

GAHC010195752017



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

Case No. : CRL.A(J)/35/2017

ALONGBAR MUSHAHARY

VERSUS

THE STATE OF ASSAM

2:SMTI. ALOKA MUSHAHARY

W/O-LT. NERSWN MUSHAHARY
VILL-THAIJUGURI
P.S.-KACHUGAON
DIST.-KOKRAJHAR
ASSAM

Advocate for the Petitioner : MR. BIKASH PRASAD(AMICUS CURIAE)

Advocate for the Respondent : MS. S JAHAN(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER (CAV)

20.07.2023
(Malasri Nandi, J)

Heard Mr. B. Prasad, learned *Amicus Curiae*. Also heard Ms. S. Jahan, learned Public Prosecutor for the State and Ms. M. Buzarbaruah, learned Legal Aid Counsel for the

informant.

2. This appeal is directed against the judgment and order dated 01.03.2017 passed by the learned Sessions Judge, Kokrajhar in connection with Sessions Case No. 125/2016, whereby the accused/appellant was convicted under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life and also to pay a fine of Rs.5,000/- in default, simple imprisonment for 3(three) months.

3. The prosecution story in brief is that the informant Aloka Mushahary, the wife of the deceased, lodged an FIR on 02.07.2016 before the Officer-in-Charge, Kachugaon Police Station, stating *inter alia* that on 30.06.2016 at about 8 p.m., her husband Nerson Mushahary(deceased) went to the nearby house of his father Thobra Mushahary. Later on, an argument took place between her husband and his younger brother Alongbar Mushahary i.e. the present appellant over a certain matter. Subsequently, the appellant assaulted her husband with an axe causing grievous injuries on his person. Though the injured was taken to Kachugaon Public Health Centre, he succumbed to his injury on the way.

4. On receipt of the complaint, a case was registered vide Kachugaon P.S. Case No. 53/2016 under Sections 326/302 IPC and an investigation was initiated. During investigation, the investigating officer visited the place of occurrence, recorded the statements of the witnesses and the inquest was done on the dead body of the deceased and thereafter, the dead body was sent for postmortem examination. During investigation, the weapon of assault i.e. an axe with a wooden handle was also seized by the investigating officer. After completion of the investigation, charge-sheet was submitted against the accused/appellant under Section 302 IPC before the court of SDJM(M), Gossaigaon.

5. As the offence under Section 302 IPC is exclusively triable by the court of Sessions, the case was committed accordingly.

6. During trial, on appearance of the appellant before the court of Sessions, charge was

framed under Section 302 IPC which was read over and explained to the accused/appellant to which he pleaded not guilty and claimed to be tried.

7. To prove the guilt of the accused, the prosecution examined 7(seven) witnesses and exhibited some documents. On the other hand, the accused/appellant did not choose to adduce any evidence in his defence. After completion of trial, the statement of the accused/appellant was recorded under Section 313 Cr.P.C. wherein incriminating materials found in the evidence of the witnesses were put to him to which he denied the same and pleaded his innocence. After hearing the arguments advanced by the learned counsel for the parties, the learned Sessions Judge convicted the accused/appellant as aforesaid. Hence, the appellant has preferred this appeal.

8. Mr. Prasad, learned *Amicus Curiae* submits that the prosecution case is solely based upon the extra-judicial confession, which confession is neither reliable nor has been recorded in accordance with law. This extra-judicial confession cannot form the basis of conviction of the appellant since it has no corroboration and when examined in the light of the settled principles of law, it is inconsequential, thus, the accused is entitled to the benefit of doubt.

9. It is also submitted by the learned *Amicus Curiae* that there is neither any eye witness nor has the prosecution proved the complete chain of circumstances. The court has erred in applying the theory of last seen together to return the finding of conviction against the accused. There being no direct evidence of involvement of the appellant in the commission of the crime, the theory of last seen together could not be of any assistance to the case of the prosecution.

10. It is also the submission of learned *Amicus Curiae* that the learned trial court has failed to appreciate the medical and other evidence placed on record in its correct perspective. There are serious contradictions in the medical and ocular evidence, as regards the time of the death of the deceased. Once, the time of death of the deceased is not established, the whole story of the prosecution fails. According to the learned *Amicus Curiae*, an extra-judicial

confession, besides being inadmissible, is also a very weak piece of evidence and in a case of circumstantial evidence like the present one, cannot form a valid basis for returning the finding of guilt against the accused/appellant.

11. Alternatively, the learned *Amicus Curiae* has also argued that if this Court is not convinced with his submissions, the conviction under Section 302 IPC be converted to Section 304 Part II IPC, as it appears from the evidence on record that prior to the incident, an altercation took place between the deceased and the appellant and there was no pre-meditation. The appellant did the act under the influence of liquor and due to grave and sudden provocation.

12. In support of his submissions, the learned *Amicus Curiae* has placed reliance on a case law:- ***AIR 2022 SC 5273 (Ramanand v State of Uttar Pradesh)***

13. Per contra, Ms. S. Jahan, learned Additional Public Prosecutor for the State has submitted that the extra-judicial confession in the present case is admissible, as it was duly corroborated by the other prosecution witnesses, and thus, the trial court is fully justified in convicting the accused/appellant. It is also submitted that the present case is of circumstantial evidence and the prosecution has succeeded in establishing all the circumstances in the chain of events that would fully support the view that the accused/appellant is guilty of the offence. The learned trial court while dealing with the judgment under appeal, upon proper appreciation of evidence, thus, has come to the right conclusion which needs no interference by this Court.

14. We have considered the submissions of learned counsel for the parties and perused the record and also evidence of the witnesses recorded by the learned trial court and the judgment accordingly.

15. There is no doubt that in the present case, there is no eye witness. It is a case based upon circumstantial evidence. In case of circumstantial evidence, the onus lies upon the

prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra-judicial confession, the court has to examine the same with a greater degree of care and caution. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.

16. Now, we may examine some judgments of Hon'ble Supreme Court dealing with this aspect.

17. In the case of ***Balwinder Singh v. State of Punjab*** reported in **[1995 Supp. (4) SCC 259]**, the Hon'ble Supreme Court stated the principle that an extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

18. In another case, ***Pakkirisamy v. State of T.N.*** reported in **[(1997) 8 SCC 158]**, the Court held that it is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession.

19. Again in ***Kavita v. State of T.N.*** reported in **[(1998) 6 SCC 108]**, the Court stated the dictum that there is no doubt that conviction can be based on extrajudicial confession, but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon veracity of the witnesses

to whom it is made.

20. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, the Hon'ble Supreme Court in the case of ***State of Rajasthan v. Raja Ram*** reported in ***[(2003) vol. 8 SCC 180]*** stated the principle that an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The Court, further expressed the view that such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused.

21. In the case of ***Aloke Nath Dutta v. State of W.B.*** reported in ***[(2007) vol. 12 SCC 230]***, it was observed as follows-

“Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; (iii) corroboration.

A detailed confession which would otherwise be within the special knowledge of the accused may itself be not sufficient to raise a presumption that confession is a truthful one. Main features of a confession are required to be verified. If it is not done, no conviction can be based only on the sole basis thereof.”

22. Accepting the admissibility of the extra-judicial confession, the Hon'ble Supreme Court

in the case of ***Sansar Chand v. State of Rajasthan*** reported in ***[(2010) vol. 10 SCC 604]*** held that :-

“There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material.

In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872.”

23. Dealing with the situation of retraction from the extra-judicial confession made by an accused, the Hon’ble Supreme Court in the case of ***Rameshbhai Chandubhai Rathod v. State of Gujarat*** reported in ***[(2009) vol. 5 SCC 740]***, held as under :

“It appears therefore, that the appellant has retracted his confession. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless, the court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true.”

24. Having stated the principles which may be kept in mind by the court while examining the acceptability and evidentiary value of the extra-judicial confession, we may now refer to the extra-judicial confession made by the accused/appellant before the witnesses which are required to be discussed in this case.

25. P.W.1. Alok Mushahary, the informant who is also the wife of the deceased. She deposed before the court that on the date of incident, she was in her parents’ house and in

the evening time, having heard hue and cry from the house of her husband, she rushed to the place and saw her husband lying on the ground in a pool of blood. On being asked, he replied that accused Alongbar had assaulted and caused injury to him. Her husband succumbed to the injury while he was being carried to the hospital and thereafter, she lodged the ejahar.

26. In her cross-examination, P.W.1 replied that she saw no other person near her husband. On the following day, her husband was taken to the hospital for treatment. On her arrival, she found the accused at the place of incident and when asked, the accused replied that a quarrel took place between him and her husband and he had assaulted her husband, causing injury to her husband.

27. P.W.2 Thobra Mushahary is the father of the deceased. His deposition reveals that on the date of incident at about 8 p.m. he was cutting firewood near his house. Having heard *hullah* (uproar), he came to the house and found his son lying injured. Accused Alongbar was standing nearby and on being asked, he confessed that he assaulted the deceased with an axe when he (deceased) attempted to assault him (appellant).

28. In his cross-examination, P.W.2 replied that he did not see any weapon in the hand of Alongbar. The injured was not taken to hospital on the day of incident for want of money. He did not see any axe lying at the place of occurrence. At that time, the accused/appellant was under the influence of liquor.

29. P.W.3 is Anima Mushahary, sister of the deceased. She deposed before the court that a quarrel took place between Alongbar and Nerson on the day of occurrence. She was cooking rice in the kitchen and when coming out from the kitchen, she found Nerson lying injured on the ground. Alongbar told her that he had assaulted Nerson with an axe. The axe was lying nearby.

30. In her cross-examination, P.W.3 also stated that Nerson Mushahary had assaulted her

husband prior to the alleged incident.

31. P.W.4 Gandhi Brahma is the neighbor of the deceased and the informant. According to him, on the night of incident, a quarrel had taken place between Alongbar and Nerson. On his arrival, he found Nerson in an injured condition. The parents of Nerson said that they had no money to take him to hospital. Nerson was taken to the hospital on the following day and subsequently, he died.

32. P.W. 6 is the VDP Secretary of village of North Gongia. He deposed before the court that on the date of incident, he was informed that a quarrel had taken place between Nerson and his elder brother. He went to the house of Nerson the following day. Nerson was taken to Kachugaon Hospital for treatment but thereafter, he was referred to Kokrajhar Civil Hospital but he died on the way. He did not know why the quarrel took place between Nerson and his elder brother.

33. On perusal of the evidence adduced by the aforesaid witnesses, it reveals that there is no eye witness to the incident. But according to P.W.1, when she came to the spot, she found her husband lying injured and on being asked he replied that the accused Alongbar had assaulted him. But in cross-examination, P.W.1 stated that her husband was not in a position to speak but subsequently, P.W.1 also replied in her cross-examination that when she reached the place of occurrence, she found the accused there and on being asked, the accused confessed that a quarrel had taken place between him and the husband of P.W.1 and he had assaulted her husband causing injuries on his person. There is no denial on the part of the accused/appellant that he had not made any confession before P.W.1. P.W.2 also stated that when he came to the spot, he found the deceased lying injured and accused/appellant also present there and he confessed his guilt, stating that he had assaulted the deceased with an axe. P.W.3 also corroborated the fact that the accused/appellant told her that he had assaulted the deceased with an axe. It also reveals that there is no cross-examination regarding confession made by the accused before P.W.1, P.W.2 and P.W.3, by denying the fact of his confession.

34. The medical report also supported the ocular evidence. The medical officer who conducted the postmortem examination of the deceased, was examined in the case as P.W.5. From his deposition, it discloses that on 02.07.2016 at about 3.10 P.M., he conducted postmortem examination on the dead body of Nerson Mushahary and found the following injuries- (i) split lacerated injury seen left side of the forehead (ii) fracture frontal bone(left) (iii) blood clot all over forehead under scalp (iv) blood clot between subdural space (v) swelling upper eye lid of left side due to bleeding (vi) oozing of blood through nose. The medical officer opined that the cause of death was shock and haemorrhage due to head injury which was the impact of a blunt object and antermortem in nature. Time of death, within 24 hours from the time of postmortem examination.

35. P.W.7 is the investigating officer. He deposed in his evidence that on 02.07.2016, he was posted at Kachugaon Police Station as second officer. The then Officer-in-Charge of Kochugaon P.S. asked him to investigate the case lodged against the accused Alongbar Mushahary. Accordingly, he visited the place of occurrence and seized an axe vide Ext.2 (seizure list). P.W. 7 also proved the FIR vide Ext. 3. According to P.W.7, during investigation, he arrested the accused/appellant and recorded the statement of the witnesses and after completion of investigation, he submitted the charge-sheet against the accused/appellant under Section 302 IPC vide Ext. 4.

36. Though it appears from the evidence of the witnesses that there is no eye witness to the incident, however, it reveals that the appellant made an extra-judicial confession before P.W.1, P.W.2 and P.W.3 immediately after the incident. It is a settled principle of law that extra-judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra-judicial confession can be accepted and can be the basis of conviction, if it passes the test of credibility.

37. In the case in hand, from the evidence of P.W.1, P.W.2 and P.W.3, it reveals that the extra-judicial confession made before them inspires confidence, as they found the

accused/appellant immediately after the incident on the spot and on being asked, he voluntarily stated that he assaulted his brother with an axe causing injuries on his person. Under such backdrop, the extra-judicial confession made by the accused/appellant can be the basis for conviction, as it does not suffer from any material discrepancies and inherent probabilities.

38. It is pertinent to mention herein that the accused/appellant is the brother of the deceased. P.W.2 is the father of the deceased and the appellant and P.W.3 is the sister of both the deceased and the appellant. So both the deceased and appellant are clearly related to P.W. 2 and P.W. 3. It is not proved that there is any enmity/bitter relationship between the accused/appellant and his father and sister, for them to make a false allegation that the accused/appellant made a confession before them that he had assaulted the deceased. Under such circumstances, there is no reason to disbelieve the evidence of P.W.2 and P.W.3 regarding the confession made by the accused.

39. Now, coming to the question of conversion from Section 302 IPC to Section 304 Part I or Part II IPC. The learned *Amicus Curiae* has argued that as it appears from the evidence on record that prior to the incident, an altercation took place between the accused/appellant and the deceased, it transpires that the act is not a planned act. It is also established that the appellant was under the influence of liquor at the relevant time. Under the facts and circumstances of the case, it can be said that this is not a case under Section 302 IPC, but rather a case under Section 304 Part II IPC.

40. It is an admitted fact that on the fateful night, none of the prosecution witnesses were present at the scene of the crime. However, it appears from the evidence of P.W.1, P.W.2 and P.W.3 that the accused/appellant was found on the spot immediately after the incident and on being asked, he admitted that he had assaulted his brother with an axe.

41. In order to appreciate the argument of learned *Amicus Curiae*, there is a need to refer to the law on the subject.

Hon'ble Supreme Court in ***Rampal Singh vs. State of U.P.*** reported in **(2012) vol. 8 SCC 289** in following paras discussed distinction between 302 and 304 IPC as well as distinction in 304 Clause I and II as under:-

"10. ..We are of the opinion that elucidative discussion on the legal principles governing the distinction between Sections 300, 302 of the Code on the one hand and Section 304, Part I and Part II of the Code on the other, would be necessary to precisely answer the questions raised.

11. Sections 299 and 300 of the Code deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from a reading of this provision, the former part of it, emphasises on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the three stated manners noted-above, it would be 'culpable homicide'. Section 300, however, deals with 'murder' although there is no clear definition of 'murder' in Section 300 of the Code. As has been repeatedly held by this Court, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'."

42. In the case of ***Ajit Singh v. State of Punjab*** reported in **[(2011) vol. 9 SCC 462]**, the Hon'ble Supreme Court held that in order to hold whether an offence would fall under Section 302 or Section 304 Part I of the Code, the courts have to be extremely cautious in examining whether the same falls under Section 300 of the Code which states whether a culpable homicide is murder, or would it fall under its five exceptions which lay down when culpable homicide is not murder. In other words, Section 300 states both, what is

murder and what is not. First finds place in Section 300 in its four stated categories, while the second finds detailed mention in the stated five exceptions to Section 300. The legislature in its wisdom, thus, covered the entire gamut of culpable homicide that 'amounting to murder' as well as that 'not amounting to murder' in a composite manner in Section 300 of the Code.

43. A question arises whether the appellant was guilty under Part I of Section 304 or Part II. If the accused commits an act while exceeding the right of private defence by which the death is caused either with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death then he would be guilty under Part I. On the other hand, if before the application of any of the Exceptions of Section 300, it is found that he was guilty of murder within the meaning of clause "4thly", then no question of such intention arises and only the knowledge is to be fastened on him that he did indulge in an act with the knowledge that it was likely to cause death but without any intention to cause it or without any intention to cause such bodily injuries as was likely to cause death. There does not seem to be any escape from the position, therefore, that the appellant could be convicted only under Part II of Section 304 and not Part I.

44. As we have already discussed, classification of an offence into either Part of Section 304 is primarily a matter of fact. This would have to be decided with reference to the nature of the offence, intention of the offender, weapon used, the place and nature of the injuries, existence of pre-meditated mind, the persons participating in the commission of the crime and to some extent the motive for commission of the crime. The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished

45. After analyzing the evidence on record, it is evidently clear that there was no premeditation on the part of the appellant. There is no evidence that the appellant made any special preparation for assaulting the deceased with intent to kill his brother. There is no dispute that an altercation took place between the appellant and the deceased prior to the incident and the appellant in the heat of passion under the influence of liquor, assaulted his

brother with an axe causing injuries on his person. It also appears from the evidence on record that the deceased was not taken to the hospital immediately after the incident. The injured died when he was taken to the hospital on the following day of the incident. It has also come to the mind of this Court that if proper treatment was given to the deceased in time then there might be chance of his recovery. It also appears from the fact that the appellant did not act in a cruel or unusual manner and did not take undue advantage. As such, we are convinced that the intention of the accused/appellant was not to kill the deceased.

46. Applying the above settled principle of law which has been enumerated in the said cases, we are of the considered view that it is a fit case for modifying the sentence and the appellant ought to have been convicted under Section 304 Part II of the Indian Penal Code instead of Section 302 of the Indian Penal Code.

47. We accordingly convict the appellant under Section 304 Part II IPC and alter the sentence of the appellant from Section 302 of the Indian Penal Code to Section 304 Part II of the Indian Penal Code and sentence him to undergo rigorous imprisonment for 10 (ten) years and the fine shall remain the same, as imposed by the learned trial court. The conviction under Section 302 IPC is hereby set aside. The period which he detained in custody shall be set off from the period of imprisonment imposed on him.

48. In the result, the appeal is partly allowed with aforesaid modification.

49 . Send back the LCR.

JUDGE

JUDGE

Comparing Assistant