

GAHC010049352020



IN THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Mizoram &
Arunachal Pradesh)

Crl.A 90/2020

Sri Bhopal Das
S/O Late Bhairab Das,
R/O Vill. Langsoliet Near P.W.D. Colony,
P.S. Borlangfer,
Dist. Karbi Anglong, Pin 782460.

.....petitioner

VERSUS

1.The State Of Assam And Anr.
Represented By P.P., Assam

2: Sri Narayan Das
S/O Late Kumud Das
R/O Vill. Langsoliet Near P.W.D. Colony
P.S. Borlangfer
Dist. Karbi Anglong
Pin 782460

.....respondents.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Appellant : Mr. S.A. Ahmed

Advocate for the Respondent : Mr. B. Sharma, Addl. P.P.

Date of Hearing : 01.12.2022

Date of Judgment : 01.03.2023.

JUDGMENT & ORDER (CAV)

1. Heard Mr. S.A. Ahmed, learned Amicus Curiae appearing on behalf of the appellant. Also heard Mr. B. Sharma, learned Addl. P.P. for the State of Assam.
2. This appeal is preferred by the accused, Bhopal Das (hereinafter referred as the appellant) against the Judgment & Order dated 20.01.2020 passed by the Sessions Judge, Karbi Anglong, Diphu in Sessions Case No. 98/2016 under Section 302 of the Indian Penal Code (IPC for short). The appellant was convicted under Section 304 Part-1 IPC to suffer Rigorous Imprisonment for 4 years and to pay a fine of Rs. 2,000/- with default stipulation.
3. The learned counsel for the appellant laid stress in his argument that the learned Trial Court convicted the appellant on the basis of sole eye-witness. The evidences of other witnesses are nothing but hearsay evidence. Contradictions lends a benefit of doubt to the appellant.
4. Per contra, the learned Additional P.P. Mr. K.K. Das laid stress in his argument that PW-3 is an eye-witness who has categorically testified that the appellant hit the deceased with a bamboo stick. He dealt a blow on the head of the deceased with a bamboo stick. This evidence is substantiated by the evidence of the Investigating Officer. The inquest report also fortifies the evidence. It is submitted that the appellant deserves stringent punishment.
5. The genesis of the case was that on 18.02.2016 at around 2:30 P.M., Shyamal Das (hereinafter referred to as the deceased) was passing through the road near Langsoliet PWD Colony, when the appellant dealt a blow with a lathi on his head. The deceased was immediately admitted in Langsoliet Nursing Home. As his injury was serious, he was referred to Hojai for better treatment. The deceased succumbed to his injuries on his way to the hospital. The appellant then appeared before the Borlangfer police station at around 6:20 PM and informed the police about the incident. The FIR was written by a co-villager Shri Kamaleshwar Deka. The Borlangfer P.S. Case No. 2/2016 was registered under Section 302 IPC and the police embarked upon the investigation. On completion of investigation charge-

sheet was laid against the appellant under Section 302 IPC.

6. At the commencement of trial a formal charge under Section 302 IPC was framed and read over and explained to the appellant who adjured his guilt and claimed innocence. To substantiate its stance, the prosecution examined 7 (seven) witnesses including the Medical Officer (M.O. in short) and the Investigating Officer (I.O. in short). Some witnesses were cross-examined to refute the charges. The statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure (Cr.P.C). to explain the evidence against him, but his answers were evasive.

7. The point which arises for determination is that whether the trial Court erred in convicting the appellant under Section 304 Part-1 IPC.

8. In this case charge was framed under Section 302 IPC but the appellant was convicted under Section 304 Part-I of the IPC. On the basis of the evidence of the sole eye witness, the appellant was convicted. While convicting the appellant under Section 304 IPC, the learned trial Court held that:-

” 15. What the Hon’ble Apex Court has observed in the case of Surinder Kumar v. UT, Chandigarh reported in ”(1989) 2 SCC 217” while dealing with the provision of Exception 4 to Section 300, of the IPC is reproduced below:

“7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly.”

16. The available in the evidence on record shows all the four ingredients which are required to extend the benefit of Exception 4 to Section 300 IPC, are present in the case in my

hand. Since the occurrence was in sudden quarrel and there was no premeditation, the act of the appellant-accused would fall under Exception 4 to Section 300 IPC."

9. A re-appreciation of the evidence will unravel whether the trial Court erred in convicting the appellant under Section 304 Part-1 IPC.

10. A neighbour Smt. Shikha Rani Das testified as PW-1 that the incident occurred about 2 years ago. At around 2:30 PM she went out of the house and she heard a commotion and she noticed a gathering on the road and she immediately went to the spot. She saw the deceased lying on the road and she noticed marks of injuries on his head. The wife of the deceased was sobbing near him and the people assembled there informed him that the younger brother of the deceased hit the deceased with a stick. The deceased was taken in a car to Lumding. Later, in the evening she learnt that the deceased passed away. The police seized a stick at the place of occurrence in her presence. She identified her signature on the seizure list as Exhibit-1(1).

11. In her cross-examination she has admitted that she did not see the appellant assaulting the deceased. She could not describe the magnitude of the injury.

12. It is true that P.W-1 heard about the incident from the neighbours and her evidence is indeed hearsay evidence. She saw the injured person with an injury on his head but she could not describe the magnitude of the injury.

13. The informant's evidence is also hearsay evidence. The informant is Sri Narayan Das and he has testified as PW-2 that the deceased was known to him. The incident occurred about three years ago. After returning home from work, he learnt that the appellant killed the deceased. That evening, Barlangfar, a teacher called him and took him to the police station to lodge an FIR regarding the incident. Barlangfar Deka wrote the ejahar (FIR) and he affixed his signature on the ejahar. He identified his signature as Exhibit-1(1). PW-2 has not named the person who informed him about the incident. It is also not clear from his evidence, if he heard about the incident from Barlangfar.

14. The evidence of PWs-1 and 2 can be termed as hearsay evidence but PW-3 is the eye-witness. He is the son of the deceased. His name is Sibash Das. He has testified that his father and the appellant are brothers. The incident occurred in the year 2016. The incident

occurred at noon. On the road near Langsoliet PWD Colony, a fight broke out between his father and the appellant regarding a fishery. At that time, the appellant brought a bamboo stick from a shop near the road and dealt a blow on the back of his father's head. He witnessed the incident because he was present at the place of occurrence. He saw the appellant hitting the deceased with a bamboo stick. His mother who was also present tried to save his father, but the appellant violently pushed her away. Thereafter his mother took his father to Lumding hospital, but as the injury was grievous, the doctor referred his father to Hojai, but while proceeding to Hojai his father succumbed to his injuries.

15. In his cross-examination PW-3 has testified that on the day of the incident, he did not attend school. Other people were also present near the place of occurrence but he could not recall the names of the persons who were present. There was no clash or confrontation when the appellant hit his father. His father was not inebriated at that time but the appellant was inebriated.

16. No contradiction could be elicited through the cross-examination of PW-3 vis-à-vis the cross-examination of the Investigating Officer as per Section 162 Cr.P.C. qua Section 145 of the Indian Evidence Act, 1872 (the Evidence Act for short). On the basis of the uncontradicted evidence of the PW-3 the appellant was convicted. The evidence of the M.O. clearly depicts that the deceased sustained the fatal injury on his head. His evidence substantiates the evidence of PW-3.

17. The M.O. Dr. Hiteshwar Teran has testified as PW-4 that on 09.02.2016, he was attached at Diphu Civil Hospital as Senior Medical & Health Officer. On that day he performed post-mortem on the deceased Shyamal Das whose body was brought by S.I. G.R. Khan in connection with this case being Barlangfar P.S. Case No. 2/2016 under Section 302 IPC. He has described the external appearance as :-

“A male body of around 30 years of age, Rigor Mortis developed partially. Both the eyes were closed. Left eye is haemorrhaging, there is bandage cover on the head. There is no other external injury seen in any other part of the body.”

18. “Detailed description”:- In the head there is incised wound is seen in his skull, which is about 12 cms in length and deep to the skull bone and brain matters. The wound is found

slightly right side of the saggital suture over the right temporal bone. The brain matter is injured and there is collection of blood in the cranium. The deceased person has sustained injuries in his head which is incised wound causing fracture of right temporal bone deep to the brain matters. It is grievous in nature. The above findings are ante-mortem in nature. The person died due to head injury caused by sharp weapon causing damage to the brain matters.

He proved the post-mortem report as Exhibit-3 and he proved his signature on the report as Exhibit-3(1) and 3(2)

No effective cross-examination was carried out.

19. The Investigating Officer is Shri Dilip Kumar Bora. He has testified as PW-7. His evidence depicts that he has submitted the charge-sheet against the appellant under Section 302 IPC. He has exhibited the charge-sheet as Exhibit-5 and has proved his No effective cross-examination was carried out.

20. The evidence of another independent witness Shri Biswanath Mazumdar can also be considered as hearsay evidence. He was not cross-examined. Shri Biswajit Mazumdar testified as PW-5 that both the appellant and deceased are brothers. The incident occurred about three years ago. He heard about a fight between the deceased and the appellant. He is the neighbour and he heard the fight but he did not see them fighting. Later he learnt that as a consequence of fight the deceased was taken to Lumding Hospital. He accompanied the deceased to Lumding Hospital but the deceased was referred to Hojai as his injury was serious. At Hojai, the deceased was declared as dead. The body of the deceased was forwarded to Diphu Hospital for autopsy. He later learnt that the fight between the appellant and the deceased was regarding a fish pond.

21. The other formal witness is Md. Ziaru Rahman Khan. He has testified as PW-6 that on 18.02.2016 he was working as the Officer-in-Charge of Borlangfar Police Station. That day, a person named Narayan lodged an FIR that on 18.02.2016 at around 2.00-2.30 PM a person named Bhopal Das while passing by the road, hit his elder brother Shyamal Das on his head with a stick and then Shyamal Das was admitted in Lumding Nursing Home. Shyamal died on the way, while he was being taken for better treatment to Hojai. On receipt of the FIR, he

registered a Barlangfar P.S. Case No. 02/2016 under Section 302 of the IPC and he, embarked upon the investigation. Ext-1 is the FIR and Ext-1(2) is his signature. He interrogated the complainant in the Police Station. Thereafter, the Appellant Gopal Das appeared in the Police Station and admitted about the incident. He then took both the complainant and the appellant to the place of occurrence and prepared a sketch map. Ext-4 is the sketch Map and Ext-4(1) is his signature. Thereafter, he seized a wooden stick used in the incident in presence of witnesses. The appellant Gopal Das showed the stick. Ext-1 is the Seizure List and Et-1(2) is his signature. He interrogated the appellant at the place of occurrence and in the presence of witnesses, the appellant admitted of hitting his elder brother on his head with a stick. He recorded the statements of the witnesses present at the place of incident. Thereafter, he sent the body of the deceased for post mortem examination. He (PW-6) also added that while the deceased was being taken to Hojai for better treatment, he died and the family members brought the body of the deceased back to their house. Thereafter, when the accused himself admitted the fact of murder, he arrested him after his medical examination and forwarded him to judicial custody. On 22.02.2016 as he was transferred to Dilal Police Station, he handed over Case Diary to the next Officer-in-Charge.

22. Section 138 of the Indian Evidence Act envisages that:- no particular number of witnesses shall in any case be required for the proof of any fact.

23. In the instant case, we have clinching evidence of one eye witness, who has categorically stated that he saw his uncle hitting his father with a bamboo. The blow landed on his father's head. No contradictions could be elicited through the cross examination of the witness PW-3 and the cross-examination of the I/O, PW-6 as per Section 145 of the Indian Evidence Act, 1872 (Evidence Act) qua Section 162 Cr.P.C.

24. The other I/O, Shri Dilip Kumar Bora submitted charge-sheet while the investigation was conducted by the I/O PW-6.

25. Shri Dilip Kumar Borah testified as PW-7 that on 26.02.2016, while working as Officer In-charge of Barlangfar P.S., he received the case diary from the previous Investigation Officer and after perusal of the case diary, he found that the investigation was almost complete. So he laid the charge-sheet against the appellant under Section 302 IPC. He

proved the charge-sheet as Exhibit-5 and Exhibit-5(1) as his signature.

26. In this case at hand, the evidence of the eye witness is substantiated by the evidence of the Medical Officer. It is clear from the evidence of Medical Officer PW-4 who conducted the post-mortem that an incised wound was visible in the skull. The incised wound was about 12 cms in length and deep up to the skull bone and the brain matter. The wound was found slightly on the right side of the sagittal suture of the right temporal bone. The brain matter was injured and there was collection of blood in the cranium. The deceased person has sustained injuries on his head.

27. The wound is described an incised wound, the fracture was bone deep and into the brain matter and the injury was grievous in nature. In his opinion, the person died as a result of the incised wound, which was caused by the sharp weapon. The seizure list, which is proved as Exhibit-1, clearly depicts the seizure of one wooden stick of 4 feet, 4 inches in length.

28. The learned counsel for the appellant emphasised through his argument that according to the Medical Officer, the injury was caused by a sharp weapon but a blunt object i.e. the wooden stick, was seized in connection with this case. It is true that the Medical Officer has opined that the injury detected on the body was caused by a sharp weapon, but the evidence of the eye-witness and the seizure list clearly depicts that a blunt object was seized in connection with this case.

29. On the aspect of sharp cut injuries caused by blunt object, we would like to refer to the decision of the ***Hon'ble Supreme Court in Kailash v. State of M.P.*** reported in **(2006) 11 SCC 420** wherein it has been observed as under:

“21. The place of injury was on the parietal region. In certain situations, the wounds, produced by a blunt instrument, may simulate appearances of an incised wound. It was so stated in Glaister and Rentoul's Medical Jurisprudence and Toxicology in the following terms:

“Under certain circumstances, and in certain situations on the body, wounds produced by a blunt instrument may simulate the appearances of an incised wound. These wounds are usually found over bone which is thinly covered with tissue, in the regions of the head, forehead, eyebrow, cheek, and lower jaw, among others. When such a wound exposes hair

bulbs at its edges, it is possible by examining these carefully to decide whether they have been cut or crushed and thus establish whether the wound was caused by a sharp or blunt instrument. As a rule, especially in the living subject, a wound produced by a blunt instrument will disclose some degree of bruising and swelling of the edges and the deeper tissues will be less cleanly severed than when divided by a sharp-cutting instrument."

30. Referring to the case of Shankaria v. State of Rajasthan, reported in (1978) 4 SCC 453, the Supreme Court, in Kailash's case (supra), has held that:- "*38. After a careful examination of the statements of the doctors, the learned Judges of the High Court came to the conclusion that the injuries found on Swaran Singh and Jarnail Singh could be caused with the Ghota (Article 1). The injuries on the victims were located on the head. The scalp over the head is taut. Even an injury caused with a blunt weapon on the head, ordinarily produces a gaping wound, the edges of which if not carefully examined under a magnifying lens, can be mistaken for those of an 'incised' wound. This was the mistake committed by Dr. Jaswant Singh and he had courage enough to admit and correct it in further examination before the High Court. Thus considered, there was no contradiction between the confessional statement and the medical testimony in regard to the nature of the inflicting weapon. Rather, the medical evidence taken as a whole, including the statement of Dr. Jaswant Singh before the High Court, lends valuable support to the confession (Ext.P-39) inasmuch as it is stated therein that the injuries to the victims were caused with the Ghota (Article 1)"*

31. The Text Book of Medical Jurisprudence and Toxicology (24th Edition, 2011, Page 528), which we have reproduced below reads as:

"Incised Looking Wound.- Occasionally, on wounds produced by a blunt weapon or by a fall, the skin splits and may look like incised wounds when inflicted on tense structures covering the bones, such as the scalp, eyebrow, iliac crest, skin, and perineum, or by a fall on the knee or elbow when the limb is flexed.

But the edges of such wounds will be found irregular with a certain amount of bruising, and small strands of tissues may be seen at the bottom bridging across the margins, if examined with a hand lens.

In the case of wounds of the scalp, the hair bulbs will be found crushed, if they are

inflicted with a blunt weapon, but will be found cut and forced into the wound, if produced by a cutting weapon like a heavy edged axe or a chopper.”

32. After referring to the relation of the Hon’ble Supreme Court and to the 24th edition of the Modi’s Medical Jurisprudence and Toxicology, it is held that this instant case is also a case regarding evidence of assault by a blunt object which caused a sharp cut injury or an incised injury on the skull of the deceased.

33. It is also true that the investigating agency failed to record the statement of another eye witness i.e. the wife of the deceased. It has already been held in my foregoing discussions that the evidence of the eye-witness (PW-3) was found to be reliable and the incident was the consequence of a dispute between two brothers relating to a pond and there was a fight between the two brothers, which resulted in the death of one brother. Too many onlookers or eye witnesses cannot be expected to be present in an incident of such a nature. Although, the appellant was charged under Section 302 IPC, he was convicted under Section 304 Part-I IPC. The decision of the learned trial court was in order. The learned Trial Court spelt out sound reasonings while convicting the appellant under Section 304 Part-I IPC. One brother who was provoked and enraged by the dispute flew into a rage and dealt one fatal blow. It is not a case of cold blooded and pre-planned murder. A lenient view was taken by the learned trial Court. The judgment and order was passed by the learned trial Court on 20.01.2020. The appellant has been in custody for more than 3(three) years. During the period of investigation and inquiry also the appellant was in custody for more than 3(three) months. It is held that the appeal is devoid of merits, however, the period of detention undergone by the appellant during investigation and trial is set off with his custodial sentence. The appellant is to be released forthwith if not wanted in any other case.

Send back the LCR.

JUDGE

Comparing Assistant