

GAHC010212052019



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

Case No. : CRL.A(J)/71/2019

Ganesh Tanti,
S/o-Late Raju Tanti,
Village-Jangal Basti,
P.S.-Dhekiajuli,
District –Sonitpur(Assam)

.....Appellant

VERSUS

The State of Assam.

Sri Dipak Tanti,
S/o-Late Lakhi Tanti,
Village-Jangal Basti,
P.S.-Dhekiajuli,
District –Sonitpur(Assam)

..... Respondents

Advocate for the Appellant : Mr. M. Dutta, Amicus Curiae

Advocate for the Respondent : Mr. K. Baishya, Additional Public Prosecutor

Date of hearing : 06.12.2023

Date of judgment : 20.12.2023

**BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA**

JUDGMENT & ORDER (CAV)

(Mridul Kumar Kalita, J)

1. Heard Mr. M. Dutta, learned Amicus Curiae appearing for the appellant. Also heard Mr. K. Baishya, learned Additional Public Prosecutor appearing for the State of Assam.

2. This Criminal Appeal (J) has been registered under Section 374(2) of the Code of Criminal Procedure, 1973 on the basis of a petition of appeal filed by the appellant, namely, Sri Ganesh Tanti, which was forwarded by the Superintendent Central Jail, Tezpur, impugning the Judgment dated 05.04.2019, passed by the Court of learned Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 74/2018, whereby, the present appellant was convicted under Section 302 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- (Rupees Five Thousand only) and in default of payment of fine to undergo further rigorous imprisonment for 2(two) months. The appellant is presently detained in Central Jail, Sonitpur.

3. The facts relevant for consideration of this appeal, in brief, are as follows:-

i. That on 14.10.2017, one Dipak Tanti (PW-3) had lodged an FIR (First Information Report) before the Officer-in-Charge of Dhekiajuli Police Station, *inter-alia*, alleging that, on 13.10.2017 at about 7:30 PM, the maternal uncle of the first informant, namely,

Raju Tanti was killed by his son, namely, Sri Ganesh Tanti (the present appellant) by assaulting him with punches and kicks after a quarrel broke out between them over some domestic issue.

ii. On receipt of the said FIR, Dhekiajuli P.S. Case No. 923/2017 was registered under Section 302 of the Indian Penal Code and an investigation was initiated. Ultimately, after the completion of the investigation, charge sheet was laid against the present appellant, namely, Sri Ganesh Tanti, under Section 302 of the Indian Penal Code.

iii. The appellant faced the trial in Sessions Case No. 74/2018, remaining in custody, and during the trial the prosecution side examined as many as 7 (seven) prosecution witnesses. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 during which he pleaded his innocence and denied the truthfulness of the testimony of prosecution witnesses. However, no defence evidence was adduced for the appellant side.

iv. Ultimately, after completion of the trial, learned Sessions Judge, Sonitpur, convicted and sentenced the present appellant in the manner as has already been described in Paragraph No. 2 hereinbefore, by the Judgment dated 01.04.2019, which has been impugned in this instant appeal.

4. Before considering the rival submissions of learned counsel for both sides, let us go through the evidence that is available on record.

5. PW-1 Dr. Ranjan Kr. Das, the Medical Officer who had conducted the post-mortem examination on the dead body of Raju Tanti, S/O Late J. Tanti on 14-10-2017 has deposed that on examination he found rigor mortis present,

eyes and mouth closed, bleeding on the nose and mouth, and also found the following injuries on the dead body of Raju Tanti –

1. Multiple abrasions on the front of the abdomen,
2. Multiple abrasions on the face,
3. Sharp cut injury on the right eyebrow size: 4 cm x 2 cm x 2 cm,
4. Bilateral fracture of all the ribs of the chest,
5. Blood was collected in the pleurae, the right lung was ruptured in the lower lobe and the left lung was also ruptured in the lower lobe,
6. Blackish decolourization on the anterior wall of the abdomen, full of old clotted blood was inside the peritoneum cavity, the liver was ruptured on the right lobe .
7. Skull hematoma was found on the posterior aspect of the occipital lobe, size 6 cm x 5 cm x 4 cm. All the injuries were antemortem in nature.

The doctor opined that the cause of death was shock and haemorrhage as a result of injury sustained by the deceased. He proved the post-mortem report as Exhibit-1.

During cross-examination, he stated that the injuries sustained by the deceased cannot be caused by falling.

6. PW-2 Dhan Sharma, in his evidence, stated that on the day of the incident in October 2017, Munu Tanti, the elder cousin sister of the accused informed him that accused Ganesh Tanti had assaulted his father Raju Tanti. Hearing about the incident, he rushed to the place of occurrence and saw Ganesh Tanti assaulting Raju Tanti by fists and blows. Though they attempted to resist the accused from assaulting Raju Tanti but then the accused attempted to attack them also. Thereafter, on arrival of the local people, the accused fled

away. Though Raju Tanti was taken by Dipak Tanti and others to Jangalbasti CHC, he died on the way.

During cross-examination, he stated that Ganesh Tanti resided along with his two cousin sisters, Munu Tanti and Gita Tanti, and his aunty's son Dipak Tanti. At the time of the incident when the accused assaulted the deceased, Munu Tanti and her husband Ajit Tanti were present there and Dipak arrived there after his (PW 2) arrival. He stated that family members of Raju Tanti occasionally used to consume liquor but Raju Tanti moderately consumed liquor almost every day. The incident occurred at around 6 to 7 PM. He further stated that he had not seen any sharp cutting instrument but a bamboo stick in the hand of the accused.

7. PW-3 Dipak Tanti, the nephew of the deceased, stated that on 13-10-2017 at around 7 to 7.30 PM, his wife informed him that the accused had assaulted his father. Then he came to the place of occurrence and saw the accused kicking the chest of the deceased. At that time, Munu Tanti and Manjula Tanti tried to resist the father and son, and witnessing the incident he also tried to save the deceased. When he tried to overpower the accused, he fled away. As a result of the assault, the victim sustained fatal injuries and was about to die. He further stated that as the accused had assaulted the victim also by dragging him, he sustained severe injuries in almost all parts of the body including the eyes. Then he took the injured to Jangalbasti CHC but he died on the way. On the next day he filed the FIR, which is exhibited as Exhibit-2.

During cross-examination, he denied the suggestion that he did not state before police that he saw the accused kicking on the chest and abdomen of the deceased and while he tried to hold the accused, he fled away. He also denied the suggestion that he did not state before police that while the accused

assaulted his father, Munu and his (PW 3) wife Manjula prevented the accused but then the accused attempted to assault them also. He deposed that the three families reside in the same compound. In the daytime, Munu and Manjula stayed at home. According to him, the accused and the deceased after consuming liquor often picked up quarrels. He further stated that despite seeing the quarrel between the father and son, he proceeded forward as it is their habit to pick up quarrels after consuming liquor. He did not give attention to the altercation between the accused and his father as on earlier occasions also they had quarrelled.

8. PW-4, Smti Munu Tanti, cousin of the appellant, stated that on the day of the incident at around 7.30 p.m. when she was at home, the appellant brought Raju Tanti on his arm and kept him in their courtyard. Upon hearing the abusive voice of the appellant, she came out and saw the incident. Then upon arrival of police, the accused fled away.

During cross-examination, she stated that she along with her uncle deceased Raju Tanti, her aunt and her son Dipak and his wife Manjula, resided in the same land. According to her, at the time of the incident, Manjula and she were at their respective houses and except them, none was present there. Dipak and Ajit arrived there after about half an hour. She had not seen any '*marpit*' (assault). She had not seen who and by what means had assaulted the deceased. She also cannot say where the deceased was assaulted. She also stated that the deceased, the appellant, and all their family members often used to consume liquor. At the time of the incident also, the appellant had consumed liquor.

9. PW-5, Sri Babu Tanti @ Debo Tanti, in his evidence, stated that on the day of the incident in the evening, hearing the hue and cry of villagers, he

went to the place of occurrence and saw Raju Tanti in injured condition. Later on, Raju Tanti was taken to a 30 bedded hospital. He heard that a quarrel took place between the father and the son and then the accused killed his father. Later on, some village boys caught the accused in a vehicle. This witness was declared hostile.

During cross-examination by the prosecution side, he stated that "around 7:30 AM on 13/10/2017, my neighbour Raju Tanti was killed by his son Ganesh Tanti by dealing punches and kicks after a quarrel had broken out between them over some domestic issue"

During cross-examination by defence, he stated that he had not seen any quarrel between the accused and the deceased. He also had not seen by whom and in which place, the deceased was assaulted. He also admitted that the deceased used to consume liquor.

10. PW-6 Moinul Haque Choudhury, the Investigating Officer, had visited the place of occurrence and the inquest on the dead body was conducted by the Executive Magistrate. He also recorded the statement of witnesses, prepared the sketch map of the place of occurrence, sent the dead body for post-mortem examination, arrested the accused on being apprehended by local people, and laid chargesheet against the accused Ganesh Tanti under Section 302 of the Indian Penal Code.

During cross-examination, he stated that he filled up the inquest report form as per the dictation of the Executive Magistrate. He further stated that he noticed some injury on the face of the deceased but had not seen any cut injury on the dead body. He has also stated that he did not record the statement of Manjula Tanti, Geeta Tanti and Ajit Tanti as he did not meet them at the time when he visited the place of occurrence. He has also stated that PW-

3 Dipak Tanti did not state before him that *"he saw the accused kicking on the chest and abdomen of the deceased and while he tried to hold the accused, he fled away. That while the accused assaulted his father, Munu and his (PW 3) wife Manjula prevented the accused but then the accused attempted to assault them also."*

11. PW-7 Sri Sabyasashi Kashyap, the then Circle Officer-cum-Executive Magistrate, Dhekiajuli stated that on 14-10-2017 at about 10.30 AM, he conducted an inquest on the dead body of the deceased who died on 13-10-2017. At that time the eyes of the deceased were half closed and he noticed multiple injuries on the face.

During cross-examination, he stated that the name, address, and identification of the deceased were filled up by the Investigating Officer as per his dictation but the Investigating Officer has not signed the inquest report. He noticed no injury except on the face of the deceased.

12. During his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant pleaded his innocence. He has also stated in answer to the Question No. 3 posed to him by the Court that on the day of the incident, in the evening, when he was returning home he had seen a person lying on the road near his house but due to darkness he could not identify him. Hence, he returned to his home. However, after some time, he again went there and found that the person who was lying there was his father. Thereafter, he took that person in his lap to his home. It is also stated by the appellant that when he reached his home, he saw his cousins Munu Tanti (PW-4) and Manjula Tanti were there. Thereafter, Ajit Tanti, Dhan Sharma, and Dipak Tanti assaulted him and lodged a false FIR against him. He has also stated that he carried his father in his arms to his home. However, he denied the fact that he had fled

away after the incident. The appellant has also stated in his statement under Section 313 of the Code of Criminal Procedure, 1973, that his father had a land dispute with Dipak Tanti, Ajit Tanti, Raju Thapa, and Dhan Sharma. As they were staying over the land belonging to the father of the appellant and as his father did not agree, they beat up the father of the appellant and also ousted the wife of the appellant from her house. The appellant has further stated that on the day of the incident, the above-named persons assaulted him and lodged a false FIR against him.

13. Mr. M. Dutta, learned Amicus Curiae, appearing for the appellant, has submitted that the testimony of the two eye-witnesses, namely, PW-2 and PW-3 is not reliable due to the inherent contradictions in their testimony and the learned Trial Judge erred in arriving at the finding of guilt based on the testimony of the said witnesses.

14. Learned Amicus Curiae appearing for the appellant has submitted that PW-2 in his testimony has deposed that on the day of the incident, the elder sister of the appellant, namely, Munu Tanti had informed him that the appellant had assaulted his father Raju Tanti. However, it is submitted by learned Amicus Curiae that Smti Munu Tanti, while deposing as PW-4, has stated in her testimony that she had not seen who had assaulted the deceased. Learned Amicus Curiae has submitted that as Munu Tanti had herself not seen the incident of assault, hence, the statement of PW-2 that she was informed by Munu Tanti about the appellant assaulting his father is not reliable and the testimony of PW-2 that he had seen the appellant, Sri Ganesh Tanti assaulting his father with fists and blows is not believable. Further, Learned Amicus Curiae has also submitted that the testimony of PW-4 also shows that Dipak Tanti, Ajit Tanti, and others had come to the place of occurrence after about half an hour.

Hence, the statement given by PW-3 that he saw the appellant kicking on the chest of the deceased is also not reliable and therefore, the learned Trial Court erred in relying on the testimony of PW-3 in coming to the finding of guilt of the present appellant.

15. Learned Amicus Curiae has also pointed out that the testimony of PW-2 reveals that one Ajit Tanti was also present at the place of occurrence when the incident had occurred. However, Ajit Tanti has not been examined as a prosecution witness. Learned Amicus Curiae has also submitted that the explanation given by the Investigating Officer for not examining Sri Ajit Tanti, i.e., he was not present at the place of occurrence when the Investigating Officer had gone there, is not a plausible explanation which would justify non-examination of an independent witness when it could have been easily done and the said witness could have stated clearly as to what had actually happened at the place of occurrence.

16. In this regard, the learned Amicus Curiae has relied on the Judgment of Hon'ble Apex Court in "***Takhaji Hiraji Vs. Thakore Kubersing Chamansing And Others***" reported in **(2001) 6 SCC 145**, wherein it was observed that if a material witness, who would have unfolded the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness had been examined, it would not have supported the prosecution case. Learned Amicus Curiae has also cited a ruling of the Hon'ble

Apex Court in "***Machindra Vs. Sajjan Galfa Rankhamb And Others***" reported in **(2017) 13 SCC 491**, wherein, it has been observed that non-examination of a material witness who could have unfolded the relevant facts of the case necessary for adjudication makes the prosecution version doubtful.

To bring home the same point, Learned Amicus Curiae has also cited a ruling of the Hon'ble Apex Court in "***Joginder Singh Vs. State of Haryana***" reported in **(2014) 11 SCC 335**.

17. The learned Amicus Curiae has also submitted that otherwise also, the present case would not fall under Section 302 of the Indian Penal Code as even if the testimony of the prosecution witnesses is believed in toto, then also, there is no evidence to suggest that the appellant had used any weapons for assaulting the deceased. He had only used his fist and legs and it would also appear that the incident followed after a domestic issue between the father and son and sudden provocation of the petitioner cannot be ruled out. There are no materials to show that the appellant intended to kill his own father. Hence, it is submitted that the case of the prosecution would at best fall under Section 304 Part II of the Indian Penal Code and not under Section 302 of the Indian Penal Code as has been found in the impugned judgment.

18. On the other hand, the learned Additional Public Prosecutor has submitted that in view of the multiple injuries sustained by the deceased and in view of the testimony of PW-2 who had categorically stated that he had seen the present appellant assaulting Raju Tanti by means of fists and blows and further in view of the testimony of PW-3, namely, Dipak Tanti, who had seen the appellant kicking the deceased on his chest, there is no infirmity in the finding of learned Trial Court regarding the guilt of the present appellant and therefore,

there is no justification for this Court to interfere in the finding of guilt of the present appellant by the learned Trial Court.

19. We have considered the submissions made by learned counsel for both sides and have gone through the materials available on record meticulously.

20. The post-mortem examination report of the deceased as well as the testimony of PW-1, Dr Ranjan Kr. Das, who had conducted the post-mortem examination of the dead body of the deceased Raju Tanti, shows that the deceased had sustained multiple injuries on his body which were all ante-mortem in nature. It also appears that the PW-1 has pointed out in Exhibit-1, which is the post-mortem examination report, that the death of the deceased was caused due to shock and haemorrhage as a result of injuries sustained by the deceased. Thus, the fact that the deceased Raju Tanti died due to the ante-mortem injuries sustained by him is not in dispute.

21. As regards the submission of learned counsel for the appellant that non-examination of Ajit Tanti is sufficient to draw an adverse inference against the prosecution by holding that if he had been examined it would not have supported the prosecution case, we may gainfully refer to the observation of Hon'ble Apex Court in the case of "**Takhaji Hiraji Vs. Thakore Kubersing Chamansing And Others**" (supra) wherein the Apex Court had observed that if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witness may not be material and the Court in such circumstances must ask itself a question as to whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being

withheld from the Court. If the answer is positive then only a question of drawing an adverse inference may arise otherwise not. In the instant case, the appellant has stated in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973 that Ajit Tanti had also assaulted him along with Dipak Tanti and Dhan Sharma. Under such circumstances, when two of the witnesses namely, Dhan Sharma and Dipak Tanti, out of three persons who are reported to be present at the time of the incident, have been examined by the prosecution side, we are of the considered opinion that non-examination of Ajit Tanti cannot amount to withholding of material evidence considering the fact that the appellant himself had stated that Ajit Tanti had also assaulted him along with the PW-2 and PW-3. There is every likelihood that examination of Ajit Tanti would have been a repetition or duplication of evidence already adduced by PW-2 and PW-3. Therefore, we are of the considered opinion that mere non-examination of Ajit Tanti is not fatal to the prosecution case and it may not, in itself, be a ground for disbelieving the testimony of PW-2 and PW-3.

22. As regards the submissions of learned Amicus Curiae that as PW-4, namely, Munu Tanti had stated in her testimony that she had not seen who had assaulted the deceased and therefore, it is not believable that she had informed the PW-2 that the appellant had assaulted his father Raju Tanti, it appears that learned Trial Court has dealt with the said argument in paragraph No. 21 of the impugned judgment by observing that the PW-4 being the cousin sister of the appellant and who resided in the same premises with the appellant, there is every likelihood that she may not depose against the present appellant and therefore, merely based on the testimony of PW-4 that she had not seen the incident, the testimony of PW-2 and PW-3, was not discarded. We do not find the reasoning of the learned Trial Court on this point to be illogical. When

three witnesses, namely, PW-2, PW-3, and PW-4, who appear to be present at the place of occurrence when the incident occurred, differ in some aspects of their testimony, it is not very unlikely that one of the witnesses may not be wholly truthful. Under such circumstances, only that version of the said witness may be accepted which otherwise appears to be truthful in the light of the other evidence available on record.

23. In the instant case, there is evidence on record to suggest that PW-4 came out of her house upon hearing the voice of the appellant while he was abusing. She has also stated that on arrival of the police, the appellant fled away from that place. PW-5, who was declared as a hostile witness, has also stated in his testimony that the appellant was caught later on by some boys from a vehicle. The conduct of the appellant in fleeing away from the place of occurrence after the incident can undoubtedly be regarded as an additional link in the chain of circumstances pointing towards his guilt. Under such circumstances, we are of the considered opinion that the PW-4 does not appear to be a witness of a kind whose testimony may be wholly reliable and of sterling quality. Hence, her testimony may not be the basis for discarding the testimony of other eyewitnesses, who otherwise appears to be reliable.

24. As regards the testimony of the eyewitnesses is concerned, though PW-3 has stated that he saw the appellant kicking on the chest and abdomen of the deceased, however PW-6, who is the Investigating Officer, has deposed that the PW-3 did not state before him that he saw the appellant kicking on the chest and abdomen of the deceased. This appears to be a material omission which amounts to contradiction as regards the testimony of PW-3 making it unsafe for reliance. However, we do not find anything to disbelieve the testimony of PW-2 wherein he has deposed that he saw the appellant assaulting

the deceased Raju Tanti with fists and blows. We are, therefore, of the considered opinion that the learned Trial Court had correctly arrived at the finding that the appellant had assaulted his father on the date of incident.

25. As regards the submission of the learned *Amicus Curie* that the conviction of the present appellant under section 302 of the Indian Penal Code may not be sustained as the appellant did not intend to kill his father, it appears to us that there is evidence on record to suggest that the appellant was in an inebriated condition at the time of incident and though he was carrying a bamboo in his hands at the time of incident, however, he assaulted the deceased only with fists and blows, which is indicative of the fact that the appellant did not intend to kill his father Raju Tanti when he assaulted him. There is also evidence to show that a quarrel between the appellant and his father had preceded the alleged incident of assault. Under the circumstances, the possibility of the appellant being sufficiently provoked during the quarrel so as to lose his sense of self- control and assault his father with fist and blows, in a heat of passion, cannot be ruled out. The prosecution side has not been able to point towards any evidence to show premeditation on the part of the appellant.

26. In the case of "***Sukhbir Singh Vs. State of Haryana***" reported in **(2012) 3 SCC 327**, the Supreme Court of India has observed that in order to avail the benefit of Exception 4 of Section 300, the defence is only required to probabalise that the offence was committed without premeditation, in a sudden fight in a heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and had not acted in a cruel or unusual manner. This exception is based on the principle that in the absence of premeditation and on account of total deprivation of self control, the offence was committed in a heat

of passion, which normally, a man of sober urges would not resort to.

27. From a careful analysis of the evidence available on record, we are of the opinion that although the appellant had assaulted his father which resulted in his death, yet, the assault was the outcome of a sudden quarrel, made in a heat of passion and without any premeditation. Therefore, we are of the view that the accused would be entitled to the benefit of Exception 4 of Section 300 of the Indian Penal Code.

28. As such, we find that it is a fit case for conversion of the conviction of the appellant to Section 304 Part-II of the Indian Penal Code, from conviction under Section 302 of the Indian Penal Code.

29. For the reasons stated hereinabove, we set aside the conviction and sentence imposed on the appellant under section 302 of the Indian Penal Code by the impugned judgement and convict him under Section 304 Part-II of the Indian Penal Code and sentence him to undergo rigorous imprisonment for 10 years. The period of detention already undergone by the appellant shall be set off against the sentence imposed on him.

30. This appeal is accordingly, partly allowed with the above modification in the impugned judgment of conviction and order of sentence as aforesaid.

31. Let the case record of Session Case No 74/2018 be sent back forthwith to the Court of Sessions Judge, Sonitpur, along with a copy of this Judgment. Let a copy of this judgment be also sent to the Superintendent, Central Jail, Sonitpur.

JUDGE

JUDGE

Comparing Assistant