

GAHC010003262018



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

Case No. : CrI.A./51/2018

RAJU KUMAR DEKA@ RAJU KUMAR BORA
SON OF LATE LALITDEKA VILLAGE PAMILAGARH P.S. KACHUA
,P.O.SIMALUGURI, PIN 782426 DIST NAGAON, ASSAM

VERSUS

STATEOF ASSAM
REP. BY ,PP .ASSAM

2:SRI NIRMAL CHANDRA KAKATI
AB II OF POLICE
I/C BLFR P.P PS -DIPHU DIST -KARBI ANGLONG 78246

Advocate for the Petitioner : MR. S C KEYAL

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 16-08-2023
(S.P. Khaund, J)

1. This appeal is preferred seeking defeasance of the judgment and order dated 22.09.2017 and 25.09.2017 passed by the learned Sessions Judge, Karbi Anglong in

connection with Sessions Case No. 27/1994 corresponding to G.R. Case No. 555/1993 arising out of Diphu P.S. Case No. 204/1993 u/s 302/201/34 of the Indian Penal Code (IPC for short). The appellant was convicted u/s 302 IPC and sentenced to Rigorous Imprisonment for life and to pay a fine of Rs. 5,000/- with default stipulation and u/s 201 IPC and sentenced to undergo Imprisonment for 1 year. The sentences are to run concurrently.

2. The FIR unfolds that upon investigation of the place of occurrence (PO in short) and examination of witnesses and in connection with G.D. Entry No. 20 dated 02.08.1993 made at Borlangfar PP., Sri N.C. Kakoti (hereinafter referred as the informant) learnt that on 02.08.1993 at about 1 AM midnight, Smt. Tukheswari Bora, with the help of Sri Raju Kumar Borah (hereinafter referred as the appellant) hacked Harikanta Borah (hereinafter referred to as the deceased) to death with a '*dao*' in his own government quarter No. 41(C). The face of the deceased was then covered with his '*lungi*' and the naked body of the deceased was put inside two sacks. The dead body was kept under water in a '*nola*' (drain) in the nearby low lying paddy field which was in the Southern side of the railway line about 400 yards away from the PO. The body was tucked under leaves and twigs. In order to conceal evidence, the wife of the deceased Smt. Tukheswari Bora wiped-off the blood stains from the crime scene and washed off her garments. When they were examined in presence of witnesses, both the appellant and Smt. Tukheswari Bora admitted of having committed murder. The appellant led to the recovery of the dead body concealed by him. On the basis of the confessions, the weapon of offence i.e. the dao was also recovered from underneath a wooden stool in the house. Both the appellant and Smt. Tukheswari Bora had an illicit relationship.

3. This FIR was registered as Diphu P.S. Case No. 204/1993 u/s 302/301/34 IPC.

4. Investigation commenced and on completion of investigation charge-sheet was laid against the accused, named in the FIR u/s 302/301/34 IPC. After commencement of trial, a formal charge u/s 302/301/34 IPC was framed and read over and explained to the appellant and Smt. Tukheswari Bora. Both the accused adjured their guilt and claimed innocence.

5. To substantiate its stance the prosecution examined 9 witnesses and the defence cross-examined the witnesses to refute the charges. On the incriminating materials arising against them, several questions were asked to the accused as per provisions of Section 313(1)(b) of the Code of Criminal Procedure (Cr.PC for short) and their responses were recorded. The accused did not tender any evidence in defence. It is pertinent to mention at this juncture that the accused Smt. Tukheswari Bora @ Tosheswari Bora absconded at the time the arguments were to be placed before the trial Court.

6. The trial Court decided this case on the following points:-

“1. Whether the accused person Raju Kumar Borah in furtherance of common intention on 02.08.1993 at about 1 am committed murder of Hari Kanta Bora intentionally?”

2. Whether the accused person Sri Raju Kumar Borah in furtherance of common intention on 02.08.1993 at about 1 am after committing a murder caused certain evidence connected with alleged offence disappeared with intention to screen them?”

Although the IO in this case was not examined, both the accused were convicted u/s 302 IPC as the informant conducted a major part of the investigation. It was held by the trial Court that the informant, PW-1 prepared the seizure-list, recovered the body of the deceased and also conducted inquest over the body. During trial the informant passed away. It was held that the informant prepared the seizure-lists, Exts-1 and 2 which reveal seizure of two gunny bags, one *lungi* and one *gamocha* of the deceased in presence of the witnesses PW-1, PW-3, PW-5 and PW-8. Ext.-2 depicts that one dao was seized by the informant on being led

by the accused in presence of the witnesses PW-1 and PW-6. The defence had not disputed Exts.-1, 2 and 3. As no major contradictions could be elicited by the defence through the cross-examination of the witnesses, it was held that the prosecution was able to bring home the charges levelled against the appellant. The evidence of Gorakh Prasad, PW-1 was considered to be the evidence of a star witness and his evidence was relied upon to convict the appellant. The admission of the accused before the police was held to be the *extra judicial confession*. The evidence of Rajendra Singh, PW-8 was also relied upon to convict the appellant. It was also held that the confessional statement marked as Exts.-4 and 5 were properly recorded by the Magistrate and operates as conclusive proof against the appellant and co-accused.

7. The learned counsel for the appellant Mr. D. Talukdar has assailed the decision of the learned trial Court on the ground that the trial Court relied on the confessional statement which was not properly recorded by the Magistrate. It is submitted that no time for reflection was given to the appellant when his confession u/s 164 Cr.PC was recorded. He was produced before the Magistrate at 4:30 PM and thereafter his statement was recorded. The appellant is prejudiced because he was not given sufficient time for reflection to ponder over the ramifications of his confession. It is also submitted that an important family member i.e. the daughter of the deceased was not examined as a witness who may have been privy to the incident that occurred in her house on the fateful night.

8. The learned Addl. P.P. Ms. B. Bhuyan laid stress in her argument that the appellant failed to discharge his burden u/s 106 of the Indian Evidence Act, 1872 (Evidence Act for short), by explaining the chain of circumstances appearing against him. The remaining part of the arguments will be discussed at the appropriate stage.

9. On the anvil of these submissions the question that falls for consideration is whether the circumstances formed a complete chain sustaining conviction of the appellant.

10. To decide this case in its proper perspective, the evidence is once more reappraised.

11. Sri Gorakh Prasad testified as PW-1 that the appellant is a co-villager. The deceased was a gang man in the Railway Department. He used to stay with his wife and children in the railway quarter. The appellant was also in the railway quarter of the deceased. The incident occurred on 02.08.1993. At the time when he was in the bazaar near the railway station, he met Ratan Dutta who informed that the deceased was killed in his quarter and the gang man Rajendra (PW-8) informed Ratan about the incident. Ratan also informed him that when he enquired at 8 AM about the incident, Rajendra told him that the daughter of the deceased informed him that her mother killed her father. Ratan asked the wife of the deceased about her husband, and she replied that her husband had gone to his house at night. On receiving this information from Ratan he, PW-1 and Krishna (PW-2) informed the police at Barlangfar Outpost about the incident. Ratan also informed that the appellant and the wife of the deceased was planning to escape. He (PW-1) informed the police about the incident. The police proceeded towards the PO. They noticed the wife of the deceased and the appellant were all dressed up. When they confronted about the deceased, wife of the deceased replied that the deceased went to his home town by the night train. Police then arrested the appellant and entered into the house. The police noticed that the house was mopped clean and the wall was also cleaned upto a height of 2 ft. They noticed blood stains on some parts of the wall and on the bicycle. On being interrogated the appellant confessed of committing murder of the deceased. Both the accused confessed that the body was concealed at the *beel* (water body) at a distance of about 300 to 400 meters. The appellant led the police to the

place where the dead body was concealed.

12. PW-1 further stated that he, accompanied by Ratan Dutta, Ram Ch. Prasad, Krishna Singh, Raju Singh went to the spot where the police went. The appellant went down to the *beel* and hauled up the dead body by removing the twigs piled up over the body. The dead body was packed inside two gunny bags and tied up with gamocha. The police asked the appellant to open the bags and they saw the dead body. They all noticed the injuries on the body of the deceased. Police seized all the articles recovered along with the body. The witness identified the seizure-list as Ext.-1 and he proved his signature as Ext.-1(1). He identified the two gunny bags as Material Ext.-I and Material Ext.-II was the yellow coloured *lungi* and Material Ext.-III was the *gamocha*. The police seized the dao produced by the appellant. He identified the seizure-list as Ext.-2(1) and the dao with a wooden handle as Material Ext.-IV. The informant took the body to the police station. The wife of the deceased denied that she killed her husband whereas the appellant admitted that he had killed the deceased.

13. In his cross-examination PW-1 admitted that the police did not record his statement but had taken down his signatures. He heard about the incident from Ratan. He did not know when the incident took place. He had not asked others about the incident. The dao was clean and the police did not take photographs of the blood stains on the wall.

It is clear from the evidence of PW-1 that he heard about the incident from Ratan.

14. Ratan Kr. Dutta testified as PW-3 that the accused Smt. Tukheswari Bora is known to him but the appellant is not known to him. He used to see the male accused (appellant) in the house of the deceased but he did not know him. He accompanied the police to the PO

and saw the dead body inside a gunny bag. He did not know who killed the deceased or who had concealed the dead body.

15. It is apt to mention at this juncture that PW-1 had given a detailed account of how he learnt about the incident. The PW-1's evidence reveals that he heard about the incident from Ratan Dutta, but Ratan Dutta's evidence does not corroborate the evidence of PW-1. The extra judicial confession allegedly made by the accused in presence of PW-1 is not corroborated by the evidence of PW-3. Moreover due to the presence of the police at that time, this admission by the accused would be deemed to be inadmissible as being hit by the embargo contained in Section 25 of the Evidence Act. PW-3 has already denied any knowledge about the incident. Thus the evidence of PW-1 cannot be accepted, being hearsay evidence.

16. The evidence of PW-8 was also heavily relied upon by the trial Court. Sri Rajendra Singh deposed as PW-8 that the accused persons are known to him. He served as a Trackman in the Indian Railways at Lumding. The deceased was also an employee in the Indian Railways. The deceased Harikanta Borah's quarter was about 30/40 ft. away from his quarter. The incident occurred at night, in the year 1993. On the following day at about 7 AM, he went to the house of Harikanta Borah and called him but his wife came out of the quarter and informed him that Harikanta had gone to Lanka. While returning from the house of Harikanta Borah, he noticed his daughter playing outside the quarter. Harikanta's daughter informed him that her mother along with another person hacked her father (Harikanta) on the previous night and put his body in a bag and threw the body in the *bee* and covered the body with twigs and plants. He, PW-8 then went to meet the Station Master at Barlangfar Railway Station and informed him about the incident. As advised by the Station Master, he

informed his seniors about the incident, and he proceeded to Barlangfar OP. When he reached the PO, the police was already present and Harikanta Borah's daughter informed the police that her mother (Tosheswari) alongwith another person had hacked her father with a dao and put his dead body inside bags and concealed the body in the *beel*. The police arrested the accused. On being confronted by the police, the accused admitted that they had killed Harikanta Borah with a dao and placed his body in bags and concealed the bags in a nearby *beel*. Both the accused had shown the place where body was thrown and the body was pulled out of the *beel* by the appellant. The body was inside two bags and the opening of the bag was tied with a *gamcha*. The appellant opened the bag and pulled out the body of the deceased. He, PW-8 recognized the body of the deceased.

17. It is true that the PW-8 learnt about the entire sequel of events from the daughter of the deceased, but the irony is that the daughter of the deceased who witnessed the incident was not called as a witness. It is apparent that both the accused admitted their complicity in presence of the police. When an accused admits his complicity before the witnesses in presence of the police, the same cannot be considered as conclusively proven *extra judicial confession*.

18. Sri Krishna Sinha testified as PW-2 that he heard about the incident of murder from the local people. Thus, it can be concluded that the evidence of PW-2 is nothing but hearsay evidence.

PW-2, PW-5, PW-6 and PW-7 were not cross-examined by the defence.

19. Sri Harsh Nath Verma deposed as PW-5 that the appellant is not known to him. A dead body was kept concealed in a gunny bag and the police recovered the body. The police

informed him about the body concealed in the bag and asked him to affix his signature on three sheets of paper. The police informed him that the body was of gangman Bora. Thereafter the police proceeded to the quarter of the gangman and arrested both the accused and appellant (Raju Bora, Smt. Tukheswari Bora).

20. The other seizure witness Ram Ch. Prasad testified as PW-6 that the police took his signature on a sheet of paper. He denied any knowledge about the incident. He stated that the police showed him a dead body concealed in a gunny bag, but he could not recognize the person. He learnt that the dead body was of gangman Bora.

21. PW-7, Bhagwan Bhagat who was declared as the hostile witness denied any knowledge about the incident.

22. The Magistrate who recorded the confessional statement, Sri Gaurav Bothra deposed as PW-9 that on 04.08.1993, he was at Diphu Court serving as EAC and Magistrate, 1st Class. On that day he was endorsed to record the confessional statement of Raju and Smt. Tukheswari Bora. Both the accused were produced before him and they were given time for reflection and they were directed to be produced before him after the time of reflection. Thereafter both the accused Raju (appellant) and Smt. Tukheswari were produced before him one after another. He explained to them about the pros and cons of making a confessional statement. He also advised them that the confessional statement may be used as evidence against them and that they were not bound to make a confession. After observing all the formalities, he recorded their confessional statements.

23. The evidence of the Magistrate clearly depicts that time for reflection was provided to the accused who were arrested in connection with the case. Atleast a minimum of three

hours for reflection has to be provided before any accused makes a confessional statement, but the format of the confessional statement marked as Ext.- 4 does not at all reveal that time for reflection was provided to the present appellant. Moreover the confessional statement was recorded in English but no endorsement or certificate was given by the Magistrate, PW-9 that the confession was made in Assamese and he recorded the same in English and the same was explained to the appellant in the language he understood. The confession has been retracted by the appellant when his statement was recorded u/s 313 Cr.PC. The error committed by the Magistrate in recording the confessional statement of the appellant renders the confessional statement otiose. The confessional statement cannot be considered as conclusive proof.

24. In this case, it has surfaced through the evidence that the eye-witness to the incident was the daughter of the deceased, who was not examined as a witness. To decide this case, the substantive evidence of an eye-witness could not be obtained and at present this case rests solely on circumstantial evidence. It is trite law that each and every circumstance has to be conclusively proved to form a chain of circumstantial evidence. The *extra judicial confession* of the appellant is not substantiated and proved. The informant passed away and his evidence could not be recorded. The IO's evidence was also not recorded. The evidence clearly reveals that the seizure-lists have not been proved by the seizure witnesses. At the cost of repetition, it would be apt to mention that except PW-1 not a single seizure witness has proved the seizure-lists marked as Exts.-1 and 2. The other seizure witnesses are PW-3, PW-5 and PW-6. PW-5 has stated that he affixed his signatures on three sheets of papers and the contents were not read over to him whereas PW-6 was silent about seizure of any article during investigation. The evidence of PW-1 also does not clearly mention the place from

where the dao was recovered and in what manner the dao was recovered. The dao is supposed to be the weapon of offence in this case. The seized articles and the seizure-lists were identified by PW-1 whose evidence is not substantiated by the evidence of the seizure witnesses, and the seizing officer. In this aspect, the seizure lists have no evidentiary value. The evidence garnered by the prosecution is not sufficient to hold the appellant guilty of offence u/s 302/201 IPC. The stray circumstances do not form a complete chain, to hold the appellant guilty of the allege offence.

25. The learned counsel for the appellant relied on the decision of the Hon'ble Supreme Court in the case of *Shivappa v. State of Karnataka*, reported in (1995) 2 SCC 76 wherein it has been observed that:-

“From the plain language of [Section 164](#) CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under [Section 164](#) CrPC, it is manifest that the said provisions emphasis an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under [Section 164](#) CrPC. The failure of the Magistrate to put such questions from which he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of [Section 164](#) CrPC and the rules framed by the High Court is imperative and its non- compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused

should particularly be asked the reason why he wants to make a statement which would surely go against his self- interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of [Section 164](#) namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody."

26. In the instant case it is clear from the format of the confessional statement and from the evidence of the Magistrate, PW-9 that the time given for reflection has not been specifically mentioned. This discrepancy thwarts the credibility of the confessional statement. Moreover the format also reveals that the Magistrate has not noted down in the format if the appellant was produced from the police custody or from the judicial custody. No certificate or endorsement was given by the Magistrate if the confession recorded by him was explained to the appellant to enable the appellant to understand what was recorded by the Magistrate. Here, the appellant gave his statement in Assamese which was recorded by the Magistrate in English.

27. It was also being held by this Court in *Rafiqul Islam v. State of Assam*, reported in 2011 (3) GLT 841 that:-

"Though the confessional statement of the accused was recorded in a format prescribed for recording confession under Section 164 of the Code of Criminal Procedure, the mandatory requirements of Section 164 of the Code of Criminal Procedure have not been strictly complied with in the instant case. The provisions of sub-sections 2 and 3 of Section 164 of the Code of Criminal Procedure are mandatory and under the said provisions the Magistrate is required to explain to the accused, before recording the confessional statement, that:-

(1) he (accused) was not bound to make confession; (2) if he does so, it

might be used against him; and (3) even if he does not confess his guilt, he would not be sent to the custody of the police;

Besides the above explanations, the Magistrate is also required to ask the accused as to why he desires to confess the guilt. In the absence of any of the above requirements, the confession should be treated as incomplete and the same cannot be used against the accused. The above requirement has been made to satisfy the Magistrate that the confession was voluntarily and fit for giving certificate under sub-section 4 of Section 164 of the Code of Criminal Procedure. In the instant case, the Magistrate failed to inform the accused that even if, he does not want to confess his guilt, he would not be sent to police custody. In Gendra Vs. State of Assam, 1981 Cril. Law Journal 430, this Court held that the confessional statement recorded without informing to the accused as to why he desires to confess and he would not be remanded to police Lock-up even if, he does not confess the guilt, cannot be relied on."

28. In this case at hand there is no instance that the Magistrate had recorded the reason why the appellant was willing to make a confessional statement. Recapitulating the entire evidence it is held that the circumstances arising against the accused does not form a complete chain.

29. It is true that the autopsy report given by Dr. Ratul Thakur, PW-4 marked as Ext.-3 depicts that death was the result of massive hemorrhage caused by the multiple incised wounds and slashes inflicted on several parts of the body of the deceased by a sharp weapon leading to cardio respiratory failure. The deceased sustained grievous incised wounds on the scalp, right forehead, right eye, chest abdomen and left buttock. He also sustained fractures on his 5th, 6th and 7th ribs. Although death was homicidal in nature, the appellant could not be brought to book due to the discrepancies in the evidence.

The non-examination of the informant and the IO causes a dent in the evidence. The non-examination of the eye-witness i.e. the daughter of the deceased extends a benefit of doubt to the appellant.

Moreover, the seized articles including the dao were not sent for forensic examination. There is no evidence of any disclosure statement relating to the recovery of the body or any weapon of offence.

30. The judgment and order of conviction impugned by the appellant is not sustainable. The judgment and order dated 22.09.2017 and 25.09.2017 convicting the appellant u/s 302/201 IPC is hereby set aside. Appeal is allowed.

31. The appellant is to be set at liberty forthwith, if he is not wanted in any other case.

32. Sureties stand discharged.

33. Send back the LCR.

JUDGE CHIEF JUSTICE

Comparing Assistant