

(2012) 03 GAU CK 0047**Gauhati High Court****Case No:** None

Md.Abdul Majid, Son of Late
Shaikh Chand, Resident of village
Dakshin Moirabari,
P.S.Moirabari, District- Morigaon,
Assam

APPELLANT**Vs**

State of Assam

RESPONDENT**Date of Decision:** March 19, 2012**Hon'ble Judges:** A.K.Goel, C.J. and C.R.Sarma, J**Bench:** Division Bench**Advocate:** Mr. K.K. Goswami, Amicus Curiae. For the respondent : Mr. K. Mazumdar, Addl. Public Prosecutor, Assam, Advocates appearing for Parties**Judgement**

C.R. Sarma, J.

This appeal is directed against the judgment and order, dated 25/1/2005, passed by the learned Sessions Judge, Morigaon, in Sessions Case No. 33/03, under section 302 IPC. By the impugned judged and order, the learned Sessions Judge convicted the appellant under section 302 IPC and sentenced him to suffer rigorous imprisonment for life and pay a fine of Rs. 1,000/ and in default to undergo rigorous imprisonment for another period of one month.

2. We have heard Mr. KK Goswami, learned Counsel engaged by the Legal Aid Committee and Mr. K. Mazumdar, learned Additional Public Prosecutor, Assam.

The prosecution case, in brief, is that, on 10/4/2002 at about 7.15 P.M., while Abdul Razzak (hereinafter called the deceased) was returning home from the market the appellant intercepted him on the road, near the old Post Office and assaulted with a sharp weapon, causing injuries to his person. Accordingly the deceased was taken to Moirabari Hospital, wherein he succumbed to the injuries.

4. Md. Samsul Alam, son of the deceased, lodged an FIR, on the same date at about 7 P.M., with the Moirabari Police Station. On receipt of the said FIR, Police registered Moirabari PS case No. 13/02 under sections 341/326/302 IPC and launched investigation into the matter. During the investigation, Police visited the place of occurrence examined the witnesses, and prepared the inquest report, forwarded the dead body of the deceased for post mortem examination, seized a pair of blood stained Hawai Chappal, one pair of rubber sandal and a blood stained dagger from the place of occurrence. At the close of investigation, Police submitted charge sheet under sections 341/302 IPC against the appellant and forwarded him to the Court to stand trial.

5. The offence being exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Morigaon committed the case for trial and the learned Sessions Judge framed charge under section 302 IPC. The charge was read over and explained to the appellant, to which he pleaded not guilty and claimed to be tried.

6. In order to prove its case, prosecution examined as many as nine witnesses, including the Medial Officer (PW3), who performed the autopsy, the Circle Officer (PW7), who conducted the inquest and the Investigating Officer (PW9). At the close of the evidence for the prosecution, the accused person was examined under section 313 of the Code of Criminal Procedure 1973. He denied the allegations, brought against him and declined to adduce defence evidence. Considering the evidence, on record, the learned Trial Judge held the accused/appellant guilty and accordingly convicted and sentenced him as indicated above.

7. Mr. K. K. Goswami, learned counsel appearing for the appellant has submitted that there is no sufficient substantial evidence against the appellant and that the learned Trial Judge committed error by relying on the evidence of the solitary eye witness i.e. PW4. The learned counsel has also urged that the appellant is about 90 years old and as such, considering his age, a lenient view should be taken for facilitating his release at this late stage of his life.

Mr. K. Mazumdar, learned Additional Public Prosecutor, taking this Court through the evidence, on record, more particularly, the evidence of PW4, has submitted that the occurrence took place in the presence of PW4 and as such PW4 is the most natural witness in the case. Learned Additional Public Prosecutor has also submitted that there is sufficient substantive evidence, indicating the guilt of the appellant and that the learned Trial Judge committed no error by convicting and sentencing the appellant.

8. In order to appreciate the counter submissions, made by the learned counsel appearing for the parties, we feel it appropriate to, briefly, scan the evidence on record.

9. Md. Samsul Haque, PW4 stated that, on the date of occurrence i.e. 10/4/2002 at about 7.15 to 7.30 P.M., he was returning home, along with the deceased from the

Moirabari market and on their way home, the appellant, being armed with a dagger, had attacked the deceased on the road. This witness stated that, on being so attacked by the appellant, though he had raised alarm, nobody came forwarded. According to this witness, in the meantime a person, riding a motorcycle, crossed them and in the focus of the light of the said motorcycle, he saw the appellant assaulting the deceased in his stomach with a dagger. He also stated that he had rushed to the Police Station and met two police personnel, at the bus syndicate, to whom he had reported about the occurrence. According to this witness, on being so informed, police persons had visited the place of occurrence. PW4 further stated that he also accompanied the police and came to know that the appellant, while trying to flee away, was caught by the public. He also stated that some persons had taken the deceased to the Hospital where he expired. According to this witness, on the next day, he accompanied the police to the place of occurrence, wherefrom two pairs of Hawai Sandals were seized vide Exhibit 2. He stated that the said Hawai Sandals belonged to the appellant and the deceased. This witness was duly crossexamined on behalf of the defence. He denied the suggestion, put to him, that, at the time of occurrence, no motorcycle had passed through the place of occurrence and that he did not, see the assailant, in the focus of the light of the said motorcycle.

10. Md. Babul Islam, PW1, son of the deceased, stated that, on the date of occurrence at about 10 A.M., a quarrel had taken place between his father and the appellant and that the accused had threatened his father intimidating him that should he visit the market, he would be killed. According to this witness, on the fateful day his deceased father returned home from the market, followed by him. He further stated that hearing hue and cry, he rushed to the place of occurrence and the accused person, who tried to run away, had fallen into a drain, wherefrom he was taken to custody by the public. According to this witness, his father being already shifted to the Hospital, he could not find him in the place of occurrence. He further stated that, on being asked by him, his father had told him that the appellant had assaulted him. This witness lodged the FIR as the informant. He has exhibited the FIR as Exhibit 1 and his signature thereon as Exhibit 1(1). In his crossexamination, he admitted that he did not tell the Police regarding the quarrel, which had taken place in the morning and about the threat given to his father by the appellant. He also admitted that he did not tell the police that he had rushed to the place of occurrence and visited his father in the Hospital. He stated that he was not examined by the police and that the FIR was written by one Mr. Alam, on being asked by him.

11. Mr. Nazimuddin deposed as PW2. He was an independent witness. He stated that while returning from the market, he, hearing screaming cry, rushed to the place of occurrence and saw the deceased and the appellant pushing and pulling each other. According to this witness, the appellant, who had ran away, after assaulting the deceased with a dagger on his stomach, was caught by some persons. He also

stated that, in the meantime, a motorcycle arrived there and in the focus of the light of the motorcycle, he could identify the deceased and the appellant. According to this witness, the deceased was taken to the Hospital, wherein he died. In his crossexamination, this witness stated that 15 minutes after the hearing of the scream the motorcycle had arrived there and that in the meantime 10 to 15 persons had assembled there. He denied the suggestion that, before the Investigating Officer, he did not disclose about the hearing of screaming cry and the assault caused by the appellant.

12. The Medical Officer who performed the autopsy has been examined as PW3. During the post mortem examination, PW3 found the following injuries:

(1) Incised wound over right arm 3cm x .5 cm x 1cm. Injuries are clean cut and everted.

(2) Punctured wound over right hypochondrium of size 3cm x 1cm penetrating the abdominal wall. The edge of the injury is everted and clean cut on examination under magnifying glance.

The said Medical Officer opined that the injuries were antemortem and caused by sharp weapon. He exhibited the post mortem report as Exhibit No. 3 and his signature therein as Exhibit 3(1).

13. Mr. Abdul Jalil, who deposed as PW5, stated that, on the date of occurrence, at about 7.30 P.M., hearing hue and cry, he rushed to the place of occurrence and came to know that a murder had taken place. He did not find the injured in the place of occurrence, but he came to know that injury was caused to the deceased.

Mr. Ikramul Hussain, deposing as PW6, stated about the seizure of the dagger by the police vide Exhibit No. 4. According to this witness, the dagger was seized by the Police from the roadside.

14. PW7 was the Circle Officer, who conducted the inquest in respect of the dead body of the deceased. He exhibited the inquest report as Exhibit No. 5.

15. Mr. Khursed Ali, who deposed as PW8, stated that ,hearing about the incident, he went to the police station and saw the dead body of the deceased.

16. From the evidence of Mr. Sibal Kumar, PW9, SubInspector of Police, it is found that the investigation was conducted by SubInspector Shri Umakanta Rajkhowa. From his evidence, it is found that, on receipt of information, about the incident, police made a GD Entry, being GD Entry No. 268 dated 10/4/2002 and proceeded to the place of occurrence. The said GD has been exhibited as Exhibit 6 and the relevant GD Entry is Exhibit 6(1). From his evidence, it is also found that a written complaint, i.e. Exhibit 1, was receipt after the police had initiated the investigation. This witness further stated that charge sheet was submitted by Mr. Rajkhowa. The said Police Officer, who conducted the investigation and examined the witnesses,

has not been examined in this case.

17. From the evidence on record, more particularly, the evidence rendered by the prosecution witnesses, it is found that the deceased died, on 11/4/2002, due to the injuries sustained by him. From the medical evidence, it is found that the injuries were caused by sharp cutting weapon.

18. Now the question is as to who had caused the said fatal injuries. The prosecution version is that the appellant had intercepted the deceased, on the road and inflicted the said fatal injuries with a dagger. The plea of the appellant is that he did not commit the said act.

Law is well settled that in a criminal trial, it is the burden of the prosecution to prove the charge, brought against the accused person, beyond all reasonable doubt. Once the said burden is discharged, the liability shifts to the accused person to prove his innocence.

19. In view of the above discussed evidence, as revealed by the prosecution witnesses, we are required to scrutinise if the prosecution could establish that the appellant caused the death of the deceased.

20. Md. Babul Islam, PW1, son of the deceased claimed that hearing alarm, he arrived at the place of occurrence and found that his father was already shifted to the Hospital, for which he too rushed to the Hospital and that, in the Hospital, his father made a dying declaration. He lodged the FIR, immediately after the occurrence. But in the said FIR (Exhibit 1), no disclosure has been made about the said dying declaration. Withholding of such vital information from the FIR, which was lodged at the initial stage i.e. immediately after the occurrence, raises doubt about the veracity of the evidence of PW1. That apart, none of the prosecution witnesses more particularly the brother of PW1, i.e. PW4, who also claimed to be an eye witness, did not whisper anything about the dying declaration, who asserted that the deceased had made dying declaration, should have disclosed such vital information to others, more particularly to his brother. The silence of other witnesses, regarding dying declaration, indicates that PW1 did not disclose about such declaration to anyone. That apart, as admitted by PW1, he was not examined by the police. He, for the first time, disclosed about the dying declaration, at the time of giving evidence in the trial. This conduct, on the part of PW1, make it unsafe to rely on his evidence and, therefore, we are not inclined to rely on the uncorroborated evidence of PW1.

21. According to PW2, the incident took place in his presence. He clearly stated that hearing noise, he rushed to the place of occurrence and saw both the appellant and the deceased scuffling with each other. According to this witness, after about 15 minutes of the hearing of the noise, a motorcycle had arrived and in the focus of the light of the motorcycle, he could recognise the deceased. Here we may take a pause and apply our mind to the evidence given by PW2 and PW4. According to PW2, 15

minutes after hearing the noise, the motorcycle had come and he could recognise the deceased in the light of the motorcycle. This indicates that it was a dark night and as such it was not possible to recognise any person, without artificial light. There is nothing, on record, to show that there was any streetlight or other natural light. The evidence of PW2 that he recognised the deceased, in the focus of the light of the motorcycle, indicates the absence of any other artificial or natural light. According to PW2, before inflicting the fatal blows, a scuffle had taken place between the deceased and the appellant and it continued for about 15 minutes. From the evidence of PW2, it is also found that at the time of arrival of the motorcycle, already 10 to 15 persons had gathered at the place of occurrence.

But PW4, another son of the deceased, who claimed to be an eyewitness, stated that he had accompanied his father from the market and he was present with his father, at the time of occurrence. According to PW4, his father, being attacked by the appellant, he had raised alarm seeking help, but nobody came forward. He also stated that, in the meantime, a motorcycle had arrived and in the focus of the motorcycle he could see the appellant, giving blows, with a dagger, on the stomach of his father.

According to PW4, he was alone with his father, at the time of occurrence and he could see the appellant, inflicting the fatal blows, in the focus of the light of the motorcycle. This indicates that the fatal blow was inflicted as soon as the motorcycle had passed through the place of occurrence, but according to PW2, the motorcycle had arrived after the occurrence and at the time of arrival of the motorcycle about 10 to 15 persons had gathered there.

Therefore, a comparative study of the evidence of PW2 and PW4, who claims to be the eye witness to the occurrence, reveals that according to PW2, prior to occurrence, a scuffle had taken place between the deceased and the appellant and the deceased had inflicted the injuries before the arrival of the motorcycle and when the motorcycle arrived, already 10 to 15 persons had assembled there, but PW4 is silent about such scuffling and presence of PW2. If PW2's evidence is believed then it must be held that PW2 was present at the place of occurrence. The evidence of PW2 negates the presence of PW4. On the other hand, the evidence of PW4 also belies the evidence of PW2 regarding his presence in the place of occurrence. PW4 clearly stated that he saw the appellant giving the blow with a dagger in the focus of the light of the motorcycle, which was moving in slow speed. Therefore, the source of light, in which PW4 could identify the appellant, was the light of the motorcycle. But, according to PW2, the blows were given before the arrival of the motorcycle and PW2 could recognise the deceased in the focus of the light of the motorcycle. That apart, by the time the motorcycle arrived, about 10 to 15 persons had already gathered there. But according to PW4, he was there at the time of arrival of the motorcycle and despite asking for help nobody had responded.

In view of the said contradictory evidence given by PW2 and PW4, we do not find it safe to rely on their uncorroborated evidence.

We have already noticed that the evidence of PW1 regarding dying declaration is not believable. If the evidence of PW2 and PW4 is not taken into confidence, there remains no substantive evidence against the appellant. Neither the seized weapon nor the chappals were sent for forensic examination for establishing the involvement of the appellant. Therefore, the seizure of the said articles do not substantiate the involvement of the appellant

In the light of the above discussion, we are inclined to hold that the prosecution failed to prove the case, beyond all reasonable doubt. Therefore, the appellant is entitled to get the benefit of doubt. Accordingly, we allow this appeal. Consequently, the appellant is acquitted. He be set at liberty forthwith, if not required in any, other case.

Return the lower court records.