(2010) 02 GAU CK 0040

Gauhati High Court

Case No: Criminal Appeal No. 185 of 2005

Gobinda Ch. Koch	APPELLANT
Vs	
State of Assam	RESPONDENT

Date of Decision: Feb. 23, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 307, 326, 333, 427

Citation: (2010) 3 GLR 727

Hon'ble Judges: Ranjan Gogoi, J; Biplab Kumar Sharma, J

Bench: Division Bench

Advocate: R. Ali, for the Appellant; Z. Kumar, for the Respondent

Final Decision: Dismissed

Judgement

Ranjan Gogoi, J.

This appeal is directed against the judgment and order dated 12.7.2005 passed by the learned Sessions Judge, Dhubri in Sessions Case No. 95/2001. By the aforesaid order, the accused/appellant has been convicted u/s 302, IPC and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000, in default, to suffer R.I. for three months more. It may be noticed, at this stage, that by the aforesaid order passed by the learned trial court, the accused/appellant has been acquitted of the offence charged u/s 333/307/427, IPC.

2. The law was set in motion by PW1, Jakheram Koch by lodging a FIR in the Mankachar Police Station on 9.11.1999 at about 7 p.m. alleging that in the night of 8.11.1999 the accused/appellant who is the son-in-law of the first informant had killed his wife Smt. Duhita Koch and his 11/2 year old daughter Babuli Koch. In the FIR filed, it was specifically mentioned that the deceased Duhita Koch at the time of her death was 9 months pregnant and both the deceased persons had suffered injuries on their heads'', hands and legs committed by sharp weapons. Specifically,

the first informant had mentioned that after committing the offence the accused/appellant had remained confined inside the house and refused to come out in spite of repeated call of the neighbours. Thereafter, when police had come to investigate the matter the accused/appellant suddenly came out of the house and had attacked a policeman on duty with a sharp weapon. The police party had no option but to fire two shots in the air. Accordingly, appropriate action was prayed for against the accused/appellant.

3. On the basis of the aforesaid FIR lodged, a case was registered against the accused/appellant and the same was investigated by PW9, Fazlur Haque. In the course of investigation, police visited the place of occurrence and seized one sword stained with blood about 30 inches in length and 11/2 inch in breadth by seizure list (Exhibit-3). The aforesaid sword was seized from the possession of the accused/appellant when he had come out of the house. In the course of the investigation, police had also seized one "beki dao" stained with blood about 25 inches long with a handle. Such seizure was effected by seizure list exhibited as Exhibit-4. The police also prepared a sketch map of the place of occurrence and held inquest on the dead bodies of the two deceased persons which were sent for post mortem examination. On receipt of the report of the post mortem examination and after recording the statements of the persons who claimed to be acquainted with the facts of the case, charge sheet was submitted against the accused/appellant u/s 302/333/307/326/427, IPC. The offence u/s 302, IPC being exclusively triable by the court of Sessions, the learned Judicial Magistral, First Class, Dhubri by order dated 12.10.2001 committed the case for trial to the court of Sessions at Dhubri. In the trial court, charges were framed against the accused/appellant u/s 302/333/307/326/427, IPC to which he pleaded not guilty and claimed to be tried.

4. The prosecution examined 12 witnesses in support of its case, where after, the accused/appellant was examined u/s 313, Cr.PC. Two defence witnesses were examined. The prosecution, it may also be noticed, exhibited a large number of documents in the course of the trial of the case including the inquest reports, post mortem reports, seizure lists, sketch map etc. Thereafter, at the conclusion of the trial, the accused/appellant has been convicted and sentenced as aforesaid. Aggrieved, this appeal has been filed.

5. We have heard Mr. R. Ali, learned Counsel for the appellant and Mr. Z. Kamar, learned Public Prosecutor.

6. PW8, Ali Asgor Mondal, who was serving as the Medical and Health Officer, Dhubri at the relevant point of time conducted the post mortem of the deceased Duhita Koch and Babuli Koch on 10.11.1999. The injuries found on deceased Duhita Koch as deposed to by PW8 from Ext. (post mortem report) is as follows:

1. Multiple incised wound of sizes 5" x 2" x 3", 5" x 2" x 2", 3" x 2" x 2", 4" x 2" x 2", 3" x 1" x 2" over the whole face cutting tissues, vessels, mandible, malar, maxilla,

eyeballs and front bones.

2. Incised wound 5" x 3" x 3" over the forearm cutting radius and ulna and vessels.

3. Incised wound 3" x 2" x 2" over the right lateral neck cutting the right carotic artery. Blood clot were found in the wounds and the wounds margins were blood stained which could not washed away.

All other organs are healthy.

Uterus: full term pregnant with foetus.

The injuries described above were ante-mortem in nature.

In my opinion, the cause of death was due to shock and haemmorhage as a result of injuries sustained by the deceased. Ext.-7 is the p.m. report, Ext.-7(1) is my signature and Ext.-7(2) is the signature of Joint Director of Health Services.

Similarly, in the case of Babuli Koch, the following injuries recorded in the post mortem report (Ext-8) were proved by PW8:

1. Incised wound 5" x 3" x 4" over the left fact cutting the mandible maxilla ear temporal and parietal bone with exteriorisation of brain matter. Intra cranial haemmorahage with blood clot were found.

2. Incise wound 5" x 3" x 2" over the left forehead cutting the eyeball frontal bone and parietal bone was found.

3. Incised wound 4" x 2" x 3" over front of neck cutting carotic arteries and tissues was found.

4. Incised wound 3" x 2" x 2" over the left thigh.

5. Right index finger was cut. Blood clot were found in the wound and the wound margin wee blood stained which could not washed away.

Other organs are healthy.

The injuries described above were ante-mortem in nature. In my opinion, the cause of death was due to shock and haemorrhage as a result of the injuries sustained by me. Ext.-8 is the p.m. report and 8(1) is my signature and Ext.-8(2) is the signature of Joint Director of Health.

7. The opinion of PW8, as recorded in the post mortem report and deposed to in court, is that the injuries caused to the deceaseds were ante-mortem and death in both the cases was due to shock and haemorrhage as a result of injuries sustained. From the above medical evidence on record, it can, therefore, be safely concluded that death of both the deceaseds was homicidal in nature. The question, therefore, that has to be answered by the court is whether the accused/appellant can be held responsible for causing the injuries resulting in death of Duhita Koch and Babuli

Koch.

8. Admittedly, there is no eye witness to the occurrence. However, from the evidence of PWs 1, 2, 4, 5 and 6, it clearly transpires that the incident took place in the night of 8.11.1999 in the house where the accused/appellant was residing with his wife and infant daughter. The evidence of the aforesaid witnesses clearly indicate that they had gone to the house of the accused/appellant on being informed that the deceased Duhita had not come out of the house till late in the morning. Going there they had asked the accused/appellant to come out of the house but he refused to do so and finally at the intervention of the police the accused/appellant had come out of the house. It is also clear from the evidence of the said witnesses that after the accused had come out from the house they had entered the house and found the wife and the daughter of the accused/appellant lying dead inside the house with multiple injuries caused by a sharp weapon. The incident having taken place in the night when the accused/appellant and the two deceaseds were the sole occupants of the house and a blood stained ''beki dao'' with pointed end having been found and seized from inside the house by PW9 (Investigating Officer), the logical inference that follows is that it is the accused/appellant alone and nobody else who could have committed the crime.

9. From the evidence of PWs 1 and 2 examined by the prosecution, it transpires that the incident took place on Diwali night and that there was a ''mela'' on the Meghalaya side which was close to the house of the accused/appellant. It is also clear from the evidence of the said two witnesses that liquor was freely available in the ''mela'' and that the accused/appellant had come back home in a highly intoxicated state. PW4, Bhakatlal Koch had deposed that he was informed by PW5, Anirudha Koch that the accused/appellant was forced to take liquor on the night of the occurrence though PW5, in his evidence, did not make any statement to the said effect. PW5, however, had deposed that the accused/appellant was forced to take ''ganja'' in the police battalion camp located close by to which place the accused/appellant had gone prior to the incident.

10. Relying on the aforesaid part of the evidence as well as the evidence tendered by the defence witnesses its is submitted by the learned Counsel for the accused/appellant that the accused/appellant would be protected by the provisions of Sections 85 and 86 of the Indian Penal Code. In this regard, the learned Counsel for the accused/appellant has specifically pointed out the evidence of DWs 1 and 2 examined in the case.

11. DW1, Sadhin Koch had deposed that he had seen the accused/appellant taking liquor in the battalion camp and further that the accused/appellant was compelled, forced to take ''ganja'' in the said place. DW2, Vivekananda Koch who owns a Pan shop located close to the battalion camp, has deposed that the accused/appellant was compelled to take liquor as well as ''ganja'' by the inmates of the battalion camp, as a result of which, he was in a highly intoxicated state.

12. On the basis of the aforesaid evidence on record and the submissions advanced by the learned Counsel for the accused/appellant, the question that now arises for decision of the court is whether the accused/appellant would be entitled to the benefit u/s 85 of the Indian Penal Code.

13. Section 85 of the, IPC lays down that nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law. However, Section 85 as well as the provisions contained in Section 86 of the IPC make it clear that the protection granted by Section 85 will not be available until and unless it is demonstrated that what had intoxicated the person was administered to him without his knowledge or against his will.

14. In the present case, the evidence of PW1, the father-in-law of the accused/appellant and PW2, the sister of the accused/appellant goes to establish that the accused/appellant was habituated to liquor and that on the night of the occurrence he had been consuming liquor with his friends. However, PW4 had deposed to the effect that the accused/appellant was forced to take liquor which fact was informed to the witness by PW5. PW5, however, did not support PW4 in this regard and in his deposition nowhere it is stated that the accused/appellant was forced to consume liquor by any person. In such a situation and particularly when PWs 1 and 2 had clearly deposed that the accused/appellant was habituated to taking liquor and that on the night of the occurrence he had been drinking with his friends, we are of the view that the evidence of PWs 4 and 5 cannot be understood in the manner suggested by the learned Counsel for the appellant, i.e., that the evidence of PWs 4 and 5 itself establishes that the accused/appellant was forced to consume liquor and, therefore, protection u/s 85 read with Section 86 of the IPC would be available to him.

15. Coming to the evidence of the defence witnesses what the court has noticed is that DW1, though, had not deposed that the accused/appellant was forced to consume liquor, the said witness had deposed that the accused/appellant was compelled to take ''ganja'' in the battalion camp. The evidence of DW1 has to be considered to be highly unreliable in view of the fact that according to PW2, she was informed by DW1 that the accused/appellant was consuming liquor with his friends. No statement with regard to forced administration of ''ganja'' to the accused/appellant was made by DWs 1 to PW2. Insofar as DW2 is concerned, it has already been noticed that the said witness is the owner of a Pan shop located near the battalion camp. DW2 had deposed that on two occasions he had gone inside the battalion camp and he had seen liquor and ''ganja'' respectively being administered forcefully to the accused/appellant by the inmates of the camp. Reading the evidence of DW2, we do not find any sufficient basis to accept the reason as to why the said witness had gone to the battalion camp twice in the course of which visits he had specifically noticed forceful administration of liquor and ''ganja'' respectively

to the accused/appellant. We, therefore, are of the view that that DW2 is not worthy of credence as his visit to the battalion camp remains largely unexplained. The above analysis of the evidence of the defence witnesses leads us to the conclusion that both DWs 1 and 2 ought not to be believed by the court.

16. In the aforesaid circumstances, we are of the view that protection u/s 85 of the Indian Penal Code cannot be afforded to the accused/appellant. On the said conclusion reached by us, no infirmity can be found in the judgment of the learned trial court convicting the accused/appellant u/s 302, IPC and sentencing him to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000, in default, to undergo R.I. for three months more.

17. The appeal, therefore, is dismissed and the judgment and order dated 12.7.2005 passed by the learned Sessions Judge, Dhubri in Sessions Case No. 95/2001 is affirmed.