

GAHC010097322020



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

Crl.A(J) 47/2020

Sri Moina Das

.....Appellant.

Versus

The State of Assam

.....Respondent.

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the appellant : Mr. N.J. Das Amicus Curiae.

For the respondent : Ms. S. Jahan Additional PP, Assam.

Date of hearing : 16.02.2023

Date of judgment : 22.02.2023

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

Heard Mr. NJ Das, learned Amicus Curiae and Ms. B Bhuyan, learned

Additional Public Prosecutor appearing for the State respondent.

2. This appeal has been filed against the judgment and order dated 23.09.2019 passed by the learned Additional Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 64/2014, by which the appellant has been convicted under Section 302 of the IPC and sentenced to undergo life imprisonment with a fine of Rs. 5,000/-, in default rigorous imprisonment for 3 (three) months.

3. The prosecution case in brief is that the wife of the deceased submitted an FIR on 05.09.2010 stating that at around 3:30 pm, the appellant, Moina Das had waylaid the informant's husband (deceased) and dealt blows on him with a dao causing injuries. The deceased was taken to the Kanaklata Civil Hospital, Tezpur where he succumbed to his injuries at 7:00 pm on the same day.

4. Based on the FIR, Tezpur P.S. Case No. 829/2010, under Section 341/326/307/302 of the IPC was registered on 05.09.2010. After conclusion of the investigation, charge-sheet was filed against the appellant, as a *prima facie* case under Sections 326/307/302 of the IPC was found against him.

5. Three charges were framed by the learned Trial Court against the appellant under Sections 326/307/302 of the IPC, to which the appellant pleaded not guilty and prayed for trial. During the trial proceedings, 7 (seven) Prosecution witnesses were examined. Thereafter, the appellant was examined under Section 313 of the Cr.P.C, wherein he took a stand that a false case had been filed against him.

6. The learned Trial Court thereafter having come to a finding that the appellant was guilty of the offence under Section 302 IPC, convicted him and sentenced him to undergo life imprisonment with a fine of Rs. 5,000/-, in default rigorous imprisonment for 3 (three) months.

7. The learned Amicus Curiae submits that the evidence of PW-1, Smt. Maina Das is to the effect that she saw her husband lying under a tree at the gateway to her house with cut injuries on the neck, chest and hands. She also saw the appellant running away with a dao in his hand and when she reached her husband, she saw two persons, namely, Mun Das and Krishna Das, who were helping her husband drink water. Though the PW-1's evidence is to the effect that she was told by her daughter that the appellant had cut her husband, her daughter was not been made a Prosecution witness by the prosecution and as such, the daughter has not been examined by the learned Trial Court. He also submits that the evidence of PW-2, who is the son of the deceased is to the effect that his deceased father had told him "Moina has cut me and fled away. What are you doing?" He submits that PW-1 could not have been with the deceased at the place of occurrence simultaneously, as PW-1 had stated that there was no person near her when her husband told her "Maina I will die."

8. The learned Amicus Curiae also submits that though the PW-1 had stated in her evidence that Mun Das and Krishna Das were helping her husband to drink water, the evidence of PW-3, who is the eye witness, does not speak of the presence of Mun Das and Krishna Das at the place of occurrence. He also submits that Mun Das and Krishna Das were not made prosecution witnesses by the Police and as such, they were not examined by the court. He accordingly submits that the omission of the presence of Mun Das and Krishna Das in the evidence adduced by PW-3, shows that PW3 was not an eye witness to the occurrence.

9. The learned Amicus Curiae also submits that the evidence of PW-5, who is an eye witness cannot be believed, as the evidence of PW-5 shows that she had poor eye sight. Accordingly, she could not have seen the incident. Further,

though PW-5 has stated in her evidence that the incident took place on the road in front of her house, the I.O.'s sketch map of the place of occurrence does not show the house of PW-5. As such, in all probability, PW-5 did not see the incident.

10. The learned Amicus Curiae also submits that the evidence of PW-6, who was a seizure witness shows that he had not seen the seizure of the dao (weapon). He also submits that the dao had not been sent to the FSL for examination. He submits that as the evidence of the PW-3 and PW-5 cannot be made the basis of conviction of the appellant, as they were not eye witnesses, the FSL examination of the dao was extremely necessary. The same not having been done, the appellant has to be acquitted of the charge under Section 302 IPC and released from jail.

11. The learned Amicus Curiae also submits that as the daughter of the informant, Mun Das and Krishna Das were not made prosecution witnesses, this Court may presume that there were evidence which were unfavorable to the prosecution, in terms of Section 114 of the Indian Evidence Act, 1872.

12. The learned Amicus Curiae submits that the FIR submitted by the informant does not reflect the presence of PW-3 and PW-5 at the time of occurrence of the incident, despite PW-3 and PW-5 being alleged eye witnesses to the crime. He submits that not only has an FIR to be lodged promptly, with firsthand account of what has actually happened, but the persons who are responsible for the offence in question and the witnesses should also be reflected in the FIR. In this respect, he has relied upon the judgment of the Apex Court in ***Jai Prakash Singh vs. State of Bihar & Anr.***, reported in ***(2012) 4 SCC 379***.

13. In support of his submission that the failure of the prosecution to establish that seized dao was the weapon used for assaulting the deceased, by having the FSL examination done and the reliance on the evidence of PW-1 that the appellant was seen running away from the place of occurrence, was too thin a piece of evidence for the learned Trial Court, to convict the appellant under Section 302 of the IPC, the learned Amicus Curiae has relied upon the judgment of the Apex Court in ***Mallappa vs. State of Karnataka***, reported in **(2021) 5 SCC 572**. In support of his submission that improvements made in the evidence of PW-3 and PW-5 cannot be done with regard to the alleged occurrence of the crime, he has relied upon the judgment of the Apex Court in ***Rajesh alias Sarkari & Anr. vs. State of Haryana***, reported in **(2021) 1 SCC 118**.

14. Ms. B Bhuyan, learned Additional Public Prosecutor, on the other hand, submits that there was no delay in lodging of the FIR. She also submits that an FIR is not an encyclopedia where all the factual details of the occurrence of the crime and all the witnesses names are required to be mentioned. She submits that the evidence of the prosecution witnesses clearly goes to show that the appellant had caused the death of the deceased by inflicting blows on the deceased with a dao. She further submits that the oral dying declaration made by the deceased to PW-2 corroborates the fact that the appellant has caused the death of the deceased.

15. The learned Additional Public Prosecutor submits that not mentioning the names of the witnesses in the FIR is not fatal to the prosecution and in fact the Apex Court has, in the case of ***Susanta Das & Anr. vs. State of Orissa***, reported in **(2016) 4 SCC 371**, held that not mentioning of the accused persons in the FIR could not be fatal to the prosecution case. She thus submits

that if not mentioning of the names of accused persons in the FIR is not fatal, the non-mentioning of eye witnesses names cannot be fatal to the prosecution. She also submits that the evidence of prosecution witnesses are reliable and they have not been shaken in their cross-examination. She accordingly submits that as this is a clear cut case of murder, the impugned judgment and order should not be interfered.

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

17. The learned Trial Court had examined 7 (seven) Prosecution witnesses. The FIR has been filed by the wife of the deceased, who is PW-1. In her evidence, PW-1 has stated that she was informed by her daughter that the appellant had cut her husband and when she was about to reach her husband, who was around 10 meters away, she saw the appellant running away with a dao in his hand. When she reached her husband, Mun Das and Krishna Das were helping her husband drink water. An ambulance came on being called and the P.W-1's husband was taken to the hospital where he died 5 to 10 minutes after being taken to the hospital.

18. The evidence of PW-2 is to the effect that when he was returning from the market around 5:00 p.m., he saw his father (deceased) lying in an injured condition under the banyan tree. He saw cut injuries on the neck and chest of his father and he was lying in a pool of blood. On asking his mother, his mother informed him that the appellant hacked his father and fled away. Then, the deceased stated to him as follows : "Moina has cut me and fled. What are you doing". In his cross-examination, PW-2 states that the appellant was married to his sister's daughter.

19. The evidence of PW-3 is to the effect that, while coming back home after

tethering goats around 3:00 p.m., he saw the appellant hacking the deceased with a dao on the road. He saw the appellant hacking the chest, neck and hand of the deceased. When the deceased asked for water, PW-3 ran home and brought water and poured the water on the head of the deceased. He then left the deceased to inform the wife of the deceased about the incident. The evidence of PW-3 has not been shaken in the evidence. However, in the statement given by PW-3 under Section 161 of the Cr.PC, he had stated that while quarrelling, the deceased first hit the appellant with a bamboo stick. The appellant thereafter went to his house, got the dao and assaulted the deceased. The suggestion that the deceased hit the appellant with a bamboo stick had been put to PW-3 in his cross-examination, which has been denied by PW-3. No further suggestions or questions have been put to PW-3 that the action of the deceased in hitting the appellant amounted to grave or sudden provocation or that it was a case of private defense. Further, the only stance taken by the appellant in his examination under Section 313 of the Cr.PC was that a false case had been made against him.

20. The evidence of PW-4, i.e. the Doctor is to the effect that the deceased died of exsanguination due to cut injury of left carotid. The Post Mortem Examination Report which was exhibited as Ext.1 states as follows:

“External Appearance:

A male dead body was seen lying on top of Post Mortem table wearing a black long pant and check brown Jangia. Eyes and mouth were half open. Rigor mortis was present. There was a cut injury of about 2½" x 1" x 1" on left side of neck. Cutting the left sternomastoid and carotid artery. There was cut injury on left side of chest cutting the left 1st and 2nd space. Semen was present. Fecal matter was present. Cranium and spinal canal healthy.

Thorax :

Left 1st and 2nd place was cut. Including the pectoralis major muscle. Pleurae was cut beneath 2nd space with haemothorax on left side. Laryng and trachea healthy. Right lung healthy. Left lung cut in upper lobe. Pericardium healthy. Heart empty. Vessels healthy.

Abdomen:

Peritonium healthy. Mouth pharynx healthy. Stomach partly digested and food was present. Small intestine and its contents: distended by gas and faeces. Large intestine distended by gas and faeces. Liver, spleen, kidneys healthy. Bladder healthy. Organs of generation external and internal healthy. Semen and fecal matter was present. The cut injuries were antimortem in nature.

Opinion :

In my opinion Neena Das died of exsanguination due to cut injury of left carotid.

Ext- 1 Post Mortem Report, 1(2) is my signature."

21. The evidence of PW-5, who is the aunty of the deceased and grandmother of the appellant, is to the effect that the occurrence took place on the road in front of her house. There was an altercation between the deceased and the appellant and she saw the appellant assaulting the deceased with a sharp cutting weapon. She also saw the cut injury on the chest of the deceased. PW-5 states in her cross-examination that her eye sight was poor and that though she did not see when the blow was inflicted on the deceased, she saw the deceased fall to the ground.

PW-5 in her statement under Section 161 of the Cr.PC had stated that during a quarrel between the deceased and the appellant, the appellant had hit the deceased with a bamboo stick, due to which the appellant went to his house, got the dao and assaulted the deceased with the same. However, PW-5 has not been confronted with the above statement made under Section 161 of

the Cr.PC during her cross-examination and accordingly, the evidence of PW-5 would have to be considered as has been recorded.

22. The evidence of PW-6, who is the mother of the appellant is to the effect that she heard that there was a quarrel between the deceased and the appellant and that the deceased had died in hospital. Thereafter PW-6 was declared hostile by the Prosecution, wherein she denied having suppressed recovery of the weapon (dao) from the house of the appellant.

23. The evidence of PW-7, who is the new I.O. of the case is to the effect that as the old Investigating Officer had died, he had submitted the charge-sheet.

24. The examination of the appellant under Section 313 of the Cr.PC shows that the appellant's answer to all the questions was to simply deny the same and state that a false case had been filed against him with false evidence. There was no attempt to give any reasons for the assault by the appellant.

25. As can be seen from the documents on record, the deceased was inflicted with heavy injuries with a dao on 05.09.2010 at about 3:30 p.m. and due to which he died on the same day at around 7:00 p.m. The FIR was also lodged on the night of 05.09.2010. In this respect, we do not find that there has been any delay in filing the FIR, in terms of the judgment of the Apex Court in ***Jai Prakash Singh (supra)***, as the FIR has been filed on the date of the incident itself, naming the appellant as the person who has committed the crime of killing the deceased.

26. PW-3 and PW-5 are eyewitnesses to the crime in question. Though PW-3 does not talk about the presence of Mun Das and Krishna Das in his evidence, the same does not mean that Mun Das and Krishna Das were not present at the place of occurrence. No questions have been put to PW-3 on this aspect at the

time of cross-examination and as such, we do not find any ground to doubt the correctness of the evidence given by PW-3. Further, PW-3 is an independent witness and not an interested witness and as such, we find his testimony to be reliable.

27. The evidence of PW-5, who is the grandmother of the appellant and aunty of the deceased also inspires the confidence of this Court and we do not find any reason to doubt her evidence which is to the effect that the appellant and the deceased were arguing and that the deceased fell on the road on being assaulted by the appellant with a sharp weapon. The evidence of the Doctor also categorically shows that death was due to the injuries suffered by the appellant, which was caused due to the cut injury of the left carotid.

28. In the case of ***State of U.P. vs. Naresh & Others***, reported in **(2011) 4 SCC 324**, the Apex Court has held that in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

In the present case we find that the non-mentioning of the presence of some persons at the place of occurrence does not touch upon the core of the

prosecution case and as such, we do not find anything to doubt the veracity of the evidence of the prosecution witnesses.

29. With regard to the submission made by the learned Amicus Curiae that as because the sketch-map does not show the house of PW-5, there is a probability that PW-5 did not see the incident, we are not inclined to give much importance to the said submission, as all the details of all the neighbouring houses may not be in a sketch-map and the absence of the same cannot imply that the PW-5 did not witness the incident.

30. With regard to the submission made by the Amicus Curiae that there was no eyewitnesses in the FIR, it would be profitable to refer to the judgment of the Apex Court in the case of ***State of U.P. vs. Naresh & Others (supra)***, where it has been held that an FIR is not an encyclopaedia of the entire case. It may not and need not contains all the details. Naming of the accused therein may be important, but not naming of the accused in the FIR may not be a ground to doubt the contents thereof in case the statement of a witness is found to be trustworthy.

31. In the case of ***Susanta Das (supra)***, the Apex Court has held that not mentioning the names of the accused persons in the FIR cannot be fatal to the prosecution. In the present case, PW-3 and PW-5 have not been named in the FIR. For that matter, even the PW-2, PW-4, PW-6 and PW-7 have also not been named in the FIR, this case no way effect the prosecution case, inasmuch as, the above cited two judgements pertain to non-naming of an accused in the FIR and not with regard to non-naming of prosecution witnesses in the FIR. As such, the decision of the Apex Court in the above 2 (two) cases is not applicable to the facts of this case.

32. With regard to the submission made by the Amicus Curiae that the evidence of PW-1, who had seen the appellant running away with a dao, was too thin an evidence to convict someone under Section 302 IPC by applying the principle of *res-gestae*, we are of the view that even if the evidence of PW-1 cannot be the basis for convicting the appellant under Section 302 IPC, the evidence of the other witnesses clearly prove the fact that the appellant had committed the offence under Section 302 IPC.

33. In the case of ***Mallappa (supra)***, the Apex Court had set aside the judgment of the High Court of Karnataka convicting the appellant and the consequential order of sentence, and restoring the judgment of Trial Court, wherein the accused had been acquitted. One of the grounds for acquittal was the fact that the accused was seen running away from the place of occurrence of the incident. The Apex Court held that the same was too thin an evidence to convict someone under Section 302 IPC, by applying the principle of *res-gestae*. As stated in the foregoing paragraph, the evidence of the eye witnesses, namely PW-3 and PW-5 clearly prove that the appellant had committed the crime. As such, even if we disregard the evidence of PW-1, the evidence of other witnesses prove the commission of the crime.

34. With regard to the submission made by the Amicus Curiae that PW-3 and PW-5 have made improvements in their evidence which could not be done in terms of the judgment of the ***Rajesh Alias Sarkari And Another vs. State of Haryana***, reported in ***(2021) 1 SCC 118***, we do not find that there has been any improvement made by PW-3 and PW5 in their evidence, which we find to be trustworthy and inspires confidence.

35. In view of the reasons stated above, we do not find any ground to interfere with the impugned Judgment & Order dated 23.09.2019 passed by the

learned Additional Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 64/2014.

36. The appeal is accordingly dismissed. Send back the LCR.

37. In appreciation of the assistance provided by the learned Amicus Curiae, the appropriate fee payable should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant