another big cut wound at right side of face transversely from the neck "wound up to the forehead above right eye, about 8" x 1/2" x bone deep.

Cranium and spinal canal:

1. Scalp, skull, vertebrae: Scalp cut right temporal, maxillary frontal and mandible are fractured, 3rd, 4th cervical fractured.

2. Membrane: NAD.

3. Brain and spinal cord: Spinal cord injured at neck.

In the post mortem report, the Doctor noted that the stomach of the deceased was empty while smell of alcohol was present.

While the death was attributed to the injuries sustained by the deceased, no time of death has been recorded.

11. PW7 Basanta Borah was the I.O. He stated that the accused Sundiplal Sit Boriak after surrendering before the police on 19.10.2000 confessed his guilt but in the court the said accused declined to make any confession when the I.O., sent him to the Magistrate's court.

In the cross-examination, the I.O., stated that being an ASI of Police, he is not authorized to investigate Sessions Cases. He further stated that he did not send the seized dao for forensic examination nor got the finger prints found in the dao matched with that of the accused.

12. CW1, Smt. Palo Mahali was the mother of the PW1 and the deceased was her second husband. She stated that at the time of the incident she was at hospital due to illness. She stated that her daughter (PW1) did not tell anything to her about who might have killed the deceased and she stated that she herself does not suspect any of the accused in the killing of her husband.

13. CW2 Smt. Daya Tanti @ Laya is the witness who stated that at the relevant time she was working in the Mandir (Temple) and was also staying in the night in the Mandir premises. She stated that one night the PW1 came to the Mandir at about 6 P.M. by stating that her father (the deceased) being intoxicated scolded her and because of this she came to sleep in the Mandir. The CW2 deposed that PW1 slept the night in the Mandir left in the morning.

14. CW3 Sri Tankeswar Borah is the scribe who wrote out the FIR on dictation of the PW1.

15. On scrutiny of the evidence, it is seen that the presence of the accused in the company of the deceased while they were drinking together is evidenced by the deposition of PW1, the daughter of the deceased. PW1 last saw the deceased in the company of the accused at about 6 P.M. on 15.10.2000, when she left her house to spend the night in the Namghar. None of the other witnesses saw the deceased with the accused on that day.

16. Significantly, although PW1 indicated her suspicion against the accused by naming them in the FIR, she did not disclose her suspicion to any of the other witnesses, including her own mother (CW1). None of the neighbours have implicated the accused and in fact, PW4 stated that he did not see the accused in the house of the deceased nor did he hear any "nulla" from the place of occurrence.

17. If the circumstantial evidence of PW1 seeing the deceased in the company of the accused drinking together at about 6 P.M. on 15.10.2000, is to have any significant relevance, the time of the death of the deceased is a matter of vital significance. But unfortunately in the post mortem report, even the approximate time of death is not mentioned. The post mortem report indicates that the stomach of the deceased was found to be empty, whereas smell of alcohol was reported.

The absence of any alcohol in the stomach of the deceased, signifies that all the alcohol consumed by the deceased in the company of the accused got absorbed by the time the post mortem was done. On the authority of the Pharmacological effect of Alcohol from Modi's Medical Jurisprudence and Toxicology (23rd edn.), it can be seen that the rate of absorption of alcohol in an empty stomach is quicker. As the

deceased's stomach show no alcohol, it indicates that there was a time gap after the drinking session and the death of the deceased.

Therefore, even by considering medical jurisprudence, the death cannot be accepted to have occurred either during the drinking session with the accused or immediately after the drinking session ended. For in such an event, there would have been traces of alcohol in the stomach of the deceased, without the alcohol being entirely absorbed, leaving no trace of it in the stomach, when the post mortem was done.

18. As the time of death could not be confirmed by medical evidence, the death could have occurred at any time of the night of 15.10.2000 and it is difficult to rule out the possibility of the deceased being fatally assaulted by anyone other than the accused. Therefore, the last seen together evidence to hold the accused guilty of the crime may not be correct.

19. We have already noted that no other witness have indicated the involvement of the accused with the crime. Even the PW1 merely suspects the accused. But suspicion, however, strong, cannot take place of evidence. We are, therefore, of the considered opinion that circumstantial evidence in the case are not sufficient for confirming the guilty verdict against the accused/appellant.

20. The investigation in the case have been tardy as even the embedded "dao" found on the face of the deceased, was not sent for forensic examination for matching of finger prints. In the evidence of the I.O. (PW7), it is admitted that he being an AST of Police, is not authorized to investigate Sessions Cases and this might be one of the reason for the faulty investigation.

21. Significantly, PW1 does not say that the accused on the date of the incident had mis-behaved with her and even if the deceased had earlier warned the accused against the overtures made by them towards PW1, that cannot be a sufficient evidence, to implicate the accused with the crime.

22. In view of the above discussion, we are of the considered opinion that the impugned conviction and sentence cannot be sustained. Accordingly the same are set aside and quashed.

23. The appellant be set at liberty if not wanted in connection with any other case. Send down the LCR.