

GAHC010001182022



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

Case No. : CRL.A(J)/9/2022

Arjun Gowala,
W/o Sri Nirmal Gowala,
Vill- Nilpur Tea Estate,
P.S. – Biswanatyh Chariali,
District- Biswanath (Assam).

.....Appellant.

Versus

State of Assam
Represented by Add. PP, Assam.

.....Respondents.

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MARLI VANKUNG

For the appellant : Mr. N. Hasan. Amicus Curiae
For the respondents : Ms. S. Jahan Addl. PP, Assam.

Date of hearing & judgment : 02.08.2023.

JUDGMENT AND ORDER (ORAL)

(M. Zothankhuma, J)

Heard Mr. N. Hasan, learned Amicus Curiae. Also heard Ms. Jahan, learned

Addl. Public Prosecutor.

2. This appeal has been filed against the impugned Judgment dated 30.03.2021 passed by the Additional Sessions Judge (FTC), Biswanath Chariali, Assam in Sessions Case No. 50/2019, by which the appellant has been convicted under Section 302 IPC for killing his younger brother. The appellant was thereafter sentenced to undergo R.I for life with a fine of Rs. 10,000/-, i.d. S.I for 6 months.

3. The prosecution case in brief is that an FIR dated 21.08.2018 was submitted by the father of the appellant to the Officer-in-charge, Biswanath Chariali Police Station stating that around 7:30 P.M on 20.08.2018, the appellant picked up a quarrel with his youngest son inside their house with the intention of killing him. The appellant attacked the youngest son with a sharp meat chopping knife causing serious injury. The injured was taken to Biswanath Civil Hospital by Ambulance. The deceased was brought to the hospital, where he was declared dead. In pursuant to the FIR, Biswanath Chariali P.S. Case No. 205/18 under Section 302 IPC was registered on 21.08.2018.

4. After investigation was completed, the Investigating Officer (I.O) submitted a Charge-sheet, on finding a prima facie case against the appellant under Section 302 IPC for having killed his younger brother. Charge under Section 302 IPC was thereafter framed by the learned Trial Court against the appellant, to which he pleaded not guilty and claimed to be tried.

5. The learned Trial Court thereafter examined 7 Prosecution witnesses and after examination of the appellant under Section 313 Cr.PC, came to a finding

that the appellant was guilty of having killed his younger brother. The appellant was thus convicted under Section 302 IPC and sentenced accordingly.

6. The learned Amicus Curiae submits that the evidence of the cousin (PW-3) of the appellant, is to the effect that he had heard that the appellant had caused the death of his younger brother from his younger sister Manisha Gowala. However, Manisha Gowala was not made a witness by the prosecution. He also submits that while the 1st I.O (PW-7) had done the investigation, the 2nd I.O had collected the post mortem report and submitted the Charge-sheet. However, the 2nd I.O was not examined by the learned Trial Court. He also submits that the appellant was provoked by the deceased, as the evidence of PW-1 showed that the appellant had asked the deceased as to why he had assaulted their father, which was denied by the deceased and was told to ask their father about it. It was because of the provocation on the part of the deceased that the appellant stabbed his younger brother and as such, the First Exception to Section 300 IPC was attracted to this case. He also submits that as the appellant had stabbed the deceased only once, the same showed that there was no intention to cause the death of the appellant. He accordingly prays that the conviction of the appellant should be under Section 304 Part-II IPC.

7. Ms. S. Jahan, learned Addl. Public Prosecutor, on the other hand submits that the deposition of PW-1, who is the wife of the deceased and the extra judicial confession made to PW-3, which is reflected in the cross examination of PW-3, coupled with the Doctor's evidence proves that the appellant had caused the death of the deceased. She further submits that the father of the deceased had submitted the FIR and had also taken the appellant to the Police Station.

Further, the weapon (knife) had also been seized from the possession of the appellant, when he surrendered before the Police. Thus, the above facts having proved the fact that the appellant had caused the death of the deceased, the impugned Judgment passed by the learned Trial Court should not be interfered with.

8. We have heard the learned counsels for the parties.

9. As can be seen from the Trial Court records, the FIR has been filed by the father of the appellant. It was the father of the appellant who had taken the appellant to the Police Station, where the appellant surrendered and was arrested. The knife (weapon) was also recovered from the possession of the appellant at the Police Station.

10. The evidence of PW-1, who is the wife of the deceased is to the effect that the appellant had come into their house and when PW-1 went to the kitchen to fetch water for her husband. She heard her husband shout "Maa". On entering the room, PW-1 saw the appellant fleeing the scene after having stabbed her husband with a knife. Her husband held her hand and told her that "Arjun has stabbed me". PW-1 also stated that the appellant had been threatening her husband and herself, by stating that he would assault them. When her husband pulled her by her hand, she fell down with him. Her sister-in-law, father-in-law, mother-in-law, husband and herself were at home. Thereafter they took the deceased to the Civil Hospital. However, her husband expired after he had been taken to the Civil Hospital. She also stated that the appellant on entering the room, asked her husband as to why he had assaulted their father, whereupon

the deceased had replied that he had not assaulted their father and told the appellant to ask their father about it. Thereafter the appellant had stabbed her husband.

11. In her cross-examination, PW-1 stated that no quarrel took place between her husband and her father-in-law, though her sister-in-law falsely stated that the appellant had been assaulted. PW-1 further stated that the appellant had consumed liquor before coming to their house and no quarrel had taken place between the appellant and the deceased earlier. The appellant came carrying a knife and after the incident, her in-laws went out to call a vehicle.

12. The evidence of PW-2, who is a villager is basically hearsay evidence, as he stated that he had heard from others that the appellant had stabbed the deceased.

13. The evidence of PW-3, who is the cousin of the appellant, is to the effect that he was told by his younger sister Manisha Gowala that the appellant had stabbed the deceased. Thereafter he went to the Civil Hospital to see him. PW-3 stated that he did not witness the incident. However, after the assault, the appellant returned to their house and told him that he had assaulted his younger brother (deceased). Thereafter he fled away.

14. The evidence of PW-4, who is the Village Defence Party (VDP) Secretary is hearsay, inasmuch as, he had been told about the incident and was not an eyewitness to the same.

15. The evidence of PW-5, who is the mother of the appellant and the deceased, is to the effect that she heard the deceased shout "Maa" but she did not have any knowledge as to how the deceased died, as she did not witness

the scene.

16. The evidence of PW-6 is to the effect that he was the Senior Medical & Health Officer at Behali Block PHC on 21.08.2018, where he conducted the Post Mortem examination of the body of the deceased. PW-6 stated that the following injuries were seen by him, which is as follows :

“One penetrating wound of size 3 X .5 cm piercing upto peritoneum at right supra lateral area of the umbilicus.

There was fracture of right ribs, third, fourth and fifth at the para vertebral line.

The right side pleura found punctured.

Right lung punctured by fracture ribs.

Heart found empty.

Peritoneum contained blood.

Liver found punctured posteriorly.

All the injuries were of ante mortem in nature.

The time since death was within 24 hours.

In the opinion of PW-6, death was due to cardio vascular accident following severe internal haemorrhage, leading to severe shock as a result of the injuries sustained. Ext. 2 was the post mortem report and Ext. 2(1) was identified as his signature.

17. The evidence of PW-7, who is the First Investigating Officer (IO), is to the effect that while he was on duty as Sub-Inspector of Police in Biswanath Police Station, the VDP Secretary informed the police over phone that the appellant had caused grievous injury to the deceased, by stabbing the deceased with a knife. Accordingly, GDE No.608 dated 20.08.2018 was registered and he went to the place of occurrence. He learnt that the appellant had stabbed his younger brother and fled the scene. A sketch map of the place of occurrence was drawn

and he seized some bloodstained clothes. He took the statements of two witnesses and went to the Biswanath Civil Hospital, where he learnt that the deceased had died. On arriving back at the police station he came to learn that the appellant surrendered himself and had handed over the knife with which he had killed his younger brother. The knife was thereafter seized. On 21.08.2018, the father of the appellant lodged an FIR in connection with the incident and the same was registered. Inquest was done on the dead body and the same was sent for Post Mortem Examination. As he retired from service on 31.01.2019, he handed over the Case Diary (CD) to the OC. The succeeding Investigating Officer (IO) collected the Post Mortem report and submitted the charge-sheet.

In his cross-examination, PW-7 stated that he did not get the knife examined by the Forensic Expert and he had seized a "gamocha" in the house.

18. The examination of the appellant under Section 313 Cr.P.C. is basically to the effect that he had admitted to having stabbed his younger brother in the belly and that his father had taken him to the Biswanath Police Station.

19. On considering the above facts, we find that the evidence recorded by the prosecution witnesses, especially PW-1 and PW-3 coupled with the evidence of the Doctor (PW-6) proves that the appellant had killed his younger brother. Also explanation of the appellant under Section 313 Cr.P.C. corroborates the evidence that the appellant had caused the death of the deceased.

20. Though the learned Amicus Curiae has taken a stand that the Second IO had not been made a witness in the case, we find that no prejudice has been caused to the appellant on account of the Second IO not having been made a prosecution witness. In the case of ***Behari Prasad vs. State of Bihar***,

reported in **(1996) 2 SCC 317**, the Apex Court has held that non-examination of the Investigating Officer was not fatal to the prosecution case, especially when no prejudice was likely to be suffered by the accused. As can be seen, nothing has been brought by the appellant to show that any prejudice has been caused to him, by the non-examination of the Second Investigating Officer. We also find that the informant, i.e. the father of the appellant, had not been made a prosecution witness as he had died prior to the trial proceedings having commenced. The fact is also clear from the charge-sheet where the death of the informant has been mentioned.

21. With regard to the submission of the learned Amicus Curiae that Exception-I to Section 300 IPC can be attracted to the facts of this case, we find that there is nothing in the evidence to attract the said provision, inasmuch as, the answer given by the deceased to the appellant that he had not assaulted his father and to ask their father about it, cannot in our view, amount to a provocation. In any event, even if it is assumed there was some provocation from the deceased which resulted in retaliation on the part of the appellant, it is settled law that the retaliation has to be proportionate to the provocation. However, the stabbing of the deceased cannot be said to be proportionate to the answer given by the deceased to the appellant. In the case of ***Dauvaram vs. State of Chattisgarh***, reported in ***AIR 2022 SC 3620***, the Apex Court has held that retaliation should be proportionate to the provocation.

22. In the case of ***Ajit Singh vs. State of Punjab*** reported in **(2011) 9 SCC 462**, the Apex Court has held that in order to hold whether an offence would fall under Section 302 or Section 304 Part I of the Code, the Courts have to be extremely cautious in examining whether the same falls under Section 300 of the Code which states whether a culpable homicide is murder, or would it fall

under its five exceptions which lays down when culpable homicide is not murder. As stated above, there is nothing to show that Exception I to Section 300 IPC is attracted to the facts of this case.

23. In the case of ***Sansar Chand vs. State of Rajasthan***, reported in ***(2010) 10 SCC 604***, the Apex Court has held that there is no absolute Rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. In the present case, the appellant had told the PW-3 that he had assaulted the deceased. This extra-judicial confession has been corroborated by the evidence of PW-1, besides the fact that the appellant had also surrendered before the police when he was taken to the police station by his father. Further, the weapon was also recovered from the appellant when he took the same to the police station.

On considering all the above evidence that has been recorded by the learned Trial Court, coupled with the fact that the appellant has not made any alibi for not having committed the crime, we are of the view that the prosecution has been able to prove the guilt of the appellant beyond all reasonable doubt. In that view of the matter, we do not find any reason to come to a finding that the case of the appellant comes within the First Exception to Section 300 IPC.

24. In view of the above reasons, no ground has been made out to interfere with the impugned judgment dated 30.03.2021 passed by the Court of the Additional Sessions Judge (FTC), Biswanath Chariali, in Sessions Case No.50/2019. The appeal is accordingly dismissed. Send back the LCR.

25. In appreciation of the assistance provided by Mr. N. Hasan, the learned Amicus Curiae, the appropriate fee payable to him should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant