

GAHC010278122019



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

Crl.A(J) 103/2019

Raju Das

.....Appellant

Versus

1. The State of Assam
2. Sri Karuna Kanta Singha,
S/o Late Naba Kishore Singha,
Village- Sudarshanpur, Part-III,
(Rajargram), P.S.- Lala,
District- Hailakandi, Assam.

.....Respondents

Crl.A. 285/2019

1. Sri Kalai Das,
Aged about 25 years,
S/o Sri Anil Das,
Village: Kalapahar,
P.O.- Kalacherra,
P.S.- Lala, District- Hailakandi,

PIN- 788160

2. Sri Kutu Das,
Aged about 23 years,
S/o Sri Hridaymony Das,
Village: Kalapahar,
P.O.- Kalacherra,
P.S.- Lala, District- Hailakandi,
PIN- 788160

.....**Appellants**

Versus

1. The State of Assam
2. Karuna Kanta Singha (Informer),
S/o Late Nabakishor Singha,
Village: Sudarshanpur, Part-III (Rajargram),
P.O.- Kalacherra/Olivacherra,
P.S.- Lala, District- Hailakandi,
PIN- 788737

.....**Respondents**

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

For the appellants : Mr. AH Alamgir

Ms. B Choudhury, Amicus Curiae

For the State respondent : Ms. B Bhuyan,

Additional Public Prosecutor, Assam.

For the Informant : Mr. NH Mazarbhuiyan,
Mr. NBP Singha.

Date of hearing : 06.06.2023

Date of judgment : 19.06.2023

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

Heard Mr. AH Alamgir, learned counsel for the appellants, Ms. B Chowdhury, learned Amicus Curiae, Ms. B Bhuyan, learned Additional Public Prosecutor appearing for the State of Assam, Mr. NH Mazarbhuiyan, learned counsel and Mr. NBP Singha, learned counsel for the informant.

2. The two appeals have been filed against the impugned judgment dated 16.05.2019, passed by the court of the learned Sessions Judge, Hailakandi in Sessions Case No. 19/2017, by which the three appellants have been convicted under Sections 341/302/34 IPC for the offence of committing wrongful restraint and murder of the deceased, Harendra Singha. The three appellants have been sentenced for life with a fine of Rs. 2,000/-, each, in default two months rigorous imprisonment under Sections 302/34 IPC. They were also sentenced to undergo simple imprisonment for one month under Sections 341/34 IPC. The sentences are to run concurrently.

3. The prosecution case, in brief, is that on 30.07.2014, the informant, who is prosecution witness No. 1, in short "PW1", lodged an FIR dated 30.07.2014 with the Officer-In-charge of Lala Police Station, alleging *inter alia* that on

29.07.2014, at about 09:30 pm, his neighbour Dharmen Singha saw the appellants assaulting the deceased with a sharp weapon on several parts of his body and left him on the road. Dharmen Singh (PW7) stopped his motor cycle and tried to catch the appellants, who had fled away from the place of occurrence. Though the PW7 chased the appellants, the appellants managed to run away. An ambulance service was informed and the body of the deceased was taken to the hospital where he was declared dead.

4. On receipt of the FIR, Lala P.S. Case No. 223/2014 was registered under Sections 341/342/302/34 IPC. After investigation was completed by the Police, charge-sheet was submitted against the appellants, wherein the Investigating Officer found a *prima facie* case against the appellants under Sections 341/342/302/34 IPC.

5. On 23.03.2017, charges were framed against the appellants under Sections 341/34 and 302/34 IPC, to which the appellants pleaded not guilty and claimed to be tried. During the trial proceedings, 11 (eleven) prosecution witnesses were examined by the learned Trial Court. Then the appellants were examined under Section 313 Cr.PC. Thereafter, the learned Trial court passed the impugned judgment dated 16.05.2019 in Sessions Case No. 19/2017, convicting and sentencing the appellants under Section 302/34 IPC and Section 341/34 IPC.

6. The counsel for the appellants and the learned Amicus Curiae submit that the impugned judgment is not sustainable, inasmuch as, there are contradictions in the time of the incident and the communication of the incident to the Police. They submit that while the eye witness PW7 had seen the incident of assault at around 09:30 pm on 29.07.2014, as per the FIR and the evidence of PW7, the GD Entry No. 476 dated 29.07.2014, which had been made on the

basis of the information provided by one Najrul Khan, shows that the GD Entry had been made at 09:05 pm on 29.07.2014, to the effect that Najrul Khan saw one injured person lying on the road. Thus, as there is a discrepancy with regard to when the incident occurred, the same implied that PW7 did not witness the incident and that the incident of assault by the appellants could not be said to be proved.

7. The learned counsels for the appellants also submit that in the statement made by PW3 to the Police under Section 161 Cr.PC, PW3 stated that PW7 told him that PW7 saw the appellants running away from the place of occurrence. However, in the deposition of PW3 before the learned Trial Court, PW3 states that PW7 had told PW3 that the appellants had assaulted the deceased and fled away. Here also, the implication of the differing statements, wherein assault was not mentioned in the Section 161 Cr.PC statement, implies that PW3 was not a reliable witness and as such, the evidence of PW3 could not be admissible as evidence.

8. The learned counsels for the appellants submit that though PW7 had allegedly seen the assault of the deceased by the appellants, on the basis of the light emitted by his motor cycle, the motor cycle had not been seized by the Police, though articles such as sandals, torch light and a black t-shirt, which were lying in the place of occurrence, were seized by the Police.

9. The learned counsel for the appellants and the learned Amicus Curiae submit that though the medical report of the Doctor shows that there were wounds on the deceased, no weapon has been seized or recovered by the Police to prove that any weapon had been used by the appellants, while allegedly assaulting the deceased. They also submit that the GD Entry having been made at 09:05 pm on 29.07.2014, i.e., before the filing of the FIR, the said Sri Najrul

Khan, who gave the information due to which the GD Entry had been made, was not made a prosecution witness and as such was not examined by the learned Trial Court. They accordingly submit that Sri Najrul Khan being a material witness, the non-examination of the material witness was fatal to the case of the prosecution. They also submit that the evidence of PWs 1, 3 and 6 was hearsay evidence and could not be the basis for coming to a finding of guilt against the appellants. They also submit that when two views are possible on the basis of the evidence adduced by the witnesses, the view favourable to the accused should be accepted by the Court. In support of their submissions that the impugned judgment should be set aside due to the reasons mentioned in the foregoing paragraphs, the counsels have relied upon the judgments of the Apex Court in:-

- (i) Superintendent of Police, CBI & Anr. Vs. Tapan Kumar Singh, reported in (2003) 6 SCC 175,
- (ii) Kari Choudhury vs. Mst. Sita Devi & Ors., reported in (2002) 1 SCC 714,
- (iii) Vijender vs. State of Delhi, reported in (1997) 6 SCC 171 and
- (iv) State of U.P. & Anr vs. Jaggo alias Jagdish & Ors., reported in 1971 (2) SCC 42

10. The learned Additional Public Prosecutor and the learned counsels for the informant, on the other hand, submit that minor inconsistencies in the evidence of the witnesses, which does not go to the core of the prosecution case can be ignored. They also submit that the trial was not vitiated just because the motor cycle was not seized by the Police. They also submit that though the conviction is based on the testimony of the sole witness, i.e., PW7, the learned Trial Court

has rightly laid emphasis on the quality of the evidence of the PW7. In support of their submission that conviction can be based on the basis of the testimony of a sole eye witness, they have relied upon the judgment of the Apex Court in the case of ***Veer Singh & Ors. vs. State of Uttar Pradesh***, reported in ***(2014) 2 SCC 455***.

11. The learned Additional Public Prosecutor also submits that when there is an eye-witness account of a crime, the importance of motive recedes into the background and in support of her submission, she has relied upon the judgment of the learned Apex Court in the case of ***Sheo Shankar Singh vs. State of Jharkhand & Anr.***, reported in ***(2011) 3 SCC 654***. She also submits that the non-recovery of the weapon of offence is not fatal to the case of prosecution, as there is direct evidence of the appellants having assaulted the deceased. In this aspect of the matter, she has relied upon the judgment of the Apex Court in the case of ***Mritunjoy Biswas vs. Pranab alias Kuti Biswas & Anr.***, reported in ***(2013) 12 SCC 796***. She also submits that in terms of the judgment of the Apex Court in ***State of Uttar Pradesh vs. Mohd. Iqram & Anr.***, reported in ***(2011) 8 SCC 80***, once the prosecution had brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought forth suggestions as to what could have brought them to the spot at that dead of night. As no explanation has been given by the appellants with regard to the evidence showing their involvement in the crime during their examination under Section 313 Cr.PC and with regard to why they were present at the spot/place of occurrence (P.O.), the prosecution has proved the case of assault on the deceased by the appellants.

12. The learned Additional Public Prosecutor and the counsels for the informants submit that there is nothing on record to show that there was any

enmity between the appellants and the PW7, which could have provided reasons for PW7 to have made a false testimony against the appellants. This has also been clearly spelt out by the learned Trial Court in paragraph 21 of the impugned judgment. The learned Additional Public Prosecutor and the counsels for the informant thus submit that no ground for interference with the judgment has been made out and the appeal should be dismissed.

13. The learned Additional Public Prosecutor and counsels for the informant submit that the non examination of Najrul Khan, on whose information the GD Entry had been recorded does not vitiate the trial, inasmuch as, Najrul Khan had only informed the Police that an injured person was lying on the road. As such, there was nothing material that could have been stated by the said Najrul Khan even if he was made a prosecution witness. They also submit that as a eye witness had clearly identified all the three appellants assaulting the deceased, there was no infirmity in the conviction of the appellants under Sections 304/34 and 341/34 IPC.

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

15. The evidence of the informant, who is also PW1 is to the effect that on 29.07.2014, at about 09:30 pm, he heard a hue and cry while sleeping in his house. On coming out from his house, he saw the deceased, his nephew, lying in a pool of blood on the road in an injured condition. Many people had gathered at the place of occurrence and the Police came as they had been informed of the same. He states that he was informed on the same night that his neighbour, Dharmen Singha (PW7) had seen the assault being made on the deceased by the appellants with a sharp weapon. Though PW7 made an attempt to apprehend the appellants, they ran away under the cover of darkness.

16. The evidence of PW2 and PW4 are to the effect that they were posted at Kalacherra Patrol Post on 29.07.2014 and they went to the place of occurrence along with the In-Charge of the Patrol Post, wherein they found a person lying in an injured condition on the road. PW4 also stated that one pair of plastic sandal (black colour), one vest and one torch light were seized by the In-Charge of the Patrol Post.

17. The evidence of PW3 is to the effect that on hearing a hue and cry from the PWD road on 29.07.2014, at about 09:30 pm, he went outside his house and noticed the deceased lying on the road in an injured condition. He also noticed stab injuries on his chest and abdomen. He also noticed an injury on the head of the deceased. Many people had gathered there and ten minutes later, PW7 came running to the place of occurrence and told the gathering that the appellants had assaulted the deceased and run away. Though PW7 had chased the appellants, he could not catch them. Police came as they were informed and the deceased was shifted to the hospital by an ambulance, where he was declared dead.

18. The evidence of PW6 is that on hearing a hue and cry, she rushed from her house on to the road where she saw the deceased lying on the road with blood oozing out from his stomach and upper chest. Further, it was raining at that time. Then PW7 informed them that the appellants had assaulted the deceased and though he chased them, he could not catch them.

19. PW7, who was the lone eye-witness to the assault by the appellants on the deceased, states that on the night of 29.07.2014, at about 09:30 pm, while he was returning from the market towards his house on his bike, he saw the appellants assaulting the deceased on the PWD road with the light shining from his bike. On stopping his bike, all the three appellants ran away. Though he

chased them and ran behind them for about 100 meters, he could not catch them due to darkness and heavy rain. On returning to the place of occurrence, he found that many people had gathered there. He also saw blood oozing out from the abdomen, chest and head of the deceased. Though the deceased was taken to the Hailakandi Civil Hospital in an ambulance, the deceased succumbed to his injuries. He also stated that he knew all the three appellants.

In his cross-examination, PW7 stated that he narrated the entire incident to the Police. He also went to the village Kalapahar with the Police on the relevant night of occurrence. On being called by the Police, the appellant, Raju came out from his house. Thereafter, Police went to the house of the appellant Kutu along with Raju and on being called by Raju and the Police, Kutu came out from his house. Thereafter, Raju ran away from the house of Kutu. The appellant, Kalai was not found in his house. PW7 also stated that the Police did not seize his bike and that he did not falsely implicate the appellants.

20. The evidence of PW8, who was posted as Senior Medical and Health Officer, SK Roy Civil Hospital, Hailakandi is to the effect that he performed post-mortem examination on the body of the deceased and found presence of blood clot on the chest, abdomen and on the left side of the body. He also found one perforating stab wound of size 3cm X 3cm X 10cm on mid axillary line of 4th intercostals space and another perforating stab wound on 3cm lateral left to the umbilicus of size 3cm X 2cm X 10cm, causing perforating injury on small intestine large colon causing massive inter abdominal haemorrhage and hemoperitonium due to tear of hepatic vessel on the side intestine. In his opinion, the cause of death was due to irreversible haemorrhagic shock and respiratory failure due to stab injury on chest and abdomen, by a pointed moderate heavy sharp forceful object.

21. The evidence of PW9 is that he was the In-Charge of the Kalacherra O.P. under Lala Police Station. On 29.07.2014, at about 09:05 pm, one Najrul Khan appeared in the Police Out Post and informed him that one person was lying on the road in an injured condition. Accordingly, GD Entry No. 476 dated 29.07.2014 was made and he, alongwith his staff, went to the place of occurrence. There they found the deceased with grievous injury and in an unconscious state. An ambulance was arranged and the deceased was shifted to SK Roy Civil Hospital, Hailakandi. On that night itself, PW9 apprehended the appellant Kutu Das from his house, but he did not find the other accused persons. The appellant Kutu Das was medically examined on 29.07.2014 and one abrasion injury, 2cm X 0.5cm, was found on the left zygomatic area. Thereafter, he was arrested and forwarded to the Court.

In his cross-examination, PW9 states that after receiving the information from one Najrul Khan, he went to the place of occurrence at 09:10 pm. Further, he did not find any information regarding the presence of any other person in the P.O. from the GD Entry made by him. He also did not seize the motor cycle as he did not find the motor cycle in the P.O.

22. The evidence of PW10, who was attached to the Kalacherra O.P. as In-Charge on 10.09.2014 is to the effect that he received a case diary from the Officer-In-Charge of the Lala Police Station and on perusal of the same, he found that the investigation was almost complete. However, the investigation was pending due to no arrest being made in respect of the appellant Kalai Das and Raju Das and also due to non-collection of the post-mortem report. Though he made several attempts to apprehend the two appellants, i.e., Kalai Das and Raju Das, he could not apprehend them. However, on 11.02.2015, he received information that both the appellants had surrendered before the Court and had

been sent to judicial custody. Thereafter, he interrogated the two appellants in jail and recorded their statements. Charge-sheet was thereafter submitted against all the three appellants.

23. The evidence of PW11, who was the Circle Officer, Bilasipara, Dhubri is to the effect that he conducted inquest over the body of the deceased and he found cut injuries on the left chest and left shoulder caused by sharp weapon and also found mark of injury in the back of the head of the deceased, caused by a blunt weapon.

24. The evidence recorded by the learned Trial Court thus shows that there was only one eye-witness to the crime in question, i.e., PW7. There is nothing to show that PW7 had any enmity with the appellants or that there could be any reason for PW7 to have fabricated false evidence against the appellants.

25. The evidence adduced also shows that while GD Entry had been made at 09:05 pm on 29.07.2014, the witness PW7 noticed the incident at around 09:30 pm of the same night. This apparent discrepancy in the time of the assault, in the view of this Court is only a minor discrepancy, which does not go to the core of the prosecution case. This minor difference in the time stated by the witness PW7 could be due to various factors, one of them being that he might not have kept track of the exact/actual time of the assault on the relevant night. Though PW7 saw the assault, he was riding a bike and as such, it would not be surprising if PW7 did not look at his watch immediately while the assault was going on in front of him. He thereafter also started chasing the appellants. In all probability PW7 would have looked at the time only after he had chased the appellants for around 100 meters and, as such, some guesswork on the time would have been made, which in all probability was not accurate.

26. The minor inconsistencies made by PW3 to the Police under Section 161 Cr.PC and in his deposition before the Court is only to the effect that he did not mention in his statement to the Police that PW7 had told PW3 that the appellants had assaulted the deceased before fleeing away. PW3 has not been confronted by the appellants with regard to the above inconsistency, which is to the effect that PW3 had mentioned in his evidence that the appellants had assaulted the deceased and run away. As PW3 has not been confronted, in the view of this Court, it cannot be said that PW3 is not a reliable witness. The minor inconsistency is thus not fatal to the prosecution case.

27. In the case of ***Dr. Sunil Kumar Sambhudayal Gupta vs State of Maharashtra***, reported in ***(2011) 4 SCC 324***, the Apex Court has held that minor contradictions/inconsistencies/improvements cannot be a ground to reject the evidence in its entirety, if it does not affect the core of the prosecution case.

28. The non-seizing of the motor cycle of PW7 in our view does not vitiate the prosecution case as the seizure of the motor cycle would not serve any purpose, as the only relevance of the bike was the fact that PW7 had been able to identify the appellants from the light given out by the motor cycle headlight.

29. It is surprising that the evidence given by the Investigating Officer does not contain any statement or questions being made by the Police to the appellants, as to where the weapon of assault was kept and/or what type of weapon/s had been used in assaulting the deceased. This creates a suspicion as to whether any weapon had been used at all. However, the evidence of PW7 and Doctor's evidence and report clearly shows that a pointed weapon had been used as there were stab wounds on the deceased. Further, this aspect of the case has not been put to test by the appellants. In any event, the Apex Court in

the case of **Mritunjoy Biswas** (supra), has held that where is ample unimpeachable ocular evidence and the same has been corroborated by medical evidence, non recovery of the weapon does not affect the prosecution case. With respect to Najrul Khan, not being made a material witness on whose information a GD Entry had been made at 09:05 pm, this Court finds that the information given by Najrul Khan was only to the effect that he had seen an injured person lying on the road. Nothing beyond the said information had been recorded in the GD Entry. As such, even if Najrul Khan had been made a prosecution witness, no material information of facts besides what had been recorded in the GD Entry, could have been given during trial. In the case of **State of Himachal Pradesh vs. Gian Chand**, reported in **(2001) 6 SCC 71**, the Apex Court has held that the charge of withholding a material witness from the Court levelled against the prosecution should be examined in the background of the facts and circumstances of each case, so as to find whether the witnesses were available for being examined in the Court or yet withheld by the prosecution. As stated earlier, no material information was given by the said Najrul Khan to the Police and neither was the said information used by the learned Trial Court to come to a finding of guilt against the appellants. As such, we do not find the said Najrul Khan to be a material witness and his non-examination as a witness cannot be said to be fatal to the prosecution case.

30. In the case of **Superintendent of Police, CBI** (supra), the Apex Court has held that a GD Entry may be treated as an FIR in a particular case where it discloses a commission of a cognizable offence. It further held that an FIR is not an encyclopaedia, which must disclose all facts and details relating to the offence reported.

In the present case, though the appellants have tried to make out a case

that the GD Entry should have been treated as an FIR, as it had been made in an earlier point of time than the FIR submitted by PW1, we are of the view that there is no infirmity with the Police not having treated the GD Entry No. 476 dated 29.07.2014 as it only gave information with regard to an injured person lying on the road. Consequently, the stand of the appellants that Najrul Khan was a material witness, who had been withheld from giving evidence before the learned Trial Court is not accepted by us.

31. In the case of ***Kari Choudhury*** (supra), the Apex Court has held that there cannot be two FIRs against the same accused in respect of the same incident. However, when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency.

The above case is not applicable to the facts of this case as two FIRs have not been filed in the present case. Only one FIR has been submitted, which was done by PW1. Further, there are no rival versions of the incident in the GD Entry and the FIR.

32. In the case of ***Vijender*** (supra), the Apex Court has held that the reliance of a Trial judge to base his findings on the result of an investigation is patently wrong. The Trial Judge is required to base his conclusion solely on the evidence adduced during the trial and it cannot rely on the investigation or the result thereof.

In the present case, we are of the view that the findings of the learned Trial Court being based on the evidence of the eye witness PW7, which has not been shaken or contradicted, cannot be faulted. We also do not find that two views on the assault on the deceased can be made out from the evidence

adduced in the learned Trial Court. There is also nothing to show that PW7 is not a reliable witness.

33. In the case of ***State of U.P. & Anr vs. Jaggo alias Jagdish & Ors.*** (supra), the Apex Court reiterated the observations made by the Supreme Court in other cases, which is to the effect that the purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused and the duty of the Public Prosecutor is to represent the administration of justice so that the testimony of all the available eye-witnesses should be before the Court.

On considering the facts of this case and the evidence adduced before the learned Trial court, we do not find any instance of the decision of the Apex Court, as referred to above, having been violated by the Police or the prosecution.

34. In the present case, the weapon of offence has not been recovered. This could be due to the fact that the appellants could have thrown away the weapon while running away in the rain at night from the place of occurrence. Further, as the evidence of PW7 has not been shaken, we are of the view that the non recovery of the weapon of offence is not fatal to the case of the prosecution, keeping in view the judgment of the Apex Court in ***Mritunjoy Biswas*** (supra).

35. Keeping in view all the above facts, we find that the appellants have not attempted to make any alibi with regard to why they were there at the place of occurrence on the fateful rainy night. No attempt at giving an explanation has been made by the appellants during their examination under Section 313 Cr. PC, wherein they have made a blanket denial with regard to the questions put

to them, pursuant to the evidence recorded against them during trial.

36. In the case of ***Rajkumar vs. State of Madhya Pradesh***, reported in ***(2014) 5 SCC 353***, the Apex Court has held that in the event of complete denial, silence and non-explanation of incriminating materials, this Court will be entitled to draw an adverse inference against an accused as may be permissible in accordance with law. In the case of ***State of Uttar Pradesh vs. Mohd. Iqram & Anr.*** (supra), the Apex Court has held that once the prosecution has brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to explain as to what had brought them to the place of occurrence. In the present case, no explanation having been made by the appellants as to what they were doing on a rainy night, coupled with the fact that the PW7 had witnessed the incident of assault on the deceased by the appellants, we do not find any reason to interfere with the impugned judgment passed in Sessions Case No. 19/2017.

37. The appeals are accordingly dismissed.

38. Send back the LCR.

39. In appreciation of the assistance provided by Ms. B Choudhury, learned Amicus Curiae, her fees as per the fee structure should be paid by the Assam State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant