

GAHC010142742022



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

Case No. : CrI.A./146/2022

SANIDUL ISLAM
S/O MD. MAKRAM ALI
RESIDENT OF VILLAGE BARBALA PS HOWLY, DIST BARPETA, ASSAM
781316

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP ASSAM

2:BAHATAN NESSA
W/O LATE GAFUR TALUKDAR
RESIDENT OF VILLAGE BARBALA PS HOWLY
DIST BARPETA
ASSAM 78131

Advocate for the Petitioner : MR. B CHAKRAVARTY

Advocate for the Respondent : MR. B.B. GOGOI(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 28-02-2023

1. Heard Mr. B. Chakravorty, learned counsel for the appellant. Also heard Mr. B.B.

Gogoi, learned Addl. P.P. for the respondent No. 1 and learned counsel Mr. N. Uddin for respondent No. 2.

2. This appeal is preferred against the judgment & order dated 01.07.2022 passed by the learned Additional Sessions Judge (FTC), Barpeta in connection with Sessions Case No. 179/2021 convicting Sanidul Islam (hereinafter referred as the appellant) under Section 304 Part-II of the Indian Penal Code (IPC for short) IPC to undergo Rigorous Imprisonment for 8 years and to pay a fine of Rs. 10,000/- with default stipulation.

3. The factual matrix of the prosecution case is that on 20.04.2021, the informant Bahatan Nessa lodged an FIR with the police at Howly P.S. that on 19.04.2021 at about 6 AM the appellant along with Rashidul Islam, Makram Ali, Lal Khatun, Asiya Khatun and other unknown miscreants, trespassed into their land and started digging the soil. The complainant and her husband Gafur Talukdar tried to stop them but the miscreants verbally abused them and the appellant assaulted Gafur Talukdar with a bamboo lathi (pole). Gafur Talukdar sustained grievous injuries and he finally succumbed to his injuries. The miscreants also assaulted the informant and her daughter-in-law. They raised alarm and the neighbours came to their rescue. The FIR was registered as Howly P.S. Case No. 247/2021 under Section 120(B)/294/302 IPC. Investigation commenced and the IO went to the place of occurrence, prepared a sketch map and recorded the statements of the witnesses and obtained the autopsy report of the deceased and arrested the appellant along with Rashidul Islam and Makram Ali.

4. Charge sheet was laid against the appellant, Rashidul Islam and Makram Ali. It is pertinent to mention at this juncture that Rashidul Islam and Makram Ali also underwent trial along with the appellant but they were acquitted from the charges and were set at liberty.

5. At the commencement of trial, charge was framed under Sections 120B/302 IPC and the appellant as well as the co-accused abjured their guilt and claimed innocence. To connect the appellant to the crime, the prosecution examined six witnesses including the informant and the victim while the defence cross-examined the witnesses to refute the charges. On the incriminating circumstances arising against them, questions were asked to the appellant and his co-accused under Section 313 of the Code of Criminal Procedure (Cr.PC for short) and their responses were recorded.

6. The learned Trial Court delineated the following points for determination:

“(A) Whether A1, A2 and A3 on 19.04.2021 at about 6:00 AM at Barbela, within the jurisdiction of Howly police station, conspired to cause the death of informant’s husband and in pursuance of such conspiracy, accused did some acts to commit the death of informant’s husband and thereby committed an offence punishable u/s 120(B) IPC?

(B) Whether on the same date, time and place A1, A2 and A3 committed murder by causing death of informant’s husband namely Gafur Talukdar and thereby committed an offence punishable u/s 302 IPC?”

7. The question that falls for consideration in this case is that whether the learned trial Court erred in convicting the appellant under Section 304 Part-II IPC.

8. The trial Court discussed in depth the evidence, while convicting the appellant. The Inquest Report which was not exhibited by the prosecution or by defence was brought on record by the trial Court. It was held by the learned Trial Court that the contusion mentioned on Ext.-P1(a) was detected only after dissection and as such the Officer who held the inquest could not have detected it . Though the PW-1 and PW-2 have stated that the appellant dealt blows on the back of the victim’s neck and ear, yet the post-mortem report depicts that the

injuries were detected on the frontal scalp area and the chin. It was held by the trial Court that the weapon of offence was a bamboo pole which is not pointed or spiked but has a smooth surface and the impression of assault may not be left on one particular part of the body. The trial Court also held the appellant guilty of offence under Section 304 Part-II IPC after considering the plea of the defence that one fatal blow was dealt when the appellant flew into a rage. It was held that the appellant did not act with premeditation to eliminate the deceased.

9. The learned counsel for the appellant laid stress in his argument that the appellant deserves acquittal as there are inconsistencies between the medical report and the inquest report. The scribe of the FIR was not examined as a witness. It is submitted that according to PW-3 many people assembled at the place of occurrence, but the onlookers, including Jaharuddin, Mainuddin, Sabur Mastor were not examined as witnesses. No spade or any other implement used for digging soil were seized. Learned counsel for the appellant has also relied on the decision of the Hon'ble Supreme Court in *Madhu vs. State of Kerala*, reported in (2012) AIR SC 664 and on the decision of this Court in *Kanak Boro vs. State of Assam*, reported in 2018 (3) GLT 790.

10. The learned Addl. P.P. emphasized through his argument that the depositions of PW-1, PW-2 & PW-3 are consistent and they are the eye-witnesses who had witnessed the incident. Inquest Report cannot overrule Post-mortem Report and the inconsistencies between these two reports can be ignored because Inquest Report is not usually prepared by an expert who can give opinion regarding injuries, except superfluous injuries.

11. On the anvil of these submissions I proceed to decide this appeal.

12. Bahatan Nessa, PW-1 is the informant and she has testified that the incident occurred about 10 months ago at about 6 AM. At that time, the appellant along with Rashidul and Makram were digging soil from their land. When she and her husband Gafur Talukdar resisted, the appellant assaulted Gafur Talukdar with a bamboo. He dealt blows on the back and neck of her husband who died at the spot. Then she and her daughter-in-law Hanufa Khatun brought her husband's body inside the house and sprinkled water. Many people arrived by the time and advised her to take her husband to the hospital. She took her husband to Barpeta Medical College but the doctor declared him as brought dead. Police came to their house on the day of the incident. Her husband died on the 19th day and on the 20th day she lodged the FIR. From her cross-examination it could be deciphered that the appellant is her husband's nephew. She has stated that the police has seized the bamboo with the help of which the appellant had attacked her husband.

13. The evidence of PW-1 is corroborated by the evidence of PW-2, Hanufa Khatun who has testified that the incident occurred about 10 months back at about 6 AM. Rashidul and Asiya Khatun were digging soil from their land when her father-in-law and mother-in-law (Bahatan Nessa) tried to prevent them from digging the soil. She was also present at the spot, with her baby on her lap. When her father-in-law tried to prevent the miscreants from digging the soil, the appellant assaulted her father-in-law with a bamboo post on his shoulder, behind his ear. Instantly her father-in-law slumped to the ground. She and her mother-in-law raised alarm and her husband Inamul Talukdar who was at a distance, came and brought her father-in-law to their house. Their neighbours also came to their house. Her father-in-law was taken to the hospital and the doctor declared him as brought dead. Her father-in-law had already passed away. People advised them to take him to the hospital and so her father-in-

law was taken to the hospital.

14. Her cross-examination also reflects that the appellant is related to them, but even after her marriage she never noticed her father-in-law's family members visiting the appellant's family. She got married about 3 years ago. She further stated in her cross-examination that when they screamed many people came to their house including Late Mainuddin and his family members.

15. Through the cross-examination of the PWs, the defence tried to project a bitter animosity between the appellant's family and the informant's family.

16. A close scrutiny of the evidence of PW-1 and PW-2 clearly depicts that no contradiction can be elicited through the cross-examination of PW-1 and PW-2 as per Section 145 of the Indian Evidence Act, 1872 (the Evidence Act in short) qua Section 162 Cr.PC.

17. PW-2's husband Inamul Talukdar testified as PW-3 that Makram is his Fufa (uncle) and other two accused are his cousins. This implies that the appellant is his cousin. The incident occurred on 19.03.2021 at about 6 AM. The appellant along with other miscreants were digging soil from their land and a quarrel broke out between his mother and the appellant. At that time his father Gafur Talukdar went towards the place of occurrence. He also proceeded, but his father asked him not to proceed and so he backed off. But he heard a shriek, and he promptly went to the place of occurrence and saw his father lying on the ground and his mother informed him that the appellant assaulted his father with a bamboo stick. He lifted his father and brought him to the house and sprinkled water on his head. Their neighbours came and put a tea spoon of water into his father's mouth but his father could not gulp the water. They brought him to the Barpeta Medical College and autopsy was performed on the body of

his father.

18. It is pertinent to mention at this juncture that PW-1 and PW-3 were cross-examined about appendicitis operation undergone by Gafur Talukdar. PW-2 was not aware of the operation but PW-1 and PW-3 have admitted that about 5 years ago Gafur Talukdar underwent an appendicitis operation.

19. Much weight was given to contradictions, which could be elicited through the cross-examination of PW-3 and cross-examination of IO who testified as PW-6. The defence tried to divert the attention from the poignant point by projecting on a contradiction which could be safely brushed aside. the IO Shri Abhijit Kr. Baruah, PW-6 has admitted in his cross-examination that PW-3 has omitted to mention under Section 161 Cr.PC that a quarrel erupted between his mother and the appellant and then his father proceeded to the place of occurrence but his father prohibited him from proceeding to the place of occurrence and he backed off and when he heard some shrieks, he went to the place of occurrence. The evidence of PW-3 that he saw his father lying on the ground has remained uncontroverted and un-contradicted. His evidence substantiates the evidence of PW-2 that he was nearby and when he heard the shrieks, he went to the place of occurrence. The evidence of PW-3 that his mother informed him that the appellant assaulted his father has also remained uncontroverted and un-contradicted. The plea of the defence that the deceased had a heart attack and that he was an ailing person who also underwent appendicitis surgery can be ignored. The prosecution has adduced clinching evidence of two eye witnesses, whose evidence is bolstered by the evidence of other witnesses as well.

20. PW-4, Bialait Hussain Talukdar @ Billal testified that Makram Ali is his brother-in-law

and the appellant and Rashidul are sons of Makram Ali. The incident occurred on 19.04.2021 at about 6 AM. At that time he was at Barbala market and he received a phone call from his younger brother Gaisuddin Talukdar who informed him that his brother Abdul Gafur Talukdar was beaten to death by the appellant. The appellant dealt a blow with a bamboo on the neck of Abdul Gofur causing the fatal injury. He (PW-4) immediately rushed to the spot and saw Gofur's body lying on the verandah. They called the 108 Ambulance Service and sent Gafur to Barpeta Medical College where he was declared as brought dead. Post-mortem examination was conducted in the medical college. He became unconscious when he saw the body. In his cross-examination he admitted that there was a strained relationship between Gafur Talukdar and the appellant's family. He reached the place of occurrence after 20 minutes of the incident and many people were already assembled in the place of occurrence. He also saw the blackened injury on the right side of the shoulder behind the neck but later he stated that he could not recall the exact part of the body where he noticed the injury.

Apart from the above revelations by PW-4 no contradictions could be elicited through his cross-examination.

21. The Medical Officer Dr. Manoj Kumar Singha testified as PW-5 that on 19.04.2021, he performed post-mortem on the body of Gofur Talukdar in connection with this case and found the following injuries:

“I. External Appearance:-

Condition of subject stout emaciated, decomposed etc. :- Male body swarthy complexion average built. Rigor mortis present.

Wounds-position and character:-

1. One abrasion present over the chin, size 4 x 3 cm.
2. One dissection contusion present over the scalp frontal area midline size 5 x 4 cm.

II. Cranium and Spinal Canal:-

1. Scalp, as described. Skull & vertebrae:- Healthy.
2. Membrane:- Congested.
3. Brain – congested and spinal cord:- not examined.

III. Thorax:-

1. Walls, ribs and cartilages:- All healthy.
2. Pleurae:- Congested.
3. Larynx and trachea:- Congested.
4. Right lung and Left lung:- Congested.
5. Pericardium- Healthy. Heart-enlarged and vessels-thickened.

IV. Abdomen:-

1. Walls:- Healthy.
2. Peritoneum:- Congested.
3. Mouth, Pharynx, Oesophagus:- Congested.
4. Stomach and its contents:- Congested.
5. Small intestine and its contents:- Congested.

6. Large intestine and its contents:- Congested.
7. Liver:- Congested.
8. Spleen:- Congested
9. Kidney:- Congested.
10. Bladder:- Healthy.
11. Organs of generation, external and internal:- healthy.

V. Muscles, Bones and Joints:-

1. Injury – As described 2. Disease or deformity 3. Fracture 4. Dislocation :- Not found.”

According to his opinion death was due to syncope (heart block) resulting from coronary insufficiency. The injuries as described were ante-mortem in nature and caused by blunt impact. Time since death was 12 to 24 hours approximately. Ext.-P series is the post-mortem report and Ext.P-1(a)(a) to P-1(a)(i) are his signatures. PW-5 has admitted that the injuries mentioned in P-1(a), P-1(b), P-1(c), P-1(d) and P-1(e) may have been caused by dashing against a hard surface.

22. I have carefully scrutinised the Medico Legal Report. The injuries described under P-1 (a)(b)(c)(d)(e) have been categorically described by the Medical Officer as

Abrasion over chin;

Contusion over scalp;

Congestion of pleurae larynx and trachea, right lung and left lung;

Enlargement of heart, thickened vessels;

Congestion of peritoneum, mouth, pharynx, oesophagus, liver, spleen, kidney, stomach, intestines.

23. Thus, it is apparent that the Medical Officer replied to the queries of the defence during his cross-examination in a nonchalant manner. The afore-mentioned injuries of course cannot be caused by dashing against a hard substance. It is not fathomable that injuries on the chin and the scalp can be sustained at the same time when a person dashes against a hard substance.

24. The learned counsel for the appellant has also emphasised through his argument that the inquest report is not similar to the Medico Legal Report. A careful scrutiny of the evidence reveals that the inquest report was not marked as exhibit during trial by the defence or by the prosecution.

25. It has been correctly held by the trial Court that the superfluous injuries were recorded by a person who has no medical expertise. The contusion was detected by the medical officer after dissection.

26. S.I. Abhijit Kumar Baruah, the Investigating Officer has testified as PW-6 that on 19.04.2021 he was posted as OC at Howly PS. At 4:40 PM he received an information over phone about a murder and registered a G.D. Entry No. 494 dated 19.04.2021. He immediately rushed to the place of occurrence and prepared the sketch map and recorded the statements of the witnesses. He searched for the accused but he could not find them. The injured person was taken to the FAAMCH by his family members and he was declared as brought dead and thereafter post-mortem was performed on his body at the FAAMCH police outpost. The body of the deceased was brought back to his house in the evening. SI

Niranjan Das of FAAMCH OP had forwarded an extract copy of FAAMCH G.D. Entry No. 238 dated 19.04.2021 along with Post Mortem Report and Inquest Report of the deceased. On 20.04.2021 Bahatan Nessa lodged the written FIR with the police and accordingly this case was registered. He proved the FIR as Ext. P-1 and his signature on the FIR as Ext.-P-1(1). He searched for the bamboo stick with which the deceased was assaulted but he could not recover the same. He proved the sketch-map as Ext.-P-3 and his signature on sketch-map as Ext.-P-3(1). He proved the charge-sheet as Ext.-P-4 and his signature on the charge-sheet as Ext.P-4(1). In his cross-examination PW-6 has admitted that he has not submitted the extract copy of the G.D. Entry No. 494. The G.D. Entry No. 238 dated 19.04.2021 was registered as FAAMCH but the cause of death is not mentioned in the G.D. Entry. The inquest report submitted from the FAAMCH depicts that there were no visible injuries on the body of the deceased. He has admitted in his cross-examination that he did not interrogate the scribe of the FIR. The name of the person who obtained the right thumb impression of the informant has also not been mentioned in the FIR. The IO has admitted that he has recorded the statements of only the family members of the deceased. He has further stated in his cross-examination that during the time of investigation he could not find any other person at the place of occurrence and he could not record the statements of independent witnesses.

27. After recapitulating the entire evidence I would like to reiterate that there is clinching evidence against the appellant. The cross-examination of the witnesses could not refute the charges against the appellant. The learned counsel for the appellant relied on the decision of the Hon'ble Supreme court in *Madhu vs. State of Kerala*, reported in (2012) AIR SCC 664 wherein it has been held that –

“It is also essential to properly analyse the statement of Dr. Radhskrishnan

PW-20. Dr. Radhaskrishnan had expressed in the post mortem certificate dated 9.05.1998, and he had affirmed during the course of his deposition before the Sessions Court, that the death of Padmini Devi had been caused by drowning. The fact that she had been smothered first and thereafter drowned by the accused Madhu and Sibi cannot be stated to have been established by the prosecution. No injury whatsoever was suffered by deceased Padmini Devi either on her neck or on her feet. Padmini Devi was 47 years old at the time of occurrence. She would not have easily allowed two drunkards, who were in a state of intoxication, to carry her away by holding her by her neck and feet as has been alleged in the charge-sheet. Padmini Devi would have been expected to fight for her life, consequent upon an assault on her, at the hands of the accused Madhu and Sibi. Injury Nos. 1 and 2 referred to by the courts below, so as to infer smothering, is clearly unacceptable in view of the fact that Dr. Radhakrishnan PW20, in his cross-examination, clearly asserted, that injury Nos. 1 and 2 are possible if a person falls and during the course of that fall the right side of the face comes in contact with a rough hard surface. Dr. Radhakrishnan PW20 also stated during his cross-examination, that all the injuries suffered by Padmini Devi were superficial injuries. In the aforesaid view of the matter, even the medical evidence produced by the prosecution, does not suitably support the prosecution story, that the deceased Padmini Devi was, first assaulted by the accused Madhu and Sibi, and thereafter, drowned. The deceased is alleged to have been dragged, smothered and forcibly drowned. The instant version of the prosecution story, is wholly unacceptable, keeping in mind the statement of Dr. Radhakrishnan PW 20."

28. The instant case is not similar to the case of Madhu (*supra*). Madhu was convicted on the basis of circumstantial evidence and later due to the discrepancies in the evidence he was acquitted. In this case at hand, we have the evidence of eye witnesses and the evidence of another witness who came to the spot immediately after the petitioner was assaulted. Another witness came to the spot and he heard about the incident from the eye-witnesses. In this case we have a first hand account of two eye witnesses.

29. The learned counsel for the appellant also relied on the decision of this Court in *Kanak Boro vs. State of Assam*, reported in 2018 (3) GLT 790 wherein it has been held that –

“At this point of time, we may refer to the evidence of the Investigating Officer PW-7, who stated that on 14.08.2000 at about 1.45 pm one Ranjit Boro had come to the police station and had verbally informed about the incident stating that the deceased was his brother and that accused killed his brother over a land dispute. Reverting back to the evidence of PW-2, she had categorically stated that the

accused was her paternal uncle. In other words, accused and the deceased were brothers. This would also mean that Ranjit Boro was the brother of both the deceased and the accused. While PW-1 had stated that there was no dispute with the accused, according to Ranjit Boro, the incident took place because of a land dispute. Interestingly enough the said Sri Ranjit Boro, on whose information GD Entry No. 358 was made on 14.08.2000, was not examined by the police and was not put up as a witness during the trial. This is a serious lapse on the part of the prosecution. Ranjit Boro is also conspicuous by his absence in the testimony of both PW-1 and PW-2. That apart, though the FIR was exhibited as Ext.-2, the author of the FIR i.e., the informant was also not examined by the police and not put up as a witness. Informant Mukuta Boro was the son of the deceased. He had clearly stated that following a boundary dispute the accused had trespassed into their house and assaulted his father causing his death. Omission on the part of the investigating authority to record the statement of the informant and failure of the prosecution to present him as a witness has seriously dented the prosecution case."

30. The case of Kanak Boro is also not similar to the instant case. In Kanak Boro's case (supra) the informant was not examined as witness nor was the person Ranjit Boro who initially informed the police about the incident was examined as a witness. In the instant case, the scribe of the FIR was not examined as a witness but the informant Bahatun Nessa was indeed examined as a witness.

31. The learned trial Court held that as per the version of PW-1 and PW-2, the bamboo blow was given in the area behind the neck and ear, but the injury shown in the autopsy report was on the chin and frontal scalp area. The witnesses are rustic and illiterate witnesses. They could not properly describe the exact part of the body but it is amply clear that the fatal injury was sustained by the deceased around the part of the body which has been described by the witnesses. The injury was sustained near the head. It is not that the injuries described by the witnesses were on the lower part of the body. The IO, PW-6 has stated that during investigation he did not find any weapon of offence because there were heaps of bamboo poles and lathis and other waste materials near the place of occurrence and it was not plausible to search for the same in that pile. The fact that the incident occurred on

the morning of 19.04.2021 could not be refuted. PW-1 has given an approximate date and time regarding the incident and so did PW-2. PW-3 has given the date but the date is not correct. PW-4 has given the accurate date of the incident. The Medical Officer's evidence clearly reveals that autopsy was performed on 19.04.2021 and the time since death of the deceased was 12 to 24 hours approximately. Death was indeed the result of the assault described by PWs- 1, 2, 3 and 4. There is a ring of truth in the evidence. Although the appellant was charged under Section 302 IPC, he was held guilty of offence under Section 304 Part-II of the IPC. It was held by the learned trial Court that while the appellant along with the other accused have been digging the soil from his land, PW-1 and the deceased obstructed them and suddenly the appellant dealt a blow with a bamboo on the head of the deceased. It was correctly held that this blow was dealt without pre-meditation. As the appellant was driven by heat of passion on a sudden quarrel, the appellant did not take undue advantage of the situation or acted in a cruel manner. The bamboo stick was nearby and so he just picked it up and dealt a blow as he suddenly flew into a rage at the spur of the moment. The appellant was sentenced to 8 years of Rigorous Imprisonment. The period of imprisonment is scaled down to 5 years. It is held that the appeal is devoid of merits. The learned trial Court has spelt out sound reasonings while deciding the appeal. No incidence of earlier criminal antecedent could be produced by the prosecution. The order of conviction under Section 304 Part-II IPC is upheld but the sentence of 8 years is modified and reduced to 5 years of imprisonment.

32. The appellant is thereby sentenced to undergo Rigorous Imprisonment of 5 years for offence under Section 304 Part-II of the IPC and to pay a fine of Rs. 10,000/- and in default of payment of fine to undergo Rigorous Imprisonment for 3 months.

Send back the LCR.

JUDGE

Comparing Assistant