

GAHC010012172017



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

Case No. : CRL.A(J)/7/2017

JITEN GOWALA
VERSUS
THE STATE OF ASSAM

Advocate for the Appellants : MR DIPAK KR. DEY, AMICUS CURIAE
Advocate for the Respondent : MRS. BORNALI BHUIYAN, APP, ASSAM

Linked Case : CRL.A(J)/8/2017

PARESH TASA
VERSUS
THE STATE OF ASSAM

Advocate for the Appellants : MR DIPAK KR. DEY, AMICUS CURIAE
Advocate for the Respondent : MRS. BORNALI BHUIYAN, APP, ASSAM

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

JUDGMENT (ORAL)

Date : 08-08-2023

(Sandeep Mehta, CJ)

These two Criminal Appeals(J) have been preferred by the appellants herein, namely, Sri Jiten Gowala, and Sri Paresh Tasa, for assailing the judgment and order dated 19.12.2016/ 20.12.2016, passed by the Additional Sessions Judge, Golaghat, in Sessions Case No. 200/2014, whereby the appellants herein

were convicted for the offence punishable under Section 302 IPC and were sentenced to rigorous imprisonment for life and fine of Rs. 1,000/-, in default of payment of fine to undergo further simple imprisonment for six months each. They were also convicted for the offence punishable under Section 201 IPC and were sentenced to undergo rigorous imprisonment for two years and fine of Rs. 500/-, in default of payment of fine to undergo further rigorous imprisonment three months each. Both the sentences were ordered to run concurrently.

2. The brief facts relevant and essential for disposal of the appeals at hand are noted hereinbelow:

One Bimal Saikia (PW1) lodged a written *Ejahar* (Ext. 10) to the Officer-in-Charge, Barpathar Police Station, on 21.04.2013 alleging *inter alia* that on 17.04.2013 his son-in-law Mukul Gogoi (deceased), aged about 30 years, left his house to enjoy 'Bihu feast'. After participating in the 'Bihu feast', while Mukul Gogoi was returning to his home at about 9:30 P.M., an altercation took place between him and accused, Jiten Gowala, at the gate of the house of the accused, whereupon one Kukheswar Phukan (PW-3) intervened and resolved the quarrel. Thereafter all concerned were sent back to their respective homes. However, his son-in-law had not returned home till the date of lodging of the FIR. The informant suspected that the accused might have committed some untoward act with Mukul Gogoi. On the basis of this report, Barpathar P.S. Case No. 67/13 was registered for the offences punishable under Sections 341/342/352 IPC and investigation was commenced.

The prosecution claims that the dead body of Mukul Gogoi was found in a jute gunny bag floating in the Dhansiri River ten days after he had gone missing. The Seizure Memo. in respect of the dead body (Ext. 4) was prepared on 30.04.2013, wherein there is no such indication that the jute gunny bag was

discovered in pursuance of any information provided by the accused. The dead body of Mukul Gogoi was subjected to *post mortem*/ autopsy at K.K. Civil Hospital, Golaghat, at the hands of Dr. Mukul Sarma (PW-12). In the *post mortem* report it was noted that the dead body was decomposed, maggots were present, wound was detected on the skull fronto-temporal region of the head, nasal bone was fractured, there were also fractures on upper limbs and the lungs were ruptured. It was opined that the death was caused due to shock and haemorrhage as a result of the injuries sustained by the deceased and that the injuries were *ante mortem* in nature.

The date of arrest of the accused in this case is not known because, as has been seen in numerous cases, the Arrest Memos. of the accused were never exhibited at the trial. Be that as it may. It is further claimed by the prosecution that on 29.04.2013, one Sri Moon Gogoi (PW-17), the Revenue Circle Officer of Sarupathar Revenue Circle was deputed to remain present at the police station as an Executive Magistrate in connection with recording of the disclosure statement of the accused leading to the discovery. He claims to have gone to the police station from where the accused Jiten Gowala led the Investigating Officer and the police staff to the bank of Dhansiri River. It is further claimed that at that time the accused made a disclosure statement that after killing the deceased, the dead body was put in a gunny bag and was thrown into the river. The Investigating Officer also claimed to have recovered an iron rod at the instance of the accused Paresh Tasa and a bicycle at the instance of accused Jiten Gowala. However, no forensic investigation was carried out regarding these articles.

After concluding the investigation, Charge-sheet came to be filed against the two accused appellants and one Rai Singh Gorh for the offences punishable

under Sections 341/342/352/ 365/201/302 of the IPC. Since the offence punishable under Section 302 was triable by Sessions Court, the case was committed to the Court of Sessions Judge, Golaghat, from where it was transferred to the court of Additional Sessions Judge, Golaghat, for trial. The learned trial court framed charges against the accused persons for the offences punishable under Sections 302, 365 & 201 IPC for the above offences.

They pleaded not guilty and claimed trial. As many as 18 witnesses were examined and 10 documents were exhibited by the prosecution for proving its case.

The accused, while being questioned under Section 313 CrPC, were confronted with the circumstances appearing against them in the prosecution evidence, which they denied and claimed to be innocent. However, they did not lead any evidence in defence. After hearing the arguments advanced by the Additional Public Prosecutor and the defence counsel and appreciating the evidence available on record, the learned Additional Sessions Judge acquitted accused Rai Singh Gorh from the charges but proceeded to convict and sentence the appellants, as stated above, by the judgment and order dated 19.12.2016/ 20.12.2016, which is assailed in these two Jail Appeals.

3. Learned *Amicus Curiae* Mr. D.K. Dey, representing the appellants vehemently and fervently urged that there is no evidence whatsoever on the record of the case so as to connect the appellants with the alleged crime. He contended that the entire case of the prosecution is based on circumstantial evidence. However, not a single incriminating circumstance, which can even remotely connect the appellants with the alleged crime, was proved by the prosecution. He pointed out that the prosecution portrayed the evidence of "last seen together", discovery of the dead body and recoveries allegedly made at the

instance of the accused as incriminating circumstances for seeking conviction of the accused appellants. However, none of these circumstances was proved by any sort of reliable evidence. He thus urged that the accused appellants have been falsely implicated in this case and deserve to be acquitted.

Ms. B. Bhuyan, learned Additional Public Prosecutor, on the other hand, vehemently and fervently opposed the submissions advanced by the learned *amicus curiae*. She urged that the witness, Padumi Phukan (PW-2) clearly stated that she saw the accused Jiten Gowala and the deceased Mukul Gogoi involved in a heated argument/altercation after which the deceased was not seen alive. She further submitted that another important prosecution witness, Kukheswar Phukan (PW-3), also stated that the accused Jiten Gowala and Paresh Tasa were quarrelling with Mukul Gogoi and that he intervened and broke up the quarrel. Thereafter, Mukul Gogoi was not seen alive. As per the learned Additional Public Prosecutor, evidence these witnesses constitutes the circumstance of "last seen together". Learned Additional Public Prosecutor also submitted the evidence of the medical jurist Dr. Mukul Sarma (PW-12) clearly establishes that the victim Mukul Gogoi expired because of the *ante mortem* injuries and that it was clearly a case of homicidal death. Ms. Bhuyan also drew the Court's attention to the statement of Tankeswar Dowarah (PW-13), a VDP member of the village, who proved the fact that the dead body of Mukul Gogoi was found put in a gunny bag, which was floating in the river. This witness also proved that prior to recovery of the dead body, accused Paresh Tasa stated in the police station that he had killed Mukul Gogoi with a rod, which was subsequently recovered from the place where the accused had thrown the same. Learned Additional Public Prosecutor also drew the Court's attention to the statement of Arup Gogoi (PW-14), who also proved the factum of recovery of the dead body of Mukul Gogoi

from a gunny bag floating in the Dhansiri River, the recovery of a rod at the instance of accused Paresh Tasa, and also recovery of the bicycle on which the dead body was carried, at the instance of accused Jiten Gowala. Ms. Bhuyan also drew this Court's attention to the deposition of Moon Gogoi (PW-17), Circle Officer cum Executive Magistrate, who gave evidence regarding the disclosure statement made by accused Jiten Gowala regarding he having disposed of the dead body of Mukul Gogoi into the river after killing him. As per Ms. Bhuyan, this confession made by the accused in presence of Executive Magistrate is a gravely incriminating circumstance and, as the accused failed to offer an explanation to this circumstance, there is no reason to interfere in the conviction of the accused as recorded by the trial Judge. Lastly, our attention was drawn to the deposition of Sanjib Kumar Das (PW-18), Officer-in-Charge of Barpathar Police Station, who stated that he received the written *Ejahaar* from the complainant, Bimal Saikia, on the basis whereof Barpathar P.S. Case No. 67/2013 was registered and, thereafter, he entrusted Asstt. Sub-Inspector Pramod Dutta with the task of the investigation. The officer-in-Charge then took up the investigation himself and arrested the accused Jiten Gowala and forwarded him to the Court. He further stated that on 29.04.2013 the accused Paresh Tasa suo moto appeared at the police station and surrendered himself. Paresh Tasa confessed that he along with Jiten Gowala had killed Mukul Gogoi and threw the dead body into the river Dhansiri and, thereafter, both of them took shelter in the house of accused Rai Singh Gorh.

A request was made by the I.O. to the SDO (Civil), Dhansiri to depute a Magistrate to recover the dead body and record the statement of the accused Paresh Tasa. Accordingly, Executive Magistrate, Sri Moon Gogoi (PW-17) was deputed for the task. He came to the police station and thereafter the accused

Paresh Tasa led the Executive Magistrate and the police team to the bank of the river Dhansiri at Alisinga and disclosed that the dead body had been thrown into the river from that place. On 30.04.2013 the dead body was recovered from the Dhansiri River at Silkuti while the search was being undertaken. The I.O. then got the inquest conducted upon the dead body and recovered the jute gunny bag, the clothes worn by the deceased, etc. Learned Additional Public Prosecutor further submitted that incriminating articles, i.e. iron rod and the bicycle used in the crime were recovered by the I.O. at the instance of the accused. She thus contended that the chain of incriminating circumstances has been completed which unerringly points to the guilt of the accused. Thus she sought dismissal of the appeals and implored the Court to affirm the impugned judgment and uphold the conviction of the accused and the sentences awarded to them by the learned trial Court.

4. We have given our thoughtful consideration to the submissions advanced at the Bar and have minutely re-appreciated the evidence placed on record. We have also gone through the impugned judgment.

5. Manifestly, the case of the prosecution is based purely on circumstantial evidence in the form of "last seen together", recoveries and confession. Law is well settled that for proving the guilt of the accused in a case based on purely circumstantial evidence, the chain of circumstances has to be proved by leading unimpeachable evidence; it should be complete in all aspects, unerringly pointing towards the guilt of the accused and should be inconsistent with the guilt of anyone else.

Keeping in view the above principles, we now proceed to evaluate and analyse the evidence of the prosecution to find out whether the circumstances relied upon by the prosecution were, as a matter of fact, proved by reliable

evidence and, if so, whether the circumstances constitute a complete chain warranting conviction of the accused.

6. Firstly, we take up the aspect whether the circumstance "last seen together" was proved by the prosecution by reliable evidence. In this regard, we may note that the *Ejhar* (Ext.10) was lodged on 21.04.2013, i.e. four days after the deceased having gone missing from his house, and no explanation is forthcoming for this delay in lodging of the FIR. The two witnesses of the circumstance "last seen together", as projected by the prosecution, were Padumi Phukan (PW-2) and her husband Kokheswar Phukan (PW-3). Both these witnesses stated that they saw an argument/altercation taking place between the accused persons and the deceased and that Kokheswar Phukan (PW-3) resolved the altercation after pacifying both the parties. The witness Kokheswar Phukan stated as below in his cross-examination:

"I had been with Mukul when the argument ensured. Being under the influence of liquor during Bihu, Jiten and Mukul shouted, 'who are you? Who are you?' there happened nothing more than this. Jiten and Mukul were under the influence of liquor. Keeping Jiten and Paresh in their respective house I saw Mukul off and came back to my house. It is not a fact that no argument took place between Jiten and Mukul when I saw off Mukul. I did not see the dead body."

7. A bare perusal of the above facts elicited in the cross-examination of Kokheswar Phukan (PW-3) makes it clear that the deceased and the accused were quarrelling with each other under the influence of alcohol. The witness resolved the fight, sent the accused persons to their respective houses, and Mukul Godoi was also sent away. It is thus clear that after the fight between the accused persons and the deceased broke up, Mukul proceeded alone and the accused went to their homes. It may also be noted that the dead body of the Mukul Gogoi was recovered on 30.04.2013 and, hence, there is a gap of almost

14 days from the date on which the deceased went missing and the date on which his dead body was found. The learned trial Court itself held at paragraph 24 of the impugned judgment that there is no direct evidence on record showing that after the occurrence, which took place on the night of 17.04.2013, at about 9:30 P.M., anybody saw the accused assaulting the deceased. Thus, by no stretch of imagination, the incident as seen by Kokheswar Gogoi (PW-3) can be construed as a circumstance of "last seen together". Hence, this so called incriminating circumstance of "last seen together" was not proved even by a semblance of evidence, what to say of reliable evidence.

8. The next circumstance which the prosecution relied upon so as to seek conviction of the accused was the recovery of dead body of Mukul Gogoi and the alleged disclosure/confession of the accused. The dead body was seized vide seizure list (Ext-4) prepared on 30.04.2013. On a careful perusal of the said seizure list, it becomes clear that the Investigating Officer did mention in the said seizure list that the body had been discovered at the instance of, or in furtherance of the information provided by the accused. We find that the theory put forth by the prosecution through the evidence of Moon Gogoi (PW-17), who was posted as the Revenue Circle Officer at the relevant point of time, posing him to be an Executive Magistrate that there was a disclosure made by the accused Jiten Gowala in presence of the witness on 29.04.2013, which led to the discovery of the dead body, is absolutely cooked up. No such disclosure statement as referred to in the evidence of the witness Moon Gogoi was proved by the prosecution. The witness was presumably involved in the scheme of the things so as to surmount the bar against admissibility of the

confessional statement of an accused recorded by the police officer by resorting

to the exception carved out in Section 26 of the Evidence Act. However, in this regard, we may refer to the Division Bench judgment of this Court in the case of ***Kartik Chakraborty & Ors. -Vs- State of Assam***, reported in **2017 (5) GLT 144** wherein it was held that the Magistrate referred to in Section 26 of the Evidence Act must be a Judicial Magistrate and presence of an Executive Magistrate would not make the confession admissible. Furthermore, the statement of Moon Gogoi (PW-17) is contradicted by the evidence of the Officer-in-Charge, Sanjib Kumar Das (PW-18), who stated that it was the accused Paresh Tasa, who led the Executive Officer and the staff of police station to the bank of river Dhansiri and informed that the dead body of the deceased was thrown into the river from that place. Another fact which contradicts the testimony of Moon Gogoi (PW-17) as well as Sanjib Kumar Das (PW-18) is that the seizure list (Ext-4), whereby the dead body of Mukul Gogoi was taken out from the river, does not refer to any disclosure statement of accused in furtherance whereof the body of the deceased had been discovered. Therefore, in addition to the fact that the statement of witness Moon Gogoi (PW-17) is totally unreliable, the fact that the so called confession was made in presence of the police officers, would make it inadmissible as being hit by Section 25 of the Evidence Act.

9. PW-13, Tankeswar Dowarah also stated that the dead body of Mukul Gogoi was found floating on the bank of the river and the police recovered the same. At that time, Mukul Gogoi's elder brother was also present at the spot. The said elder brother, namely, Arup Gogoi (PW-14) also affirmed this fact. Hence, omission of the fact regarding the disclosure statement of the accused in the seizure list (Ext.4) completely discredits the prosecution theory that body of the deceased was discovered in furtherance of the disclosure made by the

accused.

10. The trial Court drew much water from the factum of recovery of an iron rod effected at the instance of Paresh Tasa vide Seizure List (Ext. 5) and the bicycle recovered at the instance of Jiten Gowala vide seizure list (Ext.6). The trial Court also placed heavy reliance on the evidence of the police officer Sanjib Kumar Das (PW-18), wherein he proved the confessional statement of the accused. The findings recorded by the trial Court at paragraph 26 and 33 of the impugned judgment are reproduced hereinbelow:

“26. PW-18 is the investigating officer who has stated in his evidence that 29-04-2013 the accused Paresh Tasa surrendered before him and made disclosure that he along with the accused Jiten Gowela threw the dead body of the deceased Mukul Gogoi into river Dhansiri after killing him and that after occurrence he and the accused Jiten Gowala took shelter in the house of the accused Raising Garh. The accused Paresh Tasa took him, Executive Magistrate Moon Gogoi, SDPO and Staff to a place named Alisinga wherefrom the dead body of the deceased was thrown to river Dhansiri. On being led and shown by the accused Paresh Tasa, he recovered and seized one iron which was used in assaulting the deceased was recovered from the pond of one Lalchan Mala vide Ext-5 and Ext-5(3) is the signature of the accused Paresh Tasa. On 02-05-2013 he recovered and seized a Ladies BSA bicycle, one blue jeans pant and half light green stripe shirt on being led and shown by the accused Paresh Tasa in presence of the witnesses from the house premises of the accused Jiten Gowela vide Ext-6. It is evident that the accused Paresh Tasa made disclosure that on 17-04-2013 at 8-30 in a mini tea garden situated at Changpul seeing the accused Jiten Gowala assaulting the deceased, he came there and assaulted the deceased also with an iron rod. There after both of them put the dead body of the deceased into a gunny bag and took the same to river Dhansiri by a bicycle and threw the same into water of river Dhansiri. They threw the iron rod to a pond situated nearby. There after they kept the bicycle and their wearing clothes in the house of the accused Jiten Gowala. I find no way to disbelieve the evidence of PW-18 on the ground that he is a police officer. Now I have come to conclusion that there is no doubt that one iron rod was recovered and seized from the pond owned by one Lalchan Mala on being led and shown by the accused Paresh Tasa. I also find that there is convincing evidence of record showing that on being led and shown by the accused Paresh Tasa, one ladies' bicycle, one blue jeans long pant, half shirt and one half pant were recovered and seized from the house of the accused Jiten Gowala.

33. It has been submitted by the learned lawyer appearing on behalf of the

*accused persons that there is evidence on record showing that while the accused Paresh Tasa was in police custody he was subjected to torture and as such disclosures made by the accused Paresh Tasa cannot be said to be voluntarily. PW-4 has stated in his deposition that she came to know that due to torture inflicted upon the accused Paresh Tasa by the police he disclosed that accused Jiten Gowala killed the deceased. PW-5 also stated in her deposition that the accused Jiten Gowala made disclosure that he killed the deceased due to torture inflicted upon him by the police. In the instant case the disclosures regarding discoveries were made by the accused Paresh Tasa. It has been observed in the case of **Musheer Khan V. State of M.P., (2010) 2 SCC 748 : (2010) 2 SCC (Cri) 1100 at page 761** "when a police officer gives evidence in court about the discovery made by him on the strength of facts deposed by the accused it is for the court to believe the version, if it is otherwise shown to be reliable and it is for the accused to cross-examine the investigating officer or rely on other materials to show that evidence of police officer is unreliable or unsafe. Therefore, reliability of the materials discovered pursuant to the facts deposed by the accused in police custody depends on the facts of each case." Taking nature of the case and the aforesaid observation into consideration, I find that the disclosures were made by the accused Paresh Tasa voluntarily."*

We express our serious reservation on the approach of the Presiding Officer of the trial Court in not only reproducing the entire confessions of the accused recorded by the police but also using the same as reliable/admissible evidence on the premise that the statement of PW-18, Sanjib Kumar Das could not be disbelieved simply because he was a police officer. The Presiding Officer seems to be totally ignorant of the principles enshrined in Article 20(3) of the Constitution of India and Section 25 of the Evidence Act and, hence, the findings so recorded are fit to be deprecated.

11. It is the cardinal principle of the criminal jurisprudence that incriminating recoveries can be used to corroborate substantive evidence. As the prosecution did not lead any substantive evidence whatsoever, the recoveries in isolation would not be of any worth whatsoever. The factum of recovery of iron rod and bicycle can otherwise also not be accepted because neither the Arrest Memos. of the accused were proved by the prosecution nor did the Investigating Officer bother to record any disclosure statement of the accused "under Section 27 of

the Evidence Act” which led the alleged discoveries. It seems that the Presiding Officer of the trial Court gave a total go by to the principles of appreciation of evidence and has rendered the impugned judgment like a layman, blindly placing reliance on the evidence of the Investigating Officer and admitting even the confessions made by the accused before the police officer in gross disregard of the salutary principles laid down in the Evidence Act. The entire procedure in conducting the trial and rendering the judgment is gravely flawed, erroneous and suffers from loopholes and blunders for which the public prosecutor as well as the Presiding Officer concerned are equally responsible.

12. By virtue of Section 165 of the Evidence Act, it was obligatory for the trial Judge to ensure that relevant evidence is not left out from being brought on record and irrelevant evidence is not allowed to be brought on record. However, no attention was paid on these important aspects of the case.

13. In the wake of the discussion made above, we have no hesitation in holding that, in the present case, the prosecution has miserably failed to lead any sort of evidence, what to talk of convincing, reliable circumstantial evidence for establishing guilt of the accused appellants in relation to the alleged murder of Mukul Gogoi. The impugned judgment is full of infirmities and illegalities and also suffers from gross mis-appreciation of evidence and, hence, the same cannot be sustained.

As a consequence, the impugned judgment and order dated 19.12.2016/20.12.2016, passed by the learned Additional Sessions Judge, Golaghat, in Sessions Case No. 200/2014 is hereby reversed and set aside.

The accused appellants, namely, Jiten Gowala and Paresh Tasa are acquitted of the charges. As the accused appellants are in custody, they are

directed to be released from prison forthwith, if they are not wanted in connection with any other case.

JUDGE

CHIEF JUSTICE

RobinK

Comparing Assistant