(2014) 09 GAU CK 0012

Gauhati High Court

Case No: Crl. Appeal No. 184/2013

Swapan Bardhan		APPELLANT
	Vs	
The State of Assam		RESPONDENT

Date of Decision: Sept. 18, 2014

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 162, 313
- Evidence Act, 1872 - Section 145, 27, 32
- Penal Code, 1860 (IPC) - Section 302

Citation: (2015) 1 Crimes 502 : (2015) 1 GLD 639 : (2014) 4 GLT 670

Hon'ble Judges: Prasanta Kumar Saikia, J; C.R. Sarma, J

Bench: Division Bench

Advocate: A. Alam, Advocate for the Appellant; S. Jahan, Additional Public Prosecutor, Advocate for the Respondent

Judgement

C.R. Sarma, J

1. This appeal is directed against the judgment and order, dated 24.04.2013, passed by the learned Sessions Judge, Morigaon, in Sessions Case No. 140/2010.

2. By the impugned judgment and order, the learned Sessions Judge, convicted the appellant under Section 302 of the Indian Penal Code (hereinafter called "IPC") and sentenced him to suffer imprisonment for life and pay fine of Rs. 10,000/- in default, suffer rigorous imprisonment for another period of one month.

Dissatisfied with the said judgment and order, the convicted person, as appellant, has come up with this appeal.

3. The prosecution case, in a nutshell, is that, on 19.10..2008, at about 10 P.M., the informant''s brother Sri. Swapan Bardhan (hereinafter called "deceased") was stabbed by their elder brother i.e. the appellant, with a dagger, in their courtyard, causing injuries to the deceased. The deceased, who sustained injuries on left side

of his chest and on his left arm, resulting profuse bleeding, was shifted to the Jagirod Railway Hospital, but he succumbed to the injuries. The younger brother of the deceased, namely, Sri. Tapan Bardhan (PW-1), as informant, lodged an FIR with the Officer-in-charge, Jagirod Police Station on the next day.

4. On receipt of the FIR (Ext.-1), Police registered a case under Section 302 IPC and launched investigation into the matter.

During the course of investigation, the Investigating Officer (I.O.) visited the place of occurrence, took custody of the dead body of the deceased, prepared inquest report (Ext. 2), sent the dead body of the deceased for post mortem examination and examined the witnesses.

At the close of the investigation, Police submitted charge-sheet, for the offence under Section 302 IPC, showing the petitioner as absconder.

(5) The accused i.e. the appellant, surrendered before the learned Chief Judicial Magistrate and the learned Chief Judicial Magistrate committed the case to the Court of Sessions for trial.

The learned Sessions Judge framed charge under Section 302 IPC. The charge was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

(6) In order to prove its case, prosecution examined as many as 10 (ten) witnesses including the Medical Officers (PWs-5 & 6) and the Investigating Police Officers (PWs-9 & 10).

PW-1, who lodged the FIR (Ext. 1), is the brother of the deceased, PW-3 is the widow of the deceased, PWs-2, 4, 7 and 8 are the independent witnesses.

(7) At the close of the examination of the prosecution witnesses, the trial Court examined the accused under Section 313 Cr. P.C. He denied the allegations, brought against him and declined to adduce any defence evidence. His plea was a denial one.

(8) After hearing both the parties and considering the evidence, on-record, the learned Sessions Judge held the appellant guilty of the offence under Section 302 IPC and accordingly, convicted and sentenced him, as indicated above.

(9) Being aggrieved by the said conviction and sentence, the convicted person, as appellant, has come up with this appeal.

(10) We have heard Mr. A. Alam, learned Counsel, appearing for the appellant and Ms. S. Jahan, learned Additional Public Prosecutor and perused the records.

(11) Mr. A. Alam, learned Counsel for the appellant, taking us through the evidence, on-record, has submitted that there is no substantive evidence, on-record, to show that the appellant had caused the fatal injuries to the deceased, on the fateful night.

The learned Counsel for the appellant, referring to the impugned judgment and order, has submitted that the learned trial Judge committed gross error and illegality by recording the conviction, on the basis of the statements, recorded by the Investigating Officer, during their examination under Section 161 Cr. P.C. In view of the above, the learned Counsel, for the appellant, has submitted that the prosecution failed to establish the charge against the appellant, beyond all reasonable doubt and as such, the impugned conviction and sentence are liable to be set aside resulting acquittal of the appellant.

(12) In support of his contention, the learned Counsel for the appellant has relied on the following decisions held in the cases of Lakhinath Chutia alias Lakhinandan Vs. State of Assam, and Goutam Das and Another Vs. State of Tripura and Another, .

(13) Controverting the said argument, advanced by the learned Counsel for the appellant, Ms. S. Jahan, learned Additional Public Prosecutor, supporting the impugned judgment and order, has submitted that the learned Sessions Judge has properly considered the evidence, on-record, and the statement, made by the witnesses, before the Investigating Officer and correctly came to the findings regarding guilt of the appellant.

It is also submitted that entire facts and circumstances of the case, coupled with the statements made by the witnesses, who were declared hostile by the prosecution, lead to the conclusion that none, other than the appellant has caused the death of the deceased.

(14) In order to appreciate the arguments, advanced by both the parties and to examine the correctness of the impugned judgment and order, we feel it necessary to briefly scrutinize the evidence, on-record.

(15) The informant, who is one of the brothers of the deceased, deposing as PW-1, stated that, on 09.10.2008, at about 10.30 PM, hearing a commotion, he came out from his house and found his elder brother i.e. the deceased lying in their courtyard. According to this witness, his brother sustained injuries and blood was oozing out from the injury, on his chest. He found the wife of the deceased (PW-3) crying near the dead body. He further stated that, on the date of occurrence, the appellant, who used to work at Guwahati, was not present at his house i.e. in the place of occurrence. This witness was declared hostile and during his cross-examination by the prosecution, he stated that he did not tell the Police that his sister-in-law i.e. wife of the deceased was crying that her husband was stabbed with a dagger by the appellant. Except the said denial statement, nothing incriminating, against the appellant, could be elicited from the evidence of this witness.

This witness, in his cross-examination, made on behalf of the defence, stated that he did not see the appellant assaulting the deceased and that he was not interrogated by the Police. He stated that he had put his signature in the FIR, on being asked by the Police, without knowing as to what was written there.

(16) Sri. Nitai Bhowmik, who was one of the neighbors of the appellant, deposing as PW-2, stated that hearing a commotion, he rushed to the house of the deceased and found the wife of the deceased crying. This witness was also declared hostile and cross-examined by the prosecution. He stated that he did not tell the Police that he had heard about a quarrel between the deceased and the appellant, relating to land and that PW-1 had shouted that the appellant had stabbed the deceased with a dagger. In his cross-examination, made by the defence, this witness clearly stated that he did not see the incident. He asserted that he was not interrogated by the Police, except asking his name.

(17) The wife of the deceased, deposing as PW-3, stated that her husband, who was a cancer patient, had undergone surgery and that he had fallen down in the bathroom due to his illness. This witness, being the wife of the deceased, was a very vital witness. Prosecution declared her hostile and cross-examined. On such cross-examination, she stated that she did not tell the Police that the accused had stabbed her husband with a dagger and then dragged him to the bank of a water tank.

During her cross-examination, made on behalf of the defence, she clearly stated that the appellant, at the time of the incident, was at Guwahati, in connection with his job. She further stated that the appellant had taken her deceased husband to Madras for surgery and that, other brothers also had spent money towards his treatment. She also stated that she did not tell the Police that the accused had stabbed her husband with a dagger and then dragged him to the bank of the water tank and killed him. She further stated that she did not tell the Police anything and that they had written at their own. Her said evidence remained undemolished.

(18) PW-4, who was a relative of the deceased, stated nothing against the appellant. He stated that he did not tell the Police that the appellant had killed the deceased. This witness was also declared hostile and cross-examined by the prosecution. He stated that he did not tell the Police that he came to know that the appellant had killed the deceased due to certain land dispute. He further stated that he did not see the occurrence and that the Police did not ask him anything.

(19) PW-7 and PW-8, who also arrived at the place of occurrence, after the incident, stated that they found the deceased lying death on the ground. None of them stated anything against the appellant.

(20) From the above evidence, given by the non official witnesses, who were close relatives of the deceased, including his wife (PW-3) and one brother (PW-1), it is found that none of them supported the prosecution version. Even the wife of the deceased also did not state anything incriminating. Rather, she supported the evidence of PW-1 indicating that the appellant, on the date of occurrence, was away from his house. There is nothing, on record, to show that the said witnesses had any adverse interest against the deceased, prompting them not to implicate the

appellant, if he was the actual assailant. Hence, we find no reason not to accept the evidence, given by the PWs aforesaid, which led to the conclusion regarding innocence of the appellant.

(21) Dr. L.P. Das, who attended the deceased first, stated that the deceased was brought to his house in injured condition and that upon examination, he found the injured to be already death. According to this witness, he had advised them to take the deceased to the Police Station. The autopsy of the dead body of the deceased was performed by PW-5. He has exhibited the post mortem report as Ext. No. 3 and his signature therein as Ext. No. 3(i). The said Medical Officer found the following injuries.

(1) About 5 to 6 Cm long sharp cutting wound in left side of chest.

(2) Contracted left lung with few amount of blood.

(3) About 5 to 6 cm long sharp cutting wound in left arm with profuse bleeding.

He opined that the cause of death was due to hemorrhage, shock and respitory suppression following premo thorax. He stated that he could not ascertain the time of death. He opined that possibility of sustaining the above mentioned injuries, due to fall, on sharp substance could not be ruled out. Hence, in view of the said medical evidence, it is doubtful whether the deceased sustained the injuries due to fall or otherwise.

(22) In the present case, no offending weapon has been recovered or seized except mentioning about the use of a dagger, in the FIR (Ext. 1). There is no substantive evidence to show that a dagger or a sharp weapon was used in causing the said injuries.

(23) PW-3 i.e. wife of the deceased has clearly stated that the deceased had fallen in the bathroom due to his ailments. Though PW-3 was cross-examined by the prosecution, no suggestion was put to her denying her said statement. Her evidence regarding fall of the deceased remained undemolished. The said evidence, given by PW-3 coupled with the opinion given by the Medical Officer (PW-5), regarding possibility of sustaining injuries due to fall, raises doubt about the involvement of the appellant. That apart, both PW-1 and PW-3, who were the brother and the wife respectively of the deceased ruled out the presence of the appellant in their house i.e. in the place of occurrence, on the fateful day.

(24) The investigation in the case was almost completed by PW-10 and due to his transfer, PW-9 collected the postmortem report and submitted the charge-sheet (Ext. No. 3). The Investigating Officer, in his evidence, given as PW-10, stated that Smt. Sima Bardhan (PW-3) had seen the occurrence. But, PW-3 clearly stated that she did not tell the Police that she had seen the occurrence. Therefore, it is not understood as to how the I.O. could say that the wife of the deceased had seen the occurrence. The I.O. further stated that Sri. Tapan Bardhan (PW-1) stated, before

him, that Sima Bardhan i.e. PW-3 had told that her husband was stabbed by the appellant and that Sri. Nitai Bhowmik i.e. PW-2 had told him that Sri. Tapan Bardhan (PW-1) shouted that Swapan (deceased) was stabbed by Sri. Sadhan, with a dagger. He further stated that Smt. Sima Bardhan (PW-3) had stated before him that her husband was killed by the accused i.e. the appellant. He also stated that Parimal Bhowmik i.e. PW-4 told him that he came to know that the appellant had killed the deceased by stabbing him with a dagger. Of course, PW-4 did not disclose the source of his information. Hence, it appears that PW-4 had no personal knowledge about the involvement of the appellant. As discussed above, all the said witnesses (PW-1, PW-2, PW-3 and PW-4) were declared hostile and cross-examined by the prosecution, but nothing incriminating could be brought out.

(25) From the evidence, on-record, more particularly, from the statement of PWs-1, 2, 3 and 4, who have been declared as hostile witnesses, it appears that no suggestion was put, to them, in respect of their previous statement, for the purpose of confronting them with their earlier statement, made before the I.O. The manner of confronting a witness, with his previous statement and the role of the Court with regard to proving previous statement, made before the Police, has been laid down in the case of Goutam Das & Anr. (supra).

In the said case, a Division Bench of this Court, held that the cross-examination by way of confronting has only one purpose i.e. to discredit or impeach the credibility of the witness.

(26) As discussed above, the said witnesses, who were declared hostile and cross-examined by the prosecution, no substantive evidence could be elicited against the appellant. Despite nonavailability of any direct or substantive evidence, the learned Sessions Judge, while recording the conviction heavily relied on the statements, made by the said hostile witnesses before the I.O.

It is settled law that the evidence of hostile witness can be relied upon to the extent to which it supports the prosecution version. Of course, conviction can be made on the testimony of hostile witness, if the evidence of hostile witness is corroborated by other reliable evidence.

But in the present case, there is no corroboration in support of the prosecution version. In fact, all the non-official prosecution witnesses, including the wife of the deceased, while giving evidence, during the trial, did not state anything incriminating against the appellant. The learned Sessions Judge, in his judgment, has stated that the earlier statements made, by PWs-1, 2, 3 and 4, have been confirmed by the I.O. and that the said witnesses, being relative of the appellant, became hostile. Fact remains that both the deceased and the appellant were brothers and as such, the said witnesses were close relative of the deceased also. There is nothing, on record, to show that the said witnesses had any hostile interest against the deceased and interest to protect the real culprit. It can''t be believed that

the wife of the deceased would have given false evidence to protect the appellant, if was the actual culprit. Therefore, the proposition that the said witnesses, being relative of the appellant, had given false statement, with a view to protect the appellant from the liability, is not acceptable. That apart, all the said witnesses categorically stated that they did not make any statement before the I.O. This part of their evidence could not be shaken.

(27) In the present case, the prosecution has relied on the statements, made by the witnesses, before the I.O., under Section 161 Cr. P.C. and the learned Sessions Judge also based on the said statements to record the conviction. It is settled law that he statement recorded under Section 161 Cr. P.C. can''t be used as substantive evidence. In the case of Tahsildar Singh and Another Vs. The State of Uttar Pradesh, , the Supreme Court observed -

"17. At the same time, it being the earliest record of the statement of a witness soon after the incident, any contradiction found therein would be of immense help to an accused to discredit the testimony of a witness making the statement. The section was, therefore, conceived in an attempt to find a happy via media, namely, while it enacts an absolute bar against the statement made before a police officer being used for any purpose whatsoever, it enables the accused to rely upon it for a limited purpose of contradicting a witness in the manner provided by Section 145 of the Evidence Act by drawing his attention to parts of the statement intended for contradiction. It cannot be used for corroboration of a prosecution or a defence witness or even a court witness. Nor can it be used for contradicting a defence or a court witness. Shortly, stated, there is a general bar against its use subject to a limited exception in the interest of the accused, and the exception cannot obviously be used to cross the bar.

19. "Contradict" according to the Oxford Dictionary means to affirm to the contrary. Section 145 of the Evidence Act indicates the manner in which contradiction is brought out. The cross-examining counsel shall put the part or parts of the statement which affirms the contrary to what is stated in evidence. This indicates that there is something in writing which can be set against another statement made in evidence. If the statement before the police officer-in the sense we have indicated-and the statement in the evidence before the court are so inconsistent or irreconcilable with each other that both of them can not coexist, it may be said that one contradicts the other."

(28) The purpose of recording statement under Section 161 Cr. P.C. and the scope of its use has been prescribed by Section 162 of the Cr. P.C., which reads as follows:

"162. Statements to police not to be signed: Use of statements in evidence.- (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or

otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act."

(29) In view of the above principle of law and the statutory provision, prescribed by Section 162 Cr. P.C., the statement made before the Police can''t be used as substantive evidence to hold a person guilty. Said statements can be used only for the limited purpose of contradicting the maker of the statement in the manner provided by Section 145 of the Evidence Act. The object of such contradiction is to impeach the credibility of the witnesses by proving his former statement, which is inconsistent with any part of his evidence given before the Court. Such statement can not be used for the purpose of corroboration. If it is intended to contradict a witness with his previous statement in writing, his attention is required to be drawn to that part of the statement, which is to be used for the purpose of contradicting him.

The procedure regarding confronting a witness with his previous statement has been laid down by a Division Bench of this Court in the case of Goutam Das & Anr.(supra). In the said case, the Court observed as under -

"The proper procedure would, therefore, be-(i) to ask a witness first whether he made such a statement before the police officer; (ii) if the witness answers in the affirmative, the previous police statement, in writing, need not be proved; (iii) the cross examiner may, if he so chooses, leave it to the party, who called the witness to have the discrepancy, if any, explained in course of reexamination; (iv) if, on the other hand, the witness denies to have made such a previous statement attributed to him or states that he does not remember having made any such statement, and it is intended to contradict him with reference to his previous statement, the cross examiner must read out to the witness the relevant portion or portions of the record which are alleged to be contrary to his statement in Court and give him an opportunity to reconcile the same, if he can; (v) the best way of putting a statement is to put it in the actual words in which it stands recorded within quotation marks."

(30) In the said case, reference has been made to the following observation made by a Division Bench of this Court in the case of The State Vs. Md. Misir Ali and Others, .

In the case of Md. Misir Ali (supra), the Division Bench, speaking through C.K. Nayudu, C.J., had observed as follows:

"We also regret to note that the procedure to be followed in the case of proving the contradictions appearing in the statements made by prosecution witnesses to the police during investigation is not being followed by subordinate Courts, as well as by the counsel appearing in criminal cases. We had occasion to point out the correct procedure more than once and it would be worth while restating it. If it is intended by an accused to contradict the evidence given by a prosecution witness at the trial, with a statement made by him before the police during the investigation, the correct thing to do is to draw the attention of the witness to that part of the contradictory statement, which he made before the police, and question him whether he did in fact make that statement. If the witness admits having made the particular statement to the police, that admission will go into evidence and will be recorded as part of the evidence of the witness and can be relied on by the accused as establishing the contradiction. If, on the other hand, the witness denies having made such a statement before the police, the particular portion of the statement recorded under Section 162. Criminal Procedure Code should be provisionally marked for identification, and when the investigating officer who had actually recorded the statement in question comes into the witness box, he should be questioned as to whether that particular statement had been made to him during the investigation, by the particular witness, and obviously after refreshing his money from the Police Case Diary the investigating officer would make his answer in the affirmative. The answer of the investigating officer would prove the statement which then exhibited in the case and will go into evidence, and may, therefore, be relied only correct procedure to be followed, which would be a conformity with Section 145 of the Evidence Act."
We respectfully fully agree with the above observations made in Md. Misir Ali (supra) and reiterate the same as the correct procedure for proving of contradictions.

(31) Carefully perusing the evidence, on record, more particularly, the hostile part, elicited during the cross-examination by the prosecution in respect of PWs-1, 2, 3 and 4 and the evidence, given by the I.O. (PW-10), we find that the statements made by the said witnesses before the I.O. has not been properly proved and marked for identification by the I.O., who actually recorded the statement.

(32) In view of specific denial of the said witnesses with regard to making such statement before the I.O. and their refusal to support such earlier statement, it can''t be concluded that what the witnesses stated before the Court was false and that the statement alleged to be made by them before the I.O. were true. All the said witnesses clearly stated that they did not make any statement before the Police

and their said stand remained undemolished. In view of the above, there remained nothing in favour of the prosecution.

(33) As discussed above, there is no substantive evidence leading to the conclusion that none other than the appellant had caused the death of the deceased.

It is settled principle of criminal jurisprudence that, in a criminal trial, the prosecution is required to prove the allegations, brought against an accused, beyond all reasonable doubt, failure for which the benefit should go in favour of the accused.

(34) In view of the above discussion, we have no hesitation in holding that the prosecution failed to establish the case against the appellant, beyond all reasonable doubt. Therefore, the impugned conviction and sentence, recorded by the learned Sessions Judge, can not be maintained. Accordingly, the appeal is allowed. The impugned conviction and sentence are set aside. The appellant be acquitted and set at liberty forth with, if not required in any other case.

(35) Return the LCR.