(2011) 12 GAU CK 0040

Gauhati High Court

Case No: Criminal Appeal No. 20 of 2005

Bipin Uria		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: Dec. 22, 2011

Acts Referred:

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

Citation: (2012) 1 GLT 371

Hon'ble Judges: A.K.Goel, C.J. and C.R.Sarma, J

Bench: Division Bench

Advocate: Mr. D. Talukdar, Advocate appeared for the Respondent: Mr. Z. Kamar, PP., Advocates appearing for Parties

Judgement

C.R. Sarma, J.

The judgment and order, dated 22.12.2004, passed by the learned Additional Sessions Judge (Adhoc), Jorhat, in Sessions Case No.20(JJ) of 2004, is in challenge in this appeal, filed under Section 374 of the Code of Criminal Procedure, 1973, (hereinafter referred to as "Cr.P.C."). By the impugned judgment and order, the learned Addl. Sessions Judge convicted the appellant for the offence under Section 302 IPC, and sentenced him to suffer rigorous imprisonment for life and pay find of Rs. 1000/ in default, suffer rigorous imprisonment for another period of one month. Aggrieved by the said conviction and sentence, the convicted person, namely, Bipin Uria, has come up with this appeal challenging the correctness of the impugned judgment and order aforesaid.

2. We have heard Mr D.Talukdar, learned counsel, appearing for the appellant and Mr. Z. Kamar, learned Public Prosecutor, appearing for the State respondent.

3. The case of the prosecution, in brief, is that, on the night of 15.12.2003 at about 7 p.m., Sri ChetanTanti (hereafter referred to as "deceased") had gone out for a walk, in the

village and he was assaulted by Sri Bipin Una and others with lathi. Smti Durgamoni Turi (PW 4), the minor daughter of PW 3, hearing a sound like breaking of bamboo fencing, towards the backside of their house, went out and saw the appellant and another, namely, Sri Shankar, assaulting the deceased with a lathi, but on being threatened by the appellant, she returned home and went to bed. On the next morning, the deceased was found hanging, with a muffler, from a bamboo, situated behind the house of PW 3. Accordingly, on 16.12.2003, the father (PW1) of the deceased, as informant, lodged an FIR (Ext. 1) with the police. Upon receipt of the said FIR, the police registered a case, being Pulibor PS Case No. 141/2003 under Sections 302/34 IPC and launched investigation into the matter.

4. During the course of investigation, the police visited the place of occurrence, prepared a sketch map, conducted inquest in respect of the dead body and forwarded the same for postmortem examination. After collecting the postmortem report, police found that the deceased died due to asphyxia as a result of ante mortem hanging. It was also revealed, from the postmortem examination, that the deceased sustained abrasion and lacerated injury over the fingers of both hands and lacerated injury on right leg (fractures in bone of right leg). The Investigating Officer recorded the statement of the witnesses and seized a 3 ï¿½feet long bamboo vide Ext. 5, on being produced by the appellant and the muffler which was found tied around the neck of the deceased vide Ext.6. At the close of the investigation, police submitted the chargesheet against the appellant and four others, under Sections 302/34 IPC.

5. As the offence under Section 302 IPC was exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Jorhat, committed the case to the Court of Sessions. Thereafter, the case was transferred to the Court of Addl. Sessions Judge, Jorhat. The learned trial Judge framed charge under Sections 302/34 IPC against the appellant and four others. The charge was read over and explained to the accused persons, to which they pleaded not guilty and claimed to be tried

6. During the course of trial, prosecution examined as many as eight witnesses, including the Medical Officer (PW 2), who performed the autopsy and the Investigation Police Officer (PW 8). At the close of the evidence for the prosecution, the accused persons were examined under Section 313 Cr.P.C. They denied the allegations, brought against them and declined to adduce defence evidence.

7. Considering the evidence on record, the learned Trial Judge found the appellant guilty of the offence under section 302 IPC and accordingly convicted and sentenced him as indicated above. The other accused persons, who were also charged along with the appellant, were acquitted for want of sufficient evidence.

8. Mr D. Talukdar, learned counsel, appearing for the appellant, taking us through the evidence on record, more particularly, the evidence of PW 3 and PW 4, has submitted that there is no other direct evidence except the evidence of PW 4 i.e., the daughter of

PW 3 and that in view of the contradictions appearing in the evidence PW 3 and PW 4, the evidence of PW 4 is not believable. Learned counsel has also submitted that if the evidence of PW 4 is disbelieved, then there is no evidence at all about the involvement of the appellant. Referring to the inquest report, which was prepared immediately after finding of the dead body and also the postmortem report, the learned counsel, appearing for the appellant, has submitted that the medical evidence coupled with the inquest report, clearly indicates that the deceased died by committing suicide i.e. by hanging himself, by means of a muffler from a bamboo. The learned counsel has submitted that there is nothing, on record, to show that the dead body of the deceased was kept hanging after causing his death. In view of the above, the learned counsel has submitted that the prosecution failed to establish the charge, brought against the appellant, beyond all reasonable doubt and as such, the appellant is entitled to acquittal. The learned counsel has also pointed out that, if the PW 4, who appears to be only eye witness to the occurrence is believed, then, according to her evidence, the appellant and another accused, namely, Sri Shankar, were seen assaulting the deceased with lathies, but the learned Sessions Judge held Sri Shankar not guilty, for want of sufficient evidence. Therefore, it is submitted that if the allegation of involvement of Shankar is not believed, then, under no circumstances, the appellant can be held liable, on the basis of the same evidence rendered by PW 4. In the light of the above, learned defence counsel has submitted that the learned Trial Judge committed gross error in appreciating the evidence, on record, in its proper perspective and as such, the finding of the learned trial Judge that the appellant was guilty of causing death of the deceased, is perverse. In view of the above facts and circumstances, the learned counsel has submitted that the learned trial Judge committed illegality by recording the conviction and the sentence against the appellant and as such, the same are liable to be set aside.

9. Supporting the impugned judgment and order and controverting the argument, advanced by the learned counsel for the appellant, Mr. Z. Kamar, learned Public Prosecutor, appearing for the State respondent, has submitted that PW 4, who was the sole eye witness to the occurrence, found the deceased in the company of the appellant, who was assaulting the former and that subsequently i.e. on the next morning, the dead body of the deceased was found hanging from a bamboo. In view of the above, the learned Public Prosecutor, referring to the theory of "last seen together", has submitted that, as the deceased was found in the company of the appellant, it can be sufficiently presumed that the death of the deceased was caused by the appellant, who was seen assaulting the deceased. In view of the above, the learned Public Prosecutor has submitted that there is sufficient material to show that the appellant caused the death of the deceased and as such, the learned Sessions Judge committed no error or illegality by convicting and sentencing the appellant as indicated above.

10. Having heard the learned counsel for both sides and carefully perusing the evidence on record, we find that, except the evidence of PW 4, who appears to be only eye witness to the occurrence of assaulting the deceased by the appellant, there is no direct evidence

regarding involvement of the appellant.

11. PW 4, in her evidence, stated that when she along with her father were inside the house, they heard a noise of breaking of bamboo fencing, situated towards the backside of their house and on being asked by her father, she went out and saw the appellant and Sri Shankar assailing the deceased with lathi. She further stated that, when she asked the appellant as to why he was assaulting the deceased, the appellant cautioned her not to disclose the same to others and threatened her that she would also be killed. According to this witness, on being so threatened, she returned and informed her father about the occurrence. She further stated that her mother, on the next morning found the deceased hanging from a bamboo with a muffler. She also stated that she and her father visited the place, where the dead body was found. She has exhibited the muffler as material Ext. 1.

In her cross examination, this witness stated that she saw the deceased being assaulted with a small lathi.

12. From the evidence of the said eye witness, it transpires that she had seen the appellant and Sri Shankar assaulting the deceased with a small bamboo lathi and on being threatened by the appellant, she left the place and informed the matter to her father (PW 3).

13. Sri Jogendra Turi, who deposed as PW 3, is the father of PW 4. Supporting the evidence of his daughter (PW 4), this witness stated that upon hearing the sound of breaking bamboo fencing, situated behind his house, he asked his daughter to go and see as to what was the matter. He further stated that his daughter had and told him that accused Bipin (appellant) was found assaulting the deceased with a lathi. According to this witness, he told his daughter that a quarrel might have taken place between them and as such, he asked his daughter to go to bed. According to PW 3, his wife i.e. PW 7, on the next morning, found the deceased hanging from a bamboo, with a muffler and he also went near the dead body and informed the members of the family of the deceased.

14. Sri Jogendra Tanti, PW 1, lodged the FIR, on the basis of the information received from his neighbour Sri Jogendra Turi i.e. PW 3. According to PW 1, PW 3 had informed him that the appellant had assaulted the deceased, on the previous night and that he i.e. PW 3 found the deceased sitting under a bamboo grove. He further stated that, on being so informed, he went near the dead body and found the deceased hanging from a bamboo with a muffler.

15. The wife of PW 3, i.e. Smti Batashi Turi, who deposed as PW 7, stated that, after getting up from bed in the morning, she went out side and saw a person sitting under a bamboo and thereafter, she immediately, informed her husband i.e. PW 3, who had informed others. She further stated that all the persons went to the place of occurrence and found the deceased in a sitting position. The evidence of PW 7, who, for the first

time, noticed the dead body of the deceased near the bamboo grove, indicates that, the deceased was found in sitting posture, under the bamboo grove. She did not state that the deceased was found hanging from a bamboo with a muffler.

16. Smti Mohanti Bhakta, who deposed as PW 5, stated that, on the fateful night, at about 7 p.m., while she was cooking rice, she heard a hue and cry, and following the hue and cry, she went out and found the appellant in her courtyard. She also stated that, on being asked as to what had happened, the appellant replied that nothing had happened. According to this witness, she, on the next day came to know that the deceased died by hanging.

In her cross examination, this witness stated that when she came out, she saw the appellant and his wife. She clearly stated that she did not see any other person, except the appellant and his wife. She also stated that she did not see PW 4 in the place of occurrence. In view of the above evidence rendered by PW 5, it is found that, the appellant and his wife were seen at the place of occurrence. She did not indicate the presence of the deceased in the company of the appellant

17. PW 6 is the Executive Magistrate, who prepared the inquest report in respect of the dead body. He has exhibited the inquest report as Ext.3 and his signature thereon as Ext.3(1).

18. The Investigating Officer has been examined as PW 8. He exhibited the bamboo lathi, seized from the appellant as material Ext. I and the muffler as material Ext. W2.

19. The Medical Officer, who conducted the postmortem, found the following injuries in respect of the dead body:

" 1. Small abrasion in laceration over the fingers of the both sides.

2. Bruise on right leg.

3. Right oblique ligature mark in the knot over right mastoid noticed pre chematization of the tissue underneath the furrow seen on neck dissection."

He also opined that the death of the deceased was caused due to asphyxia as a result of ante mortem hanging. He also exhibited the postmortem report as Ext.2 and his signature thereon as Ext.2(1).

From the above medical evidence, it appears that the injuries, sustained by the deceased were not the cause of his death. The cause of death was "asphyxia" due to hanging. There is no dispute that the deceased died due to hanging by neck.

20. Now the question is as to who had caused the hanging. Was it the deceased himself or any other person had caused the death by hanging him with a muffler?

21. None of the witnesses saw the appellant committing any act leading to the death of the deceased. The only evidence, put forward by the prosecution, regarding involvement of the appellant is the evidence of PW

4. As indicated above, PW 4 had seen the appellant and Sri Shankar assaulting the deceased and on being threatened by the appellant, she returned home and informed her father i.e. PW 3 about the occurrence. But, according to PW 3, who was informed by her daughter, only the appellant was seen assaulting the deceased. The evidence of PW 3 rules out the involvement of Sri Shankar. The learned trial Judge has also negated the involvement of Sri Shankar. If the PW 4 had seen both Sri Shankar and Sri Bipin (appellant) assaulting the deceased, there was no reason, on her part, not to disclose the same to her father. But the evidence of her father i.e. PW 3 reveals that he was informed by her daughter about the involvement of the appellant only. This indicates that either PW 4 had withheld the name of Sri Shankar from being disclosed to her father at the first point of time or she exaggerated by falsely implicating Sri Shankar in her evidence. Therefore, the general inference would be that either PW 4 had falsely implicated Sri Shankar or PW 3 had suppressed the involvement of Sri Shankar. This conduct, on the part of the said witnesses, who are father and daughter in relation, raises doubt about the veracity of their evidence on material point. Therefore, we do not find it safe to believe both of them.

22. Secondly, according to PW 3 and PW 4, on the next morning, PW 7, who is the mother of PW 4 and the wife of PW 3, for the first time, saw the deceased hanging from a bamboo with a muffler and on being alerted by PW 3, they went to the place of occurrence and found the deceased dead. Both of them clearly stated that the deceased was found hanging from a bamboo with a muffler, but PW 7 contradicted the evidence of PW 3 and PW 4 by saving that she had seen the deceased sitting under a bamboo grove. Therefore, if the deceased was found by PW 7 sitting under a bamboo grove, it is doubtful as to how PW 3 and PW 4, who rushed to the place of occurrence on being informed by PW 7 could see the deceased hanging? That apart, the informant (PW 1) also stated that P W 3 had informed him that the deceased was found sitting. In view of the above, it is found that, according to PW 7, the deceased was found in a sitting position and she did not see him in hanging position, but PW 3 and PW 4 i.e. her daughter and husband, respectively, stated that, on being alerted by PW7, they rushed to the place of occurrence and saw the deceased hanging from a bamboo with a muffler. We find contradiction, on material point, in the evidence of PW 4 and PW 3 in one hand and PW 7 on the other hand. Therefore, it is doubtful as to whether, the deceased was found hanging from the bamboo with a muffler. The different versions given by the said vital witness on material point raises doubt about evidence given by him. The inquest report(Ext.3), prepared by the Investigating Officer (PW 8), indicates that the dead body was found hanging with a muffler from a branch of a bamboo and that the same was identified by P W 3. According to inquest report, the dead body was brought down from hanging position. Therefore, the evidence of PW 7 that the deceased was found sitting under a bamboo grove and also

the evidence of P W1 that P W 3 had informed him that the deceased was found sitting are not at all believable. Therefore, there are sufficient contradictions in the evidence of the said witness regarding the condition, in which the deceased was found dead. The inquest report, Ext. 3, prepared by Executive Magistrate (PW 6), belies the evidence of PW 7. As per the inquest report, the correctness of which remained unchallenged, the deceased was found hanging from a bamboo with a muffler and the dead body was brought down. In view of the above, the evidence of PW 7 that she had seen the deceased sitting under a bamboo grove and that the PW 3 had informed PW 1 about the said condition, are not believable. If the PW 7 is not believable, then the evidence of PW 3 and PW 4 that they were informed by the P W 7 that she had seen the deceased hanging form a bamboo is also not believable. The said discrepancies found in the evidence of the witnesses aforesaid raise doubt about the evidence that the said witnesses had seen the deceased either in sitting position or hanging position.

23. The learned Pubic Prosecutor has argued that as the deceased was initially found by the PW 4 in the company of the appellant and Sri Shankar, followed by detection of dead body of the deceased, on the next morning, the theory of'' last seen together'', would be applicable in the present case, and as such, the appellant cannot escape his liability.

24. As discussed above, in view of the said contradictions, on material point, the evidence of PW 4 that she had seen the appellant and Sri Shankar assaulting the deceased is doubtful.

25. We have already noticed the contradictions found in the evidence of the vital witnesses i.e. the evidence of PW 4 and PW 3. On careful perusal of the evidence of PW 4 and PW 3 as discussed above, we are inclined to hold that their evidence is not free from doubt and as such the same is not trustworthy. Therefore, it is doubtful as to whether, PW 4 had gone out on the fateful night and saw the appellant and Sri Shankar assaulting the deceased. This doubt is more fortified by the evidence of the mother of PW 4 i.e. PW 7. The PW 7 clearly stated that her daughter, who was aged about 1617 years, was not in the habit of going out alone in the night.

This withess, in her cross examination, clearly stated that PW 4 was sleeping on that night and that she did not go out during the night. This evidence of PW 7, who was the mother of PW 4, indicates that PW 4 did not go out on the fateful night. Therefore, the evidence of PW 3 and PW 4 that PW 4 had gone out and saw the appellant assaulting the deceased is not free from doubt. This negates the proposition of last seen theory.

26. It is settled law that in a criminal trial, the prosecution is required to prove its case beyond, all reasonable doubt. The law is also well settled that if two views are possible, on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused, should be adopted.

27. In view of the above principle and the contradictions found in above discussed evidence, we find no difficulty in holding that the prosecution failed to establish its case beyond all reasonable doubt. Therefore, the appellant is entitled to get acquittal on the benefit of doubt.

28. In view of the above discussion, we find sufficient merit in this appeal requiring interference with the impugned conviction and sentence. Accordingly, the appeal is allowed and the impugned conviction and the sentence, recorded against the appellant are set aside. The appellant be released and set at liberty forthwith, if not required in any other case. Return the LCRs.