

GAHC040010352017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Criminal Appeal No.2(AP)/2017

Sri Ngapi Tayu & Anr.

.....Appellants

-Versus-

State of Arunachal Pradesh & Anr.

.....Respondents

Advocate for the appellants: Mr. A. Bhattacharya/Mr. S. Mow.

Advocate for the respondents: Ms. T. Jini.

Advocate for the informant: Mr. H. Lampu.

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of judgment : 22.11.2023

JUDGEMENT AND ORDER (CAV)

Heard Mr. A. Bhattacharya, learned counsel for the accused-appellant. Also heard Ms. T. Jini, learned Additional Public Prosecutor for the State/respondent No.1 and Mr. H. Lampu, learned counsel for the informant.

2. This appeal is directed against the judgment and order dated 16.02.2017 passed by the learned Sessions Judge, Teju in Sessions Case No. 10/L/2010, whereby the accused/appellants were convicted under section 352/34 IPC and sentenced to undergo simple imprisonment for two months each with fine of Rs. 500/- each in default of payment of fine shall suffer simple imprisonment for 15 days each. Both the accused appellants were also convicted under section 448/34 IPC and sentenced to undergo simple imprisonment for a period of five months each with a fine of Rs. 1000/- each in default, one month simple imprisonment. Both the sentences were directed to run concurrently.

3. The brief facts of the case is that on 27.01.2010, an FIR was lodged by one Robin Nani, Executive Engineer, PWD, Arunachal Pradesh, before the officer-in-charge Anini police station stating *inter alia* that on that day at around 06:45 p.m when he returned back home from office and was changing his clothes, the appellant Ngapi Tayu followed by another appellant Rijam Melo entered into his bedroom with a dao and kicked his servant Birey Mijar who was lighting the Bukhari and the appellants also charged him with the said dao which was defended by him by holding the said dao. In the meantime, his younger brother Nani Obin came to the spot and intervened and tried to specify the appellants. Though he tried to convince both the appellants out of which one of the appellants Rijam Melo took the said dao hanging on the wall and rushed to him. Somehow they resisted and both the appellants fled away with the said dao.

4. On receipt of the complaint, a case was registered vide Anini P.S. Case No. 02/2010 under Sections 452/352/506/34 IPC and investigation was initiated. Though it is not reflected in the FIR that the servant of the informant Birey Mijar died due to the alleged incident, however, after completion of investigation, charge-sheet was submitted against the present appellants under section 452/352/506/302/426/34 IPC. As the offence under section 302 IPC is exclusively triable by the court of Sessions, the case was committed accordingly.

5. During the course of trial, charge was framed under section 352/506/302/426/34 IPC which was read over and explained to the appellants to which they pleaded not guilty and claimed to be tried.

6. To prove the guilt of the accused/appellants, prosecution examined 15 witnesses and exhibited some documents. On the other hand, the appellants also adduced three witnesses in support of their case. After completion of trial, statement of the appellants were recorded under section 313 Cr.P.C. wherein incriminating materials found in the evidence of the witnesses were put to them to which they denied the same and pleaded their innocence. After hearing the arguments advanced by the learned counsel for the parties, both the appellants were convicted as aforesaid. Hence, this present appeal has been preferred before this Court.

7. The learned counsel for the appellants has argued that there are material discrepancies and contradictions in the testimony of the star witnesses of the prosecution. It is further argued that none of the prosecution witness has supported the case of the prosecution and there is no cogent evidence laid on record to prove the guilt of the appellants.

8. It is also argued that there is no independent public witness in the present case apart from the complainant himself and his brother, being that of interested witness, cannot be relied upon. Arguing further, learned counsel for the appellants submitted that the prosecution has failed to prove the guilt of the appellants beyond all reasonable doubt due to tainted testimony of the prosecution witnesses. Hence, the appellants are entitled to be acquitted on benefit of doubt.

9. It is also the submission of learned counsel for the appellants that charge has not been properly framed by the Sessions Court. It is a defective charge which may also be taken into consideration at the time of taking final decision of the case.

10. It is further submitted by the learned counsel for the appellants that the statements of the appellants under Section 313 Cr.P.C. were not recorded in accordance with law. The

incriminating materials found in the evidence of the witnesses were put to the appellants together. They did not get the opportunity to reply their answers separately which is fatal to the prosecution case.

11. In support of his submissions, the learned counsel has placed reliance on the following case laws-

(i) State vs. Jahur Ahmed & Anr., reported in Criminal Case No. 36/2019(FIR No. 519/2016).

(ii) Nar Singh vs. State of Hariyana, reported in 2015 (1) SCC 496.

12. Per contra, the learned Additional Public Prosecutor has submitted that on a combined reading of testimony of prosecution witnesses, the offence under Section 352/448/34 IPC are proved against the appellants beyond all reasonable doubt.

13. It is also the submission of learned Additional Public Prosecutor that the statements of the witnesses clearly showed that both the appellants were present at the scene of occurrence. They extended threat with dire consequences if their demand of tender was not satisfied. The attitude showed by the appellants duly covers the provision under Section 352/448/34 IPC. Under the facts and circumstances of the case, the judgment of the learned trial court needs no interference.

14. It is further submitted by learned Additional Public Prosecutor that minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. The learned Additional Public Prosecutor, therefore, has prayed for dismissal of the appeal.

15. The learned Additional Public Prosecutor also submitted that failure of trial court to question the accused of any incriminating circumstance would not itself act to vitiate the trial unless accused is materially prejudiced, thereby, defective examination of accused under

Section 313 Cr.P.C. does not by itself vitiate the trial unless accused is seriously prejudiced thereby.

16. In support of her submissions, learned Addl.P.P. has cited the following case laws-

(i) (2014) 8 Supreme 68 (Liyakat & Ors. vs. State of Rajasthan).

(ii) (2014) 6 SCC 173 (Sushil Ansal vs. State through CBI).

(iii) (2012) 4 Supreme 481 (Shamal Ghosh vs. State of West Bengal).

(iv) (2013) 12 SCC 765 (Shanmugam & Anr. vs. State Rep. by Inspector of Police, Tamilnadu).

17. I have considered the submissions of learned counsel for the parties.

18. As per prosecution case, there are three eye witnesses to the incident i.e. P.W.1, P.W.2 and P.W.3.

19. P.W.1 was the driver of the informant. He deposed in his evidence that since December, 2008, he had been working as casual driver. On 27.01.2010 at about 18:30 hours, he dropped Robin Nani, Executive Engineer, PWD at his official residence at Aanini. He handed over his briefcase to his servant Birey Mijar. Thereafter, Robin Nani asked him to bring the audit party for office dinner. When he reached near gate, he met both the accused. They came on motorcycle and asked him whereabouts of Executive Engineer. He told them that he had dropped him at his house. At this, both of them asked him to call the engineer. He told them that he is in hurry to go to the office to bring the audit party. If they wanted to meet the engineer, they should go ahead. At this, they shouted at him 'mar khayga kya'. Then he went back and called Birey loudly.

20. P.W.1 also stated that in the meantime, when he was trying to open the gate, the accused pushed him out and went straight inside the house. Suspecting some foul play, he

followed the accused up to the dining hall. In the meantime, Birey also reached there after lighting bukhari and asked the accused if they had any work, at this, the accused Ngapi Tayu slapped Birey. Thereafter, he(P.W.1) left the room. When he reached near the vehicle, the other officers also reached there and while he was narrating about the incident, they all heard a gunshot. Thereafter, he along with junior engineer Taba Saheb went to police station to inform the matter. When they returned back home, they found Birey was lying on the floor. He was lifted in the police vehicle for treatment. On the same night, they left for Dibrugarh Medical and on the next morning they reached Roing. They went to Roing Medical also for taking first aid. Thereafter, they reached Dibrugarh in the evening and Birey was admitted to Aditya Nursing Home, wherein after two days, he died. Thereafter, his body was taken to AMCH, Dibrugarh for postmortem examination. He noticed injury mark on the backside head and neck of Birey.

21. In his cross-examination, P.W. 1 replied that Birey fell on the floor on being slapped. When he came inside the room, Birey was inside the room of the informant. He saw the accused slapping Birey from near the dinning table which is in between the kitchen and the informant's room. The persons who were present outside were Samir Babu, Pal Babu, Kutti Babu and other staff around seven and eight persons.

22. P.W.2 is the brother of the informant. From his deposition, it reveals that the incident took place on 27.01.2010. On that day, at about 6:30 to 6:45 p.m., he was present in his room, at the residential quarter of his elder brother Robin Nani at Aanini. At that time, from his room, he heard one person speedily going towards his elder brother's room. He suspected it to be a stranger going towards the house of his brother. Then after few seconds, he heard the sound of hitting somebody. Then he came out and saw accused Ngapi Tayu giving kick to their servant Birey. At that time, Birey was burning local heater (Bhokari) near the door. Thereafter, he took out his dao and went inside his brother's room. When he reached his brother's room, he saw his brother caught hold of the hand of accused Nagpi Tayu in which he was holding a dao. Thereafter, he saw his brother also holding a pistol in his hand pointing towards the accused. Then, he tried to snatch away the dao from accused Nagpi Tayu. In the process, he also tried to specify accused Nagpi Tayu and told him that if he had any

grievances, it could be solved amicably by discussion. But he did not listen to his request. Within two three minutes, accused Rijam Melo also came inside the house. Accused Rijam Melo sustained injury on his person while trying to snatch away dao from accused Ngapi Tayu. At that time, one junior engineer Mr. Komar Taba also came inside the house and informed police about the incident. This witness also stated that in the entrance of the bedroom, he saw servant Bijey Mijar lying on the ground and his brother was attending him. He noticed injury on the left side of his neck and blood was oozing out. Thereafter, the injured Birey Mijar was taken to the hospital. Subsequently, he died at Dibrugarh during treatment.

23. In his cross examination, P.W.2 replied that the firewood was kept towards the left side of the door in the bedroom. There was about 4/5 ft distance between the heater (bhokari) and the firewood. Accused assaulted the deceased by kicks near the heater (bhokari). The deceased fell down near the firewood. Having seen the accused assaulting the deceased, he immediately rushed towards the bedroom. When he entered the bedroom, he found the deceased lying on the ground.

24. P.W.3 is the informant. From his deposition, it discloses that on 27.01.2010 at about 06:30 p.m., he returned back to his residential quarter. As he invited the audit team for dinner, he instructed his driver to pick them up from circuit house. Then he entered his bedroom and on the way he instructed his servant Birey Mijar to lift the bhokari. While he was changing his dress inside the room, he heard the sound of beating someone else towards his left side and saw accused Ngapi Tayu beating Birey Mijar. He also had seen Ngapi Tayu gave a kick to Birey with his left leg. He also noticed that due to the assault Birey fell on the cartoon near bhokari where firewoods were kept, beside the entrance hall. Then Nagpi Tayu took out his dao advancing towards him(P.W.3). Then he took out his pistol and pointed his pistal towards Nagpi Tayu and asked him to leave dao. In the meantime, his younger brother(P.W.2) came to the spot and caught hold of him. He also tried to snatch away dao from accused Ngapi Tayu. The accused Rijam Melo entered into his room at the moment and he also tried to snatch away dao from Ngapi Tayu. In the process, he sustained injury on his forehead. At that time, junior engineer Komkar Taba entered inside his bedroom and having

seen them such a position informed police about the incident. Thereafter, the accused persons left the place. The injured Birey Mijar was taken to the hospital. After two days, he died at Dibrugarh while taking treatment in the hospital.

25. In his cross examination, P.W.3 replied that he reached home from office at around 6:35 to 06:40 p.m. He had not seen from which door the accused persons entered into his house. But his driver told him that they entered into his house from the back side door. Firstly, he heard the sound of hitting and then when he turned towards his left side, he saw accused Nagpi Tayu kicking Birey Mijar as a result of which, he fell down in the firewood cartoon. He noticed cut injury on the left side of his neck.

26. According to P.W.4, on 27.01.2010 they had arranged a dinner for audit party in the house of executive engineer of Anini, Robin Nani. On that day, at about 06:40 p.m., he along with three of their colleagues, namely Oko Pulu, RP Gupta and OP Verma went to the house of the informant. They entered from the backside of the compound gate. He was the first person to enter into the compound. When he reached near the kitchen of the informant, he heard one voice of the informant shouting towards a person to keep the dao inside. Then he rushed to the bedroom of the informant, he saw the accused Ngapi Tayu was holding a dao in his hand and accused Rijam Melo was also present. The younger brother of the informant was trying to snatch away the dao from accused Ngapi Tayu. The accused were on aggressive mood at that time. This witness also added that when he tried to enter the bedroom, he found the servant of the informant Birey Mijar was lying on the floor. On being asked, he along with driver of the informant went to Anini police station to inform about the incident. He came to know that the injured Birey Mijar was taken to Dibrugarh for his treatment. Subsequently, de died during treatment.

27. In his cross-examination, P.W.4 replied that when he entered into the house of the informant, he found that the deceased Birey lying on the floor in between the entrance door and the fireplace area. He could not say how did Birey sustain injury on his person. He came to know that Birey Mijar died during treatment in the hospital at Dibrugarh.

28. P.W.5 is the seizure witness. He deposed in his evidence that in the year 2010, he was at Anini, working under one Rijam Melo. One day, in the afternoon, he went to the house of informant to cook some items. This witness was declared hostile on the request of the prosecution as he did not say anything about the incident but during cross-examination by the public prosecutor, he(P.W.4) admitted that he stated before the police that on 27.01.2010 he went to the house of Robin Nani to prepare meal for audit party. But he denied the other statement made before the police during investigation.

29. PW-6 is the Medical Officer who examined the victim at District Hospital, Anini. He deposed before the court that in the year 2010 he was posted at District Hospital, Anini. On 27/01/2010 at about 09:30 p.m., when he was on emergency duty, a patient was brought to the hospital by the then Executive Engineer Robin Nani, along with the police personnel of the Anini Police Station. The name of the patient was Birey Mijar. The patient was admitted in the casualty room. He attended the patient and on examination, he found that the condition of the patient was very serious, his whole neck was swollen up. At that time, the patient was conscious and could say few words. There were injuries on the left side of the neck measuring about 1 inch and blood was oozing out from the wound. After giving some basic preliminary treatment, the patient was referred to Dibrugarh vide exhibit 17(injury report).

30. In his cross examination, PW-6 replied that the punctured wound which he referred in his report was a deep cut injuries generally caused by sharp weapons like knife, dagger etc. One question was put to the doctor whether the injury to the deceased could be caused by bullet injuries, wherein doctor replied 'no', because the bullet injuries used to have entry and exit point.

31. PW-7 deposed in her evidence that in the year 2010 she was at Anini with her husband who was working at PWD Anini at that time. The incident took place in the house of the Robin Nani on 27/01/2010 in the evening, in between 6 to 7 p.m. She was present in that house. In that evening there was a dinner party. Her house was nearby, therefore, she went there to help the cook in that dinner party. She was in the kitchen. There were three/four persons in the kitchen. She knew two persons Ram Bahadur Sonar and Hari Chetry. After

some time Robin Nani came to his house. After that they heard the voice of Robin Nani asking whether anybody was in his house. Then his younger brother Nani Obin came to the kitchen and after taking a glass of water rushed towards his quarter and they also followed him. On reaching the room, they found that the deceased person was lying on the bed. She had noticed blood on the neck of the deceased. After sometime police came and the victim was taken to the hospital.

32. In her cross examination, PW-7 replied that Robin Nani is her brother-in-law. She had not heard the sound of gunshot at that time either before or after the incident. She had also not seen anybody coming or going out from that house as she was busy in the kitchen.

33. PW8 is the father of the deceased. He deposed in his evidence that his son was working in the house of Robin Nani at Anini. On receipt of the information regarding injury received by the diseased, he came to Aditya Hospital, Dibrugarh. At that time, his son was alive but could not speak. Robin Nani told him that his son was assaulted by some local youths of that area at Dibrugarh Hospital. Subsequently, his son died in the hospital.

34. PW-9 is another doctor who was working as a resident doctor at Aditya Hospital, Dibrugarh at the relevant time of incident. According to him, he issued a death certificate of the deceased Birey Mijar. On 31/01/2010 the victim was admitted to the hospital. As the victim was assaulted, there was difficulty in breathing.

35. P.W.-10 came to the spot after the incident who accompanied the deceased to the hospital along with the informant Robin Nani.

36. P.W.-11 is the doctor who conducted postmortem examination on the dead body of the deceased. He deposed in his evidence that in the year 2010, he was working as forensic medicine demonstrator in Assam Medical College and Hospital, Dibrugarh. On 31/01/2010, he conducted postmortem examination on the dead body of Birey Mijar on police requisition and found the following injuries-

1. External: partly healed abrasion, present on left side of neck 2X1 CM in size, 5 cm

lateral to mid line, 10 cm above to right sterno clavicular joint, scab formation on the area of abrasion.

2. Internal examination : cranium and spinal canal: dislocation of c 6 and c7, brain is congested, spinal cord: contusion present c5 to c7 level. Both lungs are congested and oedumatus, mild consolidation present on both lower lobe.

37. The probable weapon to cause the injury found on the dead body to be blunt weapon. Doctor opined that the cause of death was due to Spiral Shock resulting from injury to the spiral cord. All the injuries were antermortem caused by blunt force impact.

38. P.W.-12 and 13 are the seizure witnesses. According to both 12 and 13, a dao was seized in their presence.

39. P.W.-14 is another medical officer of Aditya hospital, Dibrugarh who attended the deceased in the OPD of the hospital and advised for admission in the hospital. On examination of the victim, he found surgical spine injury with respiratory distress and accordingly the patient was admitted in the hospital.

40. P.W.-15 is the investigating officer. He deposed in his evidence that a written complaint was received on 27/01/2010 from one Robin Nani with an allegation that his servant has been beaten up by the accused persons. After registration of the case, the then O/C endorsed him the case for investigation and accordingly the investigation was initiated. On receipt of the telephonic message regarding incident occurred in the house of Robin Nani, he along with other police personnel went to the spot i.e. in the house of Robin Nani and found many people. On being asked, the complainant told him that the two accused persons Ngapi Tayu and Rijam Melo came to his house and attacked his servant. Then he entered into the house of the complainant. The incident took place in a room where the bhukari(fire heater) were placed. He found the servant Birey Mijar was lying on a bed with a cloth over his neck. The victim was in a very serious condition and was bleeding from his neck. He immediately sent him to the hospital. He found some bamboo pieces and the firewood in the place of incident. He also seized a local dao. Subsequently, the victim was referred to Dibrugarh Hospital. After

completion of investigation, he submitted charge-sheet vide Ext. 13.

41. In his cross examination, PW 15 replied that he had noticed blood on the floor where the incident occurred. He did not see any empty cartridge or head of bullet at the place where it was hit. During investigation, he recorded the statement of the witnesses, prepared the sketch map vide Ext.12.

42. Though the case was registered under section 452/352/506/34 IPC but charge-sheet was submitted under Section 452/352/506/302/426/34 IPC. And charge was also framed accordingly but after completion of trial, the learned trial court convicted the appellants under section 448/352/34 IPC as it is not proved beyond reasonable doubt that both the accused/appellants committed murder of the victim. The Learner Trial Court held that the evidence of PW 1, 2, 3 & 4 suggested that both the accused entered into the official quarter of PW3 in aggressive way. It was also supported by the other witnesses that both the accused/appellants entered into the house of the complainant with a dao without being invited and had altercation with the complainant and slapped the deceased , as a result of which, learned trial court held that the accused be convicted under section 352 IPC. None of the witnesses indicated how the victim died, though they were present at the relevant time in the residential quater of the informant. As per medical officer who conducted postmortem examination on the dead body of the deceased, stated that the victim sustained punctured wound on his neck caused by sharp object. Though it is alleged by the witnesses that the accused/appellants Ngapi Tayu was carrying a dao but none of the witnesses stated that the injury found on the person of the victim was caused by the accused Ngapi Tayu by a dao. According to PW 2, 3, 4 & 5 they had seen the accused slapped the victim. As such, learned trial court decided to convict the accused/appellants under Section 352 IPC.

43. An offence under section 352 IPC has following ingredients- (i) there was assault or use of criminal force against any person; (ii) that such assault or use of criminal force was otherwise than on grave and sudden provocation given by that person.

44. To bring home an offence under section 352 IPC, the prosecution is to prove that in

relation to the victim, the accused has used criminal force, i.e. intentional use of force as defined in section 349 IPC has been made and the said force has been used without the consent of the victim and the said force has been used with the view to commit an offence or with the intention to cause or knowing it to be likely that the offender will cause injury, fear or annoyance to the person to whom it is used, or that in relation to the victim, the accused has caused an assault, the offender made any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture of repression is about to use criminal force to the victim.

45. In the case in hand, the victim did not adduce any evidence as he died. But the prosecution has failed to prove the fact that the accused/appellants had caused injuries which resulted in death of the deceased. PW 2, 3, 4 and 5 stated that the accused slapped the victim. From the FIR as well as the evidence of the witnesses, it cannot be ascertained how the victim died. According to the witnesses, the deceased sustained injuries on his neck. The presence of the accused/appellants are not in dispute on the spot, however, as it is not proved that the victim died or sustained any injury due to assault hurled by the accused/appellants, Section 352 IPC does not come into play.

46. Coming to the offence under Section 448 IPC which provides punishment for house trespass which is reproduced as below-

“Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.”

47. Section 442 IPC defines house trespass as “Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit “house-trespass”. “Explanation.—The introduction of any part of the criminal trespasser’s body is entering sufficient to constitute house-trespass.”

48. House trespass is an aggravated form of criminal trespass i.e. for the offence of house trespass there has to have all the ingredients of criminal trespass along with the ingredients of Section 442 IPC.

49. Section 441 IPC provides criminal trespass-

“Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit ‘criminal trespass’.”

50. A bare look at the provisions, it reveals that the Section requires(i) entry into or upon property in the possession of another (ii) if such entry is lawful then unlawful remaining upon such property (iii) such entry or unlawful remaining must be with intent to commit an offence or to intimidate insult or annoy any person in possession of the property.

51. Trespass is a generic name for various torts for which the remedy to the aggrieved person is with the civil court and [section 441](#) IPC defines criminal trespass which is a species of trespass and the criminal court would take cognizance of the trespass only when the trespass complained is of criminal kind as defined in the section and not otherwise.

52. In the case in hand, as has come in the testimony of the complainant and other witnesses that both the accused/appellants were present in the house of the informant. According to P.W.2, P.W.3, P.W.4 and P.W.5, the appellant Ngapi Nayu slapped and kicked the deceased Birey Mijar. Except this, the witnesses were silent why the accused/appellant trespassed into the house of the informant. Be it what it may, the prosecution is under legal obligation to prove each and every ingredient of the offence alleged against the accused beyond reasonable doubt. Suspicion, howsoever, strong it may cannot replace the standard of prove required to establish the guilt of the accused. In the present case, the prosecution has failed to discharge his onus. The evidence available on record is not sufficient enough to substantiate the guilt of the accused. So the offence under Section 448 IPC is also not proved

against the accused/appellants beyond all reasonable doubt.

53. The legal position regarding effect of defective charge may be now appreciated. The charge is in the shape of a notice to the accused of what the prosecution intends to prove against him. The object of charge is to inform the accused of the case which he is required to defend. The errors in the charge can be regarded as immaterial if the accused is not prejudiced in his defence. A mere omission to state the offence or the particulars required to be stated in the charge does not vitiate the trial unless it is demonstrated that the accused is misled due to any erroneous statement in the charge. In *R.K. Dalmia vs. Delhi Administration*, AIR 1962 SC 1821, the Apex Court held that vagueness of charge will not make the trial illegal when no prejudice is caused to the accused. In *Omprakash vs. State of Uttar Pradesh* AIR 1960 SC 409 and *Tulsi vs. State of Uttar Pradesh* AIR 1963 SC 666, the Apex Court held that where the accused had not raised objection regarding defect in charge at an earlier stage but raises it at a belated stage, the plea of prejudice also cannot be entertained.

54. Chapter XVII of the Code of Criminal Procedure deals with 'charges' in a criminal case. Sections 211 to 213 deal with the particulars which are required to be contained in a charge in a criminal trial. These provisions are made to ensure a fair procedure by which a person accused of an offence should be tried a procedure in compliance with the requirement of the mandate of Article 21 of the Constitution of India. The accused are entitled in law to know with precision what is the charge on which they are put to trial. It was held by the Hon'ble Supreme Court that in *Esher Singh v. State of Andhra Pradesh*, reported in (2004) v. 11 SCC 585 which reads as follows-

"It is the precise formulation of the specific accusation made against a person who is entitled to know its nature at the earliest stage. A charge is not an accusation made or information given in the abstract, but an accusation made against a person in respect of an act committed or omitted in violation of penal law forbidding or commanding it. In other words, it is an accusation made against a person in respect of an offence alleged to have been committed by him. A charge is formulated after inquiry as distinguished from the popular meaning of the word as implying inculcation of a

person for an alleged offence as used in Section 224 of the IPC."

55. The legal consequences of framing defective charges or omission in charges was considered by the Hon'ble Supreme Court in ***Dalbir Singh vs. State of U.P.*** reported in ***2004 VI.5 SCC 334***, it was held that-

"Section 464 of the Code deals with the effect of omission to frame, or absence or, or error in, charge. Subsection (1) of this section provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby."

56. Reverting to the case in hand, it appears from the charge report that charge was framed under Section 452/352/506/302/426/34 IPC which is reproduced below-

hereby charge you(2), Accused Nyapi Tayu & Rijam Melo

First: That you, on or about the 27th day of January 2010 at about 18.45 Hrs you committed house trespass by entering into the house of Sri Robin Nani, Executive Engineer with preparation to cause hurt to Sri Robin Nani.

And thereby committed an offence punishable under section 452 Indian Penal Code and within my cognizance.

Secondly: That you, on or about the 27th day of January 2010 at about 18:45 Hrs at Anini you both assaulted and used criminal force against Sri Robin Nani, Executive Engineer and his maid servant deceased Birey Mijar.

And thereby committed an offence punishable under section of 352 of the Indian Penal Code, and within (3) My cognizance.

Thirdly: That you, on or about the 27th day of January 20'10 at Anini you both

committed criminal intimidation by threatening Sri Robin Nani, Executive Engineer, PWD with injury to his person.

And thereby committed an offence Under Section of 506 of the Indian Penal Code, and within (8) My cognizance.

Fourthly That you, on or about the 27th day of January 2010 at about 18:45 Hrs at new Anini, both of you committed murder by intentionally causing the death of Birey Mijar and thereby committed an offence punishable U/S 302 IPC, within the cognizance of the court of session.

Fifthly: That you, on or about the 27th day of January 2010 at new Anini you both committed mischief by causing wrongful loss or damage to the property of Sri Robin Nani and you have thereby committed an offence punishable U/S426 IPC and within my cognizance.

Sixthly: That you, on or about the 27th day of January 2010 at 18:45 Hrs at New Anini you both, i.e, Nyapi Tayu and Rijam Mclo committed a criminal act in furtherance of a common intention and you are thereby found guilty U/S 34 IPC.

57. It is interesting to note that charge was framed separately under Section 34 Cr.P.C. which appears to be wrong. The charge should be like that-

“in furtherance of your common intention, you committed murder by intentionally causing the death of Bijay @ Birey Mijar and thereby committed an offence punishable under Section 302/34 IPC within the cognizance of the court of Sessions” and accordingly in other sections also.

58. It is obvious from the above that an erroneous or irregular or even absence of a specific charge shall not render the conviction recorded by a Court invalid unless the appellate court comes to a conclusion that failure of justice has in fact occasioned thereby.

59. Regarding recording of statement under section 313 Cr.P.C. by the learned Sessions

Judge, it is really shocking that the Learned Sessions Judge has recorded the statement of both the accused under section 313 Cr.P.C. together and none of the accused had put their signatures in their statements recorded under Section 313 Cr.P.C.

60. In the case of Nar Singh (supra), Hon'ble Supreme Court held that –

“Section 313 Cr.P.C. prescribes the procedural safeguard for an accused giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of section 313 lies in that it imposes a duty on the court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby an opportunity is given to him to explain any such point. Undoubtedly, the importance of a statement under Section 313 CrPC, insofar as the accused is concerned, can hardly be minimized. The statutory provision is based on the rules of natural justice for an accused who must be aware of the circumstances being put against him so that he can give a proper explanation to make that case.”

61. In another case, **Ajay Singh vs. State of Maharashtra**, reported in **2008 (1) SCC(Cri) 371**, Hon'ble Supreme Court observed as follows.

“13. The object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

14. The word 'generally' in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the

section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting [Section 313](#) of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.

15. The importance of observing faithfully and fairly the provisions of [Section 313](#) of the Code cannot be too strongly stressed:

“30...It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questionings must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.”

62. In view of the settled proposition of law, it can be said that the statement of the accused recorded under Section 313 Cr.P.C. are mandatory by putting the question to each accused separately and each and every accused should be given an opportunity to answer the question, to make the case. In the case in hand, it is apparent that the learned Sessions Judge failed to understand the importance of recording the statement of the accused/appellants under Section 313 Cr.P.C. It is also noticed that though it is recorded together, but there is no signature of the accused/appellant below the statement recorded. Generally, a format is provided to the court to record the statement of the accused under section 313 Cr.P.C. which has also not been followed by the Sessions Judge while recording

the statement of the accused under section 313 Cr.P.C. It appears from the record that the incident occurred in the year 2010 and after that, 13 years have gone. Judgment was delivered in the year 2017. No useful purpose will be served to remand the matter again before the trial court for recording the statement of the accused/appellants under section 313 Cr.P.C.

63. This being the position, the inevitable conclusion is that the prosecution has failed to establish the accusations. The conviction and sentence dated 16.02.2017 passed by the learned Sessions Judge, Tezu in connection with Sessions Case No. 10/L/2010 is hereby set aside.

64. In the result, the appeal is allowed. The appellants are acquitted and set at liberty forthwith.

65. Send back the LCR.

JUDGE

Comparing Assistant