

GAHC010117212019



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

Case No. : CRL.A(J)/44/2019

Sri Amit Sabar **.....Appellant.**
Versus
The State of Assam **.....Respondent.**

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MALASRI NANDI

For the appellant : Mr. K Goswami Amicus Curiae/Senior Counsel
For the respondent : Ms. S. Jahan Additional PP, Assam.
Date of hearing : 22.02.2023
Date of judgment : 24.02.2023

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

Heard Mr. K Goswami, learned Senior Counsel and Amicus Curiae assisted by Mr. R Das, learned counsel for the appellant. Also heard Ms. S Jahan, learned Additional Public Prosecutor appearing for the State respondent.

2. This appeal has been filed against the judgment and order dated 30.11.2018 passed by the learned Additional Sessions Judge (FTC), Jorhat in Sessions Case No. 70(J-T)/2018, by which the appellant has been convicted

under Section 302 IPC. The appellant was thereafter sentenced to undergo rigorous imprisonment for life with a fine of Rs. 10,000/-, in default, simple imprisonment for 6 (six) months vide sentence order dated 06.12.2018.

3. The prosecution case in brief is that an FIR dated 14.01.2018 was submitted before the Officer-in-Charge of Titabor Police Station stating that on 13.01.2018, at around 11:30 pm, the informant's brother Sri Amit Sabar had called their father away from the house and killed him on the road near the house, by slashing his neck with a pruning knife. Pursuant to the FIR, Titabor P.S. Case No. 09/2018 under Section 302 of the IPC was registered against the appellant. After investigation was completed, charge-sheet under Section 302 IPC was submitted in the Court.

4. The learned Trial Court framed a charge under Section 302 of the IPC against the appellant on 21.06.2018, to which the appellant pleaded not guilty and prayed for trial.

5. During the trial proceedings, 11 (eleven) prosecution witnesses were examined. Thereafter, the appellant was examined under Section 313 Cr.PC. The learned Trial Court having come to a finding that the appellant was guilty of the offence under Section 302 IPC, convicted him under Section 302 IPC and sentenced him as per the sentence order dated 06.12.2018.

6. The learned senior counsel and Amicus Curiae submits at the outset that there is no denial with the fact that the deceased was killed by his son, on being slashed with a pruning knife on the neck. He however submits that in view of the explanation given by the appellant to Question No. 33 in his cross-examination under Section 313 Cr.PC, the Exception Nos. 1 and 4 of Section 300 IPC would be attracted to the facts in hand, as the appellant's act amounted to

culpable homicide, not amounting to murder. Accordingly, the appellant should be convicted for culpable homicide not amounting to murder and sentenced under Part-II of Section 304 IPC. The learned senior counsel submits that while PW-5, who is a child witness, has stated in her evidence that her father went out to meet the appellant (her brother), who was abusing her father with filthy language, the appellant held her father's and cut his hand. Thereafter, her father fell to the ground as he had been pushed by the appellant. The neck of her father was then slashed by the appellant. The learned senior counsel submits that sequence of events, i.e., the cutting of the hand of the deceased and the act of falling down on the road is different in the statement given by PW-5 under Section 164 Cr.PC. In the statement made under Section 164 Cr.PC, PW 5 has stated that the cutting of the hand and neck of the deceased occurred only after the deceased had fallen on the road.

7. The learned senior counsel for the appellant also submits that the evidence of PW-6, who is the minor son of the deceased shows that the appellant (brother) was abusing his father in filthy language. When his deceased father went out, the appellant cut him on the hand and neck with a knife and thereafter his father fell down. However, the statement of PW-6 in his statement under Section 164 Cr.PC is to the effect that the appellant first pushed his father, who fell on the road. Thereafter the appellant cut his father on his hand and neck with a pruning knife.

8. The learned senior counsel also submits that while PW 5 had stated that the appellant threw the pruning knife towards PW 5 and PW 6, the evidence of PW-6 does not show that any knife had been thrown by the appellant towards PW-5 and PW-6.

9. The learned senior counsel for the appellant submits that the eye witnesses

to the crime are the PW-5 and PW-6, who are the minor sister and brother of the appellant and children of the deceased. He submits that the deposition of a child witness may require corroboration and must be evaluated more carefully, with greater circumspection because they are susceptible to tutoring.

10. The learned senior counsel for the appellant submits that the explanation given by the appellant to Question No. 33 in his examination under Section 313 Cr.PC is to the effect that the appellant had called his father out from his residence. His father came out with a pruning knife to slash him. A scuffle took place between the father and son, who were both intoxicated. During the scuffle, the father somehow received a cut injury on his neck. The appellant fled away from the place of occurrence. However, he returned and on finding his father in a dead condition, he hid the pruning knife in the back of the house and went to inform the incident to the Garden Manager. While the appellant was about to reach the Manager of the Tea Estate, his brother, Bimal, Raju, Munukon and some other persons caught him and tied him to a tree in front of their residence. When the Police came, the appellant showed them where the pruning knife had been kept. In his explanation, the appellant also stated that he did not cause the cut injury to his father intentionally. The learned senior counsel submits that as there was no intention or pre-meditation on the part of the appellant to kill his father, besides the injuries having been caused during the scuffle between the parties, Exception Nos. 1 and 4 to Section 300 IPC are attracted to the case. He also submits that the determination of intention of the alleged attacker has to be considered, keeping in view the law laid down by the Apex Court in ***Ajmal –vs- State of Kerela***, reported in ***(2022) 9 SCC 766***.

11. The learned senior counsel submits that under Sub-Section 4 of Section 313 Cr.PC, the answers given by the appellant in response to his cross-

examination under Section 313 Cr.PC can be taken into consideration during an enquiry or trial, though the statement made may not be evidence *stricto sensu*. In this respect, the learned senior counsel has relied upon the judgment of the Apex Court in ***Ashok Debbarma alias Achak Debbarma –vs- State of Tripura***, reported in **(2014) 4 SCC 747**.

12. The learned senior counsel for the appellant also submits that the PW 6 in his cross-examination has stated that the pruning knife belongs to his father. As such, it implies that the pruning knife had been brought outside from the house by the deceased and the same was not with the appellant, at the time the father came out to meet him.

13. The learned senior counsel submits that due to the above reasons, the appellant's conviction should be altered to culpable homicide not amounting to murder and he should be sentenced under Part-II of Section 302 IPC.

14. Ms. S Jahan, learned Additional Public Prosecutor, on the other hand, submits that the Exceptions under Section 300 IPC are not attracted to the case in hand, in view of the fact that there is nothing to show that any quarrel had taken place or that there was any grave and sudden provocation by the father. Further, there is no evidence adduced by any of the witnesses to show that there was any fight between the appellant and the deceased. She also submits that there is no evidence showing that the pruning knife had been taken out from the house by the deceased, when the appellant had called out his father from his house on the fateful night. She submits that though the eye witnesses, i.e., PW-5 and PW-6, who are the siblings of the appellant and children of the deceased are child witnesses, the learned Trial Court has put questions to them regarding their ability to understand the questions and on being satisfied, their evidence has been recorded by the learned Trial Court.

15. The learned Additional Public Prosecutor submits that the intention of the appellant to murder his father is clear from the post-mortem report and the evidence given by the PW-8, i.e., the Doctor, wherein the description of the injuries to the neck and hand shows the same to be deep and wide. She further submits that the informant, who is also the brother of the appellant, had in his evidence as PW-1 stated that his father had told him that the appellant had cut him, though PW-1 did not tell the Police that his father has told him that the appellant had cut him. The learned Additional Public Prosecutor submits that there is no evidence to show that the act of the appellant could come within any of the Exceptions provided under Section 300 IPC and accordingly, the appeal should be dismissed.

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

17. PW-1, Bimal Sabar, who is the younger brother of the appellant states in his evidence that the incident took place around 11:00 pm on the day of Magh Bihu, while he was sleeping in his house. His sister (PW-5) awakened him and told him that the appellant had cut their father. On coming out of the house, he saw his father lying at the threshold of the house and there was cut injury on the neck and hand of his father. His father told him that the appellant had cut him. His further evidence is that as the appellant had run away, Raju, Munukon and he apprehended the appellant and tied him to a tree. Thereafter, the Police arrived. In his cross-examination, PW1 states that his father consumed liquor sometimes, but he did not know whether he consumed liquor on the day of the incident.

18. The evidence of PW-2, Dipankar Saikia, who is the son-in-law of the deceased, is to the effect that he was informed by PW6 that the appellant had hacked his father-in-law with a pruning knife. On reaching his father-in-law's

house, he saw the appellant tied up in the courtyard. Further, on the appellant being asked why he had slashed his father, the appellant stated that as the deceased was disturbing him, he had slashed the deceased. PW2 was also made a seizure witness in the case.

19. PW-3, Bubul Sabar states that he was told by PW6 that the appellant had hacked his father.

20. PW-4, Anil Sabar in his evidence states that he was a seizure witness.

21. PW-5, Muni Sabar, who is the sister of the appellant and daughter of the deceased, states in her evidence that on the night of the incident, her father went to her uncle's house for dinner. After her father had returned from the dinner, the appellant, who was on the road, started verbally abusing her father with filthy language. When her father went out, the appellant caught hold of him and cut him in his hand. Thereafter, her father fell to the ground and the appellant then cut the neck of her father. When PW-5 and PW-6 went near the appellant, the appellant threw the pruning knife towards them. PW-5 and PW-6 thereafter returned to their house in fear. The appellant then fled away.

The evidence of PW-6, Rahul Sabar, who is the younger brother of the appellant and son of the deceased, is also to the same effect. PW-6 states that after his father had come home, the appellant started calling him from the courtyard, to come out. In the evidence of PW-6, there is a slight difference with regard to the sequence of events, as he states in his evidence that the appellant called his father from the courtyard. Further, the appellant slashed his father, after he was pushed to the ground. PW6 also identified the pruning knife, which was used by the appellant.

22. The evidence of PW-7, Tummi Sabar Saikia, who is the sister of the

appellant, is to the effect that she was informed by PW6 that the appellant had slashed her father.

23. The evidence of PW-8, i.e, the Doctor, is to the effect that he conducted the post-mortem examination on the deceased on 14.01.2018 and in his opinion, death was caused due to haemorrhage and shock, following the injury sustained by deceased. All the injuries were ante-mortem caused by a sharp cutting weapon and homicidal in nature.

The wounds, position and character of the injuries of the deceased stated by the Doctor in his post-mortem report is as follows:-

**“WOUNDS, POSITION AND CHARACTER –
INJURIES :-**

- (1) *Incised injury of size 12cm x 2cm is present over the frontal and left side of neck, horizontally placed, 1.5cm below the thyroid cartilage. The skin, muscles, vessels and part of the trachea are cut transversely. Margins are clean cut and well defined. Clotted blood found adherent to wound margins which resists washing with tap water.*
- (2) *Incised wound of size 7cm x 5cm x bone deep is present over the base of left thumb on the left hand, obliquely placed cutting the skin, soft tissue, tendon and bone.”*

24. Exception 1 to Section 300 IPC states that culpable homicide is not murder, if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident. In the present case, there is no evidence given by any of the witnesses to the effect that the appellant had been provoked by his father and that he had been deprived of the

power of self control, which caused the death of his father. The evidence adduced points to the fact that after the deceased father had reached his house, the appellant had called his father outside while verbally abusing him. Thereafter, the appellant had slashed his father in the hand and neck, due to which he died. In that view of the matter, we are of the view that Exception 1 to Section 300 IPC is not attracted to the facts of this case.

25. Exception 4 to Section 300 IPC states that culpable homicide is not murder if it is committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. In the present case, the evidence of the witnesses does not indicate that any fight had taken place between the appellant and the father or that any quarrel had taken place. Further, there is nothing to show that the deceased was carrying any weapon. On the other hand, the appellant's action is cruel, as he slashes his father's hand and neck, besides pushing him down. In view of the above, we are also of the view that Exception 4 to Section 300 IPC is not attracted to the facts of this case.

26. The examination of the appellant under Section 313 Cr.PC shows that he did not deny the fact that PW-5 and PW-6 were witnesses to the incident and that he had used filthy language and asked his father to come out from the house. The stand taken by the appellant in his answer to Question No. 33 is that after calling his father out from the residence, a scuffle took place between them as they were in an intoxicated state. Thereafter, his father somehow received an injury on his neck during the scuffle.

The appellant's answer to Question No. 33 under Section 313 Cr.PC is reproduced below:-

“Question No. 33:- Do you want to say something in your favour?”

Answer:- On the date of occurrence it was Magh Bihu Uruka and while my father came from the residence of my uncle after the uruka feast I called him to come outside of the residence. Then my father came with a Kalam Katari and chased me. Later on a scuffle took place between my father and me and both of us are in an intoxicated condition. Due to the scuffle between us my father somehow received cut injury on his neck. While I have not found any response from my father for a while and saw injury on the neck due to fear I fled away some distance away from my home. But later on again I returned and saw that my father somehow managed to go to his home and found him lying in front of the door step. At the time, I found my father on dead condition and due to fear I hide the knife on the back side of the residence and went to inform the matter to Garden Manager about the matter. While I was about to reach the residence of the Manager of the Tea Estate, my brother Bimal. Raju, Munukon and some other persons caught me and tied me with a rope in a tree in front of our residence and while police personnel came I had shown the Kalam katari to the police personnel. I had not caused cut injury to my father intentionally.”

27. In the case of **Ashok Debbarma (supra)**, the Apex Court has held that the statement made by an accused under Section 313 Cr.PC will not be evidence *stricto sensu* and the accused shall not render himself liable to punishment merely on the basis of answers given while he was being examined under Section 313 Cr.PC. However, as per Sub Section 4 of Section 313 Cr.PC, answers given by an accused in response to his examination under Section 313 Cr.PC can be taken into consideration in an inquiry or trial. In the case of **Hate Singh Bhagat Singh –VS- State of Madhya Bharat**, reported in **AIR 1953 SC 468**, the Apex Court has held that the answers given by the accused under Section 313 Cr.PC can be used for proving his guilt, as much as the evidence given by the prosecution witness. In the case of **Mohan Singh –vs- Prem Singh**, reported in **(2002) 10 SCC 236**, the Apex Court has held that the

statement made in defence by the accused under Section 313 Cr.PC can certainly be taken aid of, to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 Cr.PC cannot be made the sole basis of his conviction.

28. As can be seen from the judgments of the Apex Court indicated above, the statement made by an accused under Section 313 Cr.PC cannot be made the basis for finding the accused guilty as the same is not made under oath. All the same, the statement made in defence can be taken as a piece of evidence if the same lends credence to the evidence led by the prosecution. In the present case, the admission by the appellant in his statement under Section 313 Cr.PC is to the effect that he admits the presence of PW-5 and PW-6 at the time of occurrence of the incident. However his explanation that there was a fight between his father and him, as they were in intoxicated condition and that his father somehow received a cut injury on his neck, cannot be accepted, in view of the testimonies of the eye witnesses, i.e., PW-5 and PW-6.

29. With regard to the stand taken by the appellant's counsel that there was no intention or pre-meditation on the part of the appellant to kill his father, it would be profitable to refer to the judgment of the Apex Court in ***Ajmal –vs- State of Kerela (supra)***, wherein the Apex Court has held that many factors have to be looked into while determining the intention of an accused. One of the factors would be the kind of weapon used and whether the blow has been given to vital parts of the body. In the present case not only the accused has slashed his father's hand and neck by the pruning knife, which is a sharp edged weapon for cutting hedges and long grass, etc, but he also called his father out late at night while verbally abusing him. The description of the injuries given by the Doctor in his post-mortem report shows that the cuts were deep. Thus, we

are of the view that there was intention on the part of the appellant to kill his father.

30. In the case of *State of Madhya Pradesh –vs- Ramesh & Anr.*, reported in **(2011) 4 SCC 786**, the Apex Court has held that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. In the present case, the learned Trial Court had, prior to recording the evidence of PW-5 and PW-6, asked them questions to see whether they could understand the questions and were capable to give the answers to the same. On satisfying itself with the competence of the child witnesses, i.e, PW-5 and PW-6 to give evidence, the learned Trial Court had recorded their evidence. The appellant also has not taken any stand that PW-5 and PW-6 were not capable of giving evidence or that they were tutored. In fact the answers given by the appellant in his statement under Section 313 Cr.PC clearly shows that PW-5 and PW-6 were present at the place of occurrence of the crime and that they had not been tutored.

31. With regard to the minor discrepancies regarding the sequence of events that occurred, at the time the appellant slashed his father and the falling of the father to the ground, we are of the view that the said minor discrepancies do not affect the core of the prosecution case. In the judgment of the Apex Court 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, such evidence cannot be safe to be relied 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. In the present case, we do not doubt the credibility of the witnesses and find that their testimonies inspire confidence.

32. In view of the reasons stated above, we are of the view that there is no infirmity with the impugned judgment and order passed by the learned Trial Court and accordingly no ground for interference has been made out.

33. The Appeal is accordingly dismissed. Send back the LCR.

34. 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