

**(2016) 09 GAU CK 0018**

**GAUHATI HIGH COURT**

**Case No:** Criminal Appeal No. 32 (J) of 2015

Nalia Das

APPELLANT

Vs

State of Assam

RESPONDENT

**Date of Decision:** Sept. 19, 2016

**Acts Referred:**

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

**Citation:** (2016) 168 AIC 694 : (2016) 5 GauLT 650

**Hon'ble Judges:** Mr. Ajit Singh C.J. and Mr. Manojit Bhuyan, J.

**Bench:** Division Bench

**Advocate:** Ms. Usha Das, Learned Amicus Curiae, for the Appellant; Ms. Shamima Jahan, Learned Additional Public Prosecutor, Assam, for the Respondents

**Final Decision:** Allowed

**Judgement**

**Ajit Singh, C.J.** - Appellants Nalia Das and Sarulora Das @ Jatin Das have been convicted under Section 302/34 of the Indian Penal Code and sentenced to imprisonment for life and fine of Rs.5,000/- each with default stipulation.

2. The victim of the incident was Nayanmoni Saikia, aged about 35 years.

3. According to the prosecution case, on 30.11.2009, around 7 p.m., Nayanmoni had gone out from the house towards village and as he reached Chakradhara Gaon Tinali (Tri-juncture), Sarulora Das caught hold of him tightly with his both arms and Nalia Das dealt a blow on his head with an axe. Thereafter, both of them fled from the scene of occurrence. Nayanmoni was immediately taken to Golaghat Civil Hospital by his brother Jitumoni Saikia (PW-1) and father Tikheswar Saikia (PW-2). But since the condition of Nayanmoni did not improve, he was referred to Dibrugarh Hospital on 1.12.2009 for better treatment. Ejahar exhibit 1 of the incident was lodged by Jitumoni at Ghiladhari Police Station, which was registered as First Information Report. In the ejahar, Jitumoni did not claim himself to be an eye witness nor did he mention the name of Sarulora as a participant in the crime.

Nayanmoni, however, succumbed to the head injury on 3.12.2009. Dr. Dhrubajyoti Deka (PW-5) conducted the post mortem examination on the dead body of Nayanmoni. He found one incised looking lacerated wound on left parietal temporal region of the head of Nayanmoni. The doctor opined that Nayanmoni died due to coma, as a result of head injury caused by blunt face impact.

4. The Investigating Officer, Tahindra Nath Dutta (PW-11) arrested the appellant Nalia Das on 6.12.2009 from his house. He also seized one axe Material exhibit 1 from there vide seizure exhibit 5. Jiba Das (PW-8), Biren Das (PW-9) and Minati Das (PW-10) are witnesses to seizure.

5. During trial, the appellants denied the charge and pleaded false implication. They, however, did not examine any witness in defence.

6. The trial court relying upon the evidence adduced by the prosecution convicted and sentenced the appellants as aforesaid.

7. After hearing the learned counsel for the appellant and learned Additional Public Prosecutor, we are of the considered view that the appeal deserves to be allowed. Jitumoni has been examined by the prosecution as an eye witness. But, as mentioned above, in the ejahar lodged by this witness, he did not claim himself to be an eye witness to the incident. Not only this, he did not even mention Sarulora Das as a person who had caught hold of Nayanmoni with his both arms. Also, in his police case diary statement, Jitumoni stated that he had come to know from local people who had witnessed the incident that Sarulora Das helped Nalia Das in causing injury to Nayanmoni. We are, therefore, unable to believe that Jitumoni saw Nalia Das and Sarulora Das committing the crime. Jitumoni is brother of Nayanmoni and perhaps to ensure their conviction, he has improved his version in the court by becoming an eye witness which he is not.

8. Another eye witness examined by the prosecution is Tikheswar Saikia. He is father of Nayanmoni. He too has substantially changed his version in the court from what he stated during investigation under Section 161 of the Code of Criminal Procedure. Tikheswar has testified that Nalia Das was hurling abuses at him hearing which Nayanmoni went out to know why he was doing so. According to Tikheswar, he and his younger son (Jitumoni-PW-1) also went out and followed Nayanmoni. Nayanmoni was little ahead of them and stopped near Nalia Das and Sarulora Das. At that point of time, Sarulora Das grabbed Nayanmoni tightly with both arms and Nalia Das inflicted injury on his head with an axe. As already seen above, Jitumoni in the ejahar lodged by him did not claim himself to be a eye witness nor did he mention the name of Sarulora Das as a participant in the crime. Apparently, Jitumoni did not accompany Tikheswar as deposed by him. Moreover, Tikheswar in his police case diary statement has not said anything about hurling of abuses by Nalia Das which made Nayanmoni to come out from the house and he followed him with Jitumoni. In the police case diary statement, Tikheswar merely stated that he had come towards

Chakradhara Gaon Tinali (Tri-Juncture) for a walk, where he heard commotion and saw Nalia Das engaged in a scuffle. Nayanmoni then separated Nalia Das from the person he was having scuffle, but Sarulora Das suddenly grabbed Nayanmoni and Nalia Das hacked him on the head with an axe. This substantial change in the version of Tikheswar regarding the incident creates a doubt that he really saw the incident. Also Jitumoni did not name his father Tikheswar as an eye witness. His testimony, therefore, cannot be relied upon.

9. Tarun Saikia (PW-3) is neighbour of Nayanmoni. He denied having seen the incident and was declared hostile by the prosecution. Manik Chandra Das (PW-4) is co-villager. According to him, he had asked Tikheswar and Nalia Das not to quarrel and later came to know that Nalia Das had killed Nayanmoni. Admittedly, he is not an eye witness to the incident. Kanthi Das (PW-6) says that he came to know from the mother of Nayanmoni that Nalia Das had killed him. But mother of Nayanmoni has not been examined by the prosecution. The evidence of this witness, therefore, does not help the prosecution. Palash Das (PW-7) turned hostile and did not support the prosecution. Jiba Das (PW-8), Biren Das (PW-9) and Minati Das (PW-10) are witnesses to the seizure of axe from the house of Nalia Das. These witnesses denied that seizure of axe was made from the house of Nalia Das in their presence. The seizure of axe from the house of Nalia Das is thus not really proved by the prosecution.

10. For these reasons, we find that the prosecution has failed to prove its case beyond reasonable doubt that Nalia Das and Sarulora Das committed the murder of Nayanmoni. The impugned conviction and sentence are therefore set aside. The appellants are in jail. They are directed to be released forthwith, if not wanted in any other case.