

GAHC010160562020



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

Case No. : CRL.A(J)/89/2020

Sri Dheni Tudu,
S/o Sri Ragda Tudu
Village: Santipur No.3
PS Kokrajhar, Assam.

.....Appellant.

Versus

State of Assam
Represented by Add. PP, Assam.

.....Respondents.

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

For the appellant : Mr. B. Prasad Advocate
For the respondents : Ms. B. Bhuyan Addl. PP, Assam.

Date of hearing : 24.07.2023.
Date of judgment : 02.08.2023

JUDGMENT AND ORDER (CAV)

(M. Zothankhuma, J)

Heard Mr. B. Prasad, learned Amicus Curiae for the appellant. Also heard

Ms. B. Bhuyan, learned Addl. Public Prosecutor for the State.

2] This appeal has been filed against the Judgment dated 25.03.2019 passed by the Court of the Addl. Sessions Judge (FTC), Kokrajhar in Session Case No. 179/2018, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo Rigorous Imprisonment for life with a fine of Rs. 10,000/-, in default, to suffer imprisonment for one year.

3] The prosecution case in brief is that an FIR dated 02.05.2018 was submitted by the informant/Prosecution Witness-1 (PW-1), to the effect that when her elder brother Hopna Hembrom went to visit their relative Smt. Malho Mardi (PW-2) on 29.04.2018, the appellant dragged her brother out from Smt. Malho Mardi's house at around 11pm /12' midnight. He thereafter assaulted her elder brother and stomped on his chest with his boot. He also kicked his brother's head, as a result of which his brother died at 5 am on 01.05.2018. In pursuant to the FIR, Kokrajhar Police Station Case No. 192/2018 under Sections 448/325/302 IPC was registered.

4] After investigation of the case was completed, the Investigating Officer submitted his charge sheet, on having found a prima facie case against the appellant under Section 302 IPC. Charge was framed by the learned Trial Court against the appellant under Section 302 IPC, to which the appellant denied the charge and claimed trial. During the trial proceedings, seven prosecution witnesses were examined by the learned Trial Court. Thereafter, the appellant was examined under Section 313 Cr.PC, wherein he took the stand that he did not beat up the deceased and he was not involved in the death of the deceased.

5] The learned Trial Court on considering the evidence adduced, came to a

finding that the evidence of PW-1 and PW-2 established beyond all reasonable doubt that the death of the deceased had occurred, due to being stomped mercilessly on the chest and face by the deceased with a spiked boot. Consequently, the appellant was convicted under Section 302 IPC and sentenced accordingly.

6] The learned Amicus Curiae submits that the impugned Judgment has to be set aside, as no document was exhibited by the prosecution during trial. Further, the Investigating Officer of the case was not examined, thereby denying an opportunity to the appellant to contradict the evidence given by the prosecution witnesses. The learned Amicus Curiae thus prays that the matter should be remanded back to the learned Trial Court, for the purpose of exhibiting the documents and questioning the concerned witnesses with regard to the same, besides examining the Investigating Officer.

7] The learned Amicus Curiae also submits that all documents including the FIR, Charge Sheet, Post-Mortem Examination Report, Seizure List, Inquest Report etc. are relevant and necessary documents, which the prosecution has to exhibit during trial. In support of the above submission, the learned Amicus Curiae has relied upon the Division Bench Judgment of this Court in the case of *State of Mizoram Vs. Abdul Jalil & Others*, reported in (2008) 1 JLT 610. He also submits that in the absence of exhibiting documents, such as Post-Mortem Report etc, it cannot be proved that the deceased had died due to the injuries sustained by him, which had been discovered at the time of his Post-Mortem Examination. In this regard, he has relied upon the judgment of the Supreme Court in the case of *Shivnath Prasad Vs. State of Bihar*, reported in 2008 15 SCC 735.

8] The learned Addl. Public Prosecutor, on the other hand submits that there is nothing in the cross examination of the prosecution witnesses, to show that the witnesses were contradicted, in relation to the statements made by them under Section 161 Cr.PC. As such, the evidence of the witnesses could not have been contradicted even if the I.O was a witness. The Addl. Public Prosecutor also submits that the appellant has not been able to show that the non-examination of the Investigating Officer as a witness had caused any prejudice to the appellant. She submits that in the case of *Behari Prasad Vs. State of Bihar*, reported in (1996) 2 SCC 317, the Apex Court has held that non-examination of the Investigating Officer was not fatal to the prosecution case, especially, when no prejudice was likely to be suffered by the accused. The Addl. Public Prosecutor also submits that the Supreme Court in the case *State of Karnataka Vs. Bhaskar Kushali Kotharkar & Others*, reported in (2004) 7 SCC 487, had held that the learned Single Judge of the High Court was not justified in reversing the order of the Session Court, by holding that the non-examination of the Investigating Officer and the Constable, who recorded the First Information Statements had caused prejudice to the accused, inasmuch as, the Session Judge had given valid reasons for finding the accused guilty.

9] The learned Addl. Public Prosecutor submits that as there are eye witnesses to the crime in question, on the basis of which the appellant had been found guilty of having committed murder, there was no requirement for remanding the matter to the learned Trial Court. With regard to non-exhibiting of documents by the prosecution before the learned Trial Court, the learned Addl. Public Prosecutor submits that in the case of *Malay Kumar Ganguly & Anr. Vs. Dr. Sukumar Mukherjee & Ors.*, AIR 2010 SC 1162, the Supreme Court has held that a document becomes inadmissible in evidence unless the author is

examined, for the contents thereof cannot be held to have proved, unless the authority is examined and subjected to cross examination in the Court. She thus submits that for proving the contents of a document, the author of the said documents have to be examined. She however submits that proving of the contents of documents is not mandatory in all cases, especially in the present case, where there are eyewitnesses to the crime.

10] The Addl. Public Prosecutor also submits that the Doctor, who had done the Post-Mortem examination of the deceased had been examined and he had proved that the deceased had died due to the injuries sustained by him. As there were eye-witnesses, who had seen the appellant assaulting the deceased and as the Doctor had opined that the deceased had died due to the injuries sustained by him, there was no infirmity with the learned Trial Court coming to a finding that the appellant was guilty of the crime of killing the deceased and convicting him under Section 302 IPC.

11] We have heard the learned counsels for the parties.

12] The evidence of PW-1 (informant) is to the effect that she knew the appellant and that the occurrence took place at about 11 p.m in the residence of PW-2. At that time one Ragda Tudu, the father of the appellant had come to her house and informed her at about 2 p.m. that her elder brother Hopna Hembrom had been beaten up by the appellant causing injuries on his chest, head and other parts of the body. She saw the deceased with injuries on his chest, forehead and other parts of his body. The deceased thereafter succumbed to his injuries at about 5 a.m. on the following morning.

13] The evidence of PW-2 is to the effect that she had invited her elder brother Hopna Hembrom to her residence. After having dinner, they had gone to

sleep by 11 p.m. The appellant thereafter came to their house and started shouting regarding the presence of Hopna Hembrom in her house. PW-2 told the appellant that Hopna Hembrom was her elder brother but he would not listen. The appellant dragged the deceased and started assaulting him with his sports boot. She thereafter ran to the villagers to call them and when she returned home she found Hopna Hembrom was lying on the ground with injuries on his head. The villagers thereafter took the deceased to the residence of the appellant and the following morning the deceased was taken to Ultapani Health Centre where he was treated. Thereafter PW-2 brought him home. Again he was taken to the residence of the appellant and on the following morning at about 5 a.m. he passed away.

14] The evidence of PW-3 is to the effect that the appellant's father informed him that Hopna Hembrom got injured on the fateful night, but PW-3 went only in the morning and saw the deceased was seriously injured. Then they took him to the hospital.

15] The evidence of PW-4 is also to the same effect as described by PW-3.

16] The evidence of PW-5 & PW-6 who are studying in Class-III and were about 7 years of age, are to the effect that they had seen the appellant killing the deceased by kicking him with his boots.

17] The evidence of PW-7, who is a Doctor, is to the effect that there were various injuries over the face, nose, chest, head and neck. In his opinion the death was due to shock and haemorrhage following head injury by blunt impact, which was ante mortem and homicidal in nature.

18] In his examination under Section 313 Cr.P.C., the appellant has taken the stand that he had not beaten up the deceased and that he was innocent.

19] The learned Trial Court, as stated earlier had convicted the appellant under Section 302 IPC by holding in paragraph-43 of the impugned judgment as follows :

“43. In any view of the matter, even if the evidence of child witnesses PW 6 and pw 7 and also the evidence of PW 4 is kept out of consideration, the evidence of PW 1 and PW 2 establishes beyond all reasonable doubt that the death of Hopna Hembrom occurred due to merciless stomping by the accused on chest and face with a spiked boot.”

20] The facts of the case and the evidence adduced shows that there were eyewitnesses who had seen the deceased being stomped/kicked by the appellant with his boots. The evidence of the Doctor also proves the fact that death had occurred due to blunt impact. However, the question that has to be decided is as to whether a Court can convict an accused without exhibiting documents and without examining the Investigating Officer.

21] In the case of ***State of Mizoram Vs. Abdul Jalil & Ors.***, reported in ***2008 (1) GLT 610***, the Division Bench of this Court held that all documents including the FIR, Charge-sheet, Post Mortem Examination Report, Seizure List, Inquest Report etc. which are relevant and necessary for the prosecution case are to be exhibited and considered. The above case was in relation to the accused persons having been found guilty under Sections 302/384/341 IPC read with Section 25(1-B)(a) of the Arms Act. In the criminal reference filed by the State for confirmation of the conviction and sentence awarded upon the accused persons, in terms of Rule 9 of the Rules for the Regulation of the Procedure of Officers Appointed to Administer Justice in the Lushai Hills, 1937, the Amicus Curiae for the accused persons had taken a stand that the FIR, Charge-sheet, Post Mortem Examination Report, Seizure List, Inquest Report had not been

exhibited and considered during trial. It was in the above context that the Division Bench of this Court had directed that all documents including FIR, Charge-sheet, Post Mortem Examination Report, Seizure List, Inquest Report etc., which are relevant and necessary for the prosecution case, are to be exhibited and considered.

22] In the case of ***Malay Kumar Ganguly & Another vs. Dr. Sukumar Mukherjee & Others***, the Supreme Court has held that a document become inadmissible in evidence unless the author is examined and for the contents of the documents to be proved, the author of the same has to be examined.

23] A combined reading of the judgments in the ***State of Mizoram Vs. Abdul Jalil (supra)*** and ***Malay Kumar Ganguly (supra)*** shows that all documents which are relevant and necessary for the prosecution case, such as FIR, Charge-sheet, Post Mortem Report, Seizure List and Inquest Report etc. have to be exhibited for the purpose of proving the contents and using it for the purpose of evidence.

24] In the case of ***Alagupandi @ Alagupandian Vs. State of Tamil Nadu***, reported in ***(2012) 10 SCC 451***, the Supreme Court has held that it is a settled principle of law that the Court can record a finding of guilt while, entirely or substantially, relying upon the statement of the sole witness, provided his statement is trustworthy, reliable and finds corroboration from other prosecution evidence.

25] In the case of ***Govindaraju @ Govinda Vs. State by Srirampuram P.S. & Anr.***, reported in ***(2012) 4 SCC 722***, the Supreme Court of India has held that it is a settled proposition of the law of evidence that it is not the

number of witnesses that matters, but it is the substance. It is also not necessary to examine a large number of witnesses, if the prosecution can bring home the guilt of the accused even with a limited number of witnesses.

26] In the case of ***Lallu Manjhi & Anr. Vs. State of Jharkhand***, reported in ***(2003) 2 SCC 401***, the Supreme Court of India has classified the oral testimony of the witnesses into three categories, namely, (a) wholly reliable, (b) wholly unreliable, and (c) neither wholly reliable nor wholly unreliable. It has held that in the 3rd category of witnesses, the Court has to be cautious and see if the statement of such witness is corroborated either by other evidence.

27] In the case of ***C.M. Sharma Vs. State of A.P.***, reported in ***(2010) 15 SCC 1***, the Supreme Court has held that in case of a partly reliable witness, the Court needs to seek corroboration in material particulars from the other evidence. However, in case in which a witness is wholly reliable, no corroboration is necessary.

28] A reading of the judgments of the Supreme Court in ***Alagupandi @ Alagupandian (Supra)***, ***Govindaraju @ Govinda (Supra)***, ***Lallu Manjhi (Supra)*** and ***C.M. Sharma (Supra)*** shows that the prosecution can bring home the guilt of an accused on the basis of the evidence given by a wholly reliable witness, without the same being corroborated by other documentary or expert evidence. As such, in a case where there are eyewitnesses, whose evidence is wholly reliable, it would not be necessary for their evidence to be corroborated by documents. As such, it may not be necessary to exhibit documents for coming to a finding of guilt against the accused in such cases.

29] In the case of ***Rang Bahadur Singh Vs. Kapil Deo & Ors.***, reported in ***1983 AWC 610 ALM***, the learned Single Bench of Allahabad High Court (Lucknow Bench) has held that it is a prudent rule of appraisal of evidence that oral testimony which is corroborated by documentary evidence is to be preferred, to one which is not corroborated by any documentary evidence on record. However, where either no documentary evidence exists or it has not been brought on record, the oral testimony cannot be viewed with suspicion and rejected merely because of want of documentary evidence. In the absence of documentary evidence, the oral evidence led by the parties is to be scrutinized with great care and caution.

In the above case, the learned Trial Magistrate had considered the oral evidence, but had omitted to consider the material documentary evidence on record. The learned Sessions Judge, on the other hand, had not taken into consideration the oral evidence. The learned Single Bench of the Allahabad High Court, thus, held that it was in the above context that both oral and documentary evidence ought to be considered together and reasons had to be recorded, as to why one is to be accepted in preference to the other.

30] On considering all the above judgments, we are in respectful agreement with the observation of the learned Single Bench of the Allahabad High Court (Lucknow Bench) in ***Rang Bahadur Singh (Supra)*** wherein he has stated that it is a prudent law of appraisal of evidence that oral testimony corroborated by documentary evidence is to be preferred to one which is not corroborated by any documentary evidence on record. However, just because no documents have been exhibited, does not mean that the same would be fatal to the prosecution case. Each case would have to be decided on the facts and

circumstances pertaining to the said case and as to whether the witnesses were wholly reliable.

31] There can be cases where documents are destroyed due to a plethora of reasons and the non-exhibiting of documents cannot, in all cases, lead to the prosecution case being discarded. There can be cases whether ocular evidence of seeing the act of assault can be doubted and some cases where the ocular evidence is clear. Can it be said in the latter type of cases that the Prosecution case will fail, only because documents are not exhibited. We answer the same in the negative. We are of the view that the Courts can decide a case only on the basis of the ocular evidence, provided that the evidence/witness is wholly reliable.

32] The next question that has to be decided is as to whether the non-examination of the case I.O (Investigating Officer) would be fatal to the case of the prosecution. In the case of *Behari Prasad Vs. State of Bihar (Supra)*, the Apex Court has held that non-examination of the Investigating Officer was not fatal to the prosecution case, especially when no prejudice was likely to be suffered by the accused. Similarly, in the case of *State of Karnataka Vs. Bhaskar Kushali Kotharkar & Others (Supra)*, the Supreme Court has held in the same lines as the above case.

The above judgments clearly show that unless prejudice is going to be caused to the accused, non-examination of the Investigating Officer is not fatal to the prosecution case.

33] Thus, though we are of the view that the prosecution can bring home the guilt of the accused only on the basis of the evidence of eye witnesses, which is wholly reliable, in the absence of documents being exhibited besides non-

examination of Investigating Officer, on the condition that no prejudice is caused to the accused, it would be prudent that documents are exhibited and the Investigating Officer is examined by the Trial Court. The above would also have to be considered on the particular facts and circumstances pertaining to each case and it cannot have a generalized universal application.

34] We are aware that Courts have to monitor trial proceedings in the aid of justice and that unnecessary things should not be taken into consideration. The object of Section 165 of the Evidence Act and Section 311 of the Cr.PC is to enable the Court to arrive at the truth, irrespective of the fact that the prosecution or the defence has failed to produce some evidence, which is necessary for a just and proper disposal of the case. In the case of ***Rajendra Prasad Vs. Narcotic Cell***, reported in ***(1999) 6 SCC 110***, the Supreme Court has held that lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, the function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

35] In the case of ***Zahira Habibulla H. Sheikh Vs. State of Gujarat***, reported in ***(2004) 4 SCC 158***, the Supreme Court has held that whether a retrial under [Section 386](#) or taking up of additional evidence under [Section](#)

391 is the proper procedure will depend on the facts and circumstances of each case, for which no straight-jacket formula of universal and invariable application can be formulated. The underling object should be to find out the truth and dispense justice impartially. The object should be to ensure that the very process of Courts are not employed or utilized in a manner which gives room to unfairness or lends themselves to be used as instruments of oppression and injustice.

36] Though we have held that Courts can come to a finding on the basis of the evidence adduced by wholly reliable witnesses and in the absence of the Investigating Officer being produced as a witness, provided no prejudice is caused to the accused, in view of the decision of the Supreme Court in the case of ***Shivnath Prasad (Supra)*** and the decision of the Co-ordinate Bench of this Court in ***State of Mizoram Vs. Abdul Jalil & Ors (Supra)*** and without making any observation with regard to the merits of the case, we are of the view that the present case should be remanded back to the learned Trial Court, for exhibiting the FIR, charge sheet, Post-Mortem Report etc. and to also examine the Investigating Officer.

37] The materials exhibited 98/18 and 128/18, which are the shoe allegedly used for stomping the deceased and the CD have in all probability been destroyed by now, in terms of the impugned Judgment. However, the absence of the above said exhibits should not come in the way of the learned Trial Court in taking a decision on the merits of this case. Thus, the matter is remanded back to the learned Trial Court to take a fresh decision on the matter. Consequently, the impugned Judgment dated 25.03.2019 passed by the Court of the Addl. Sessions Judge (FTC), Kokrajhar in Session Case No. 179/2018 is

hereby set aside.

Send back the LCR.

38] In appreciation of the assistance provided by Mr. B. Prasad, the learned Amicus Curiae, the appropriate fee payable to him should be paid by the State Legal Services Authority.

JUDGE

JUDGE

Comparing Assistant