

GAHC010263202022



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

Case No. : I.A.(CrI.)/844/2022

TIBHU TANTI AND ANR.
S/O LATE KAMDEV TANTI, R/O SOKALATINGA TEA ESTATE, BAHBARI
LINE, P.O.- SOKALATINGA, P.S.- PULIBOR, DIST.- JORHAT, ASSAM.

2: MAHESH URIA
S/O LATE GHANA URIA
R/O SOKALATINGA TEA ESTATE
BAHBARI LINE
P.O.- SOKALATINGA
P.S.- PULIBOR
DIST.- JORHAT
ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
TO BE REP. BY THE P.P., ASSAM.

2:POBON BAWRI
S/O LATE LAL BAURI
R/O SOKALATINGA TEA ESTATE
BAHBARI LINE
P.O.- SOKALATINGA
P.S.- PULIBOR
DIST.- JORHAT
ASSAM
PIN- 785703

Advocate for the Petitioner : MR. A AHMED

Advocate for the Respondent : PP, ASSAM

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

ORDER

Date : 15-03-2023

(M. Zothankhuma, J)

Heard Mr. A Ahmed, learned counsel for the applicants. Also heard Ms. B Bhuyan, learned Additional Public Prosecutor appearing for the State.

2. This application under Section 389 Cr.PC is for suspending the sentence, imposed in connection with the judgment dated 05.11.2022, passed by the court of the learned Additional Sessions Judge, Jorhat in Sessions Case No. 241/2016, by which the applicants have been convicted under Sections 302/34 IPC and sentenced to undergo rigorous imprisonment for life with a fine to Rs. 5,000/-, in default, simple imprisonment for 6 (six) months.

3. The learned counsel for the applicants submits that the conviction of the applicants cannot have been made on the basis of circumstantial evidence on the basis of "last seen together" theory, as the Division Bench judgment of this Court in ***Criminal Appeal (J) No. 103/2020*** (Dhiren Tanti vs. The State of Assam & Anr.) has held that it would be wholly unsafe to base the conviction of the accused only on the circumstance of "last seen together", as the prosecution must adduce evidence to prove the other links in the chain of circumstances, so as to prove the guilt of the accused.

4. The learned counsel for the applicants submits that in the present case, the only evidence against the applicants is the evidence of the PW-3, who has

stated that the applicant No. 2 had come to their house and taken away her husband to the house of the applicant No. 1, where he was beaten up. He submits that though PW-3 has stated that she was obstructed while going to see her husband, the cross-examination of PW-3 is to the effect that she had not come out of her house and had no knowledge as to who tied her husband and beaten him. He also submits that the evidence of the witness does not give any indication that the applicants had beaten up the deceased. Further PW-5 has stated that Bapu Uria informed him that a crowd from the garden was physically assaulting the deceased. The learned counsel thus submits that as there is no evidence to show that the applicants had beaten up the deceased or tied him up in the house of the applicant No. 1, the conviction of the applicants was illegal, as the "last seen together" theory could not be conclusive proof that the applicants had killed the deceased.

5. He also submits that in the case of ***Reena Hazarika vs. State of Assam***, reported in ***(2019) 13 SCC 289***, the Apex Court has held that in the case of circumstantial evidence, the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last-seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a *prima facie* case. He accordingly submits that as there is nothing to link the chain of circumstances in the present case, the sentence imposed upon the applicants should be suspended and they should be allowed to go on

bail. The learned counsel for the applicants also submits that as the applicants were on bail during the proceedings in the learned Trial Court, they may also be allowed to go on bail pending disposal of the appeal.

6. Ms. B Bhuyan, learned Additional Public Prosecutor, on the other hand submits that the evidence of PW-3 read with the evidence of PW-5 herein, goes to show that the applicants were involved in the killing of the deceased. She further submits that the deceased was taken out from his house by the applicant No. 2 and taken to the house of the applicant No. 1, where he was tied up and beaten to death. Thereafter, his body was thrown in the river, which was recovered the next morning. She submits that the evidence of PW-3 clearly shows that she was obstructed from going to the house of the applicant No. 1 by Bapu Uria, who had also told PW-5 that the deceased was physically being assaulted by a crowd from the garden. She also submits that the applicants have failed to offer reasonable explanation to "last seen together" theory and as such, there was no infirmity with the findings of the learned Trial Court in convicting and sentencing the applicants. She also submits that the deceased had been killed, as he had been alleged to have practised witchcraft, which caused the death of the daughter of the applicant No. 1. The learned Additional Public Prosecutor submits that the decisions cited by the learned counsel for the applicants is not applicable to the facts of this case and accordingly, the application should be dismissed.

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

8. PW-3 has stated that the applicant No. 2 had come to her house and taken away her husband to the house of the applicant No. 1. Though she went to see her husband, she was obstructed by Bapu Uria on the ground that the applicants may beat her. Thereafter, her husband was beaten from 12 midnight, after being tied in the house of the applicant No. 1. The Police thereafter recovered the dead body from Kakodanga river. She also states that her husband was beaten up on being suspected to be practicing witchcraft. In her cross-examination, the PW-3 has stated that she had no knowledge, who had tied up her husband and who had beaten him since she was at home. She also states that her husband had a good relation with the applicants prior to the incident. She also states that she does not know how many people had gathered in the night.

9. The evidence of PW-5, who is the VDP Secretary of Bahbari Tea Estate is to the effect that on a date prior to the incident, he had visited the house of the applicant No. 1 to enquire about the health of his sister, who was suffering from tuberculosis. Upon reaching the said house along with a pharmacist of the Bahbari Tea Estate, he declared the sister of the applicant No. 1 as dead. The next morning, the Secretary of the Tea Estate Majdur Sangha, Bapu Uria informed him that a crowd had killed the deceased and asked him to come to the place of occurrence. However, considering the seriousness of the incident and instead of visiting the place of occurrence, PW-5 called the Pulibor Police Station and informed them about the place of occurrence. In his cross-examination, PW-5 states that Bapu Uria informed him that the deceased was assaulted by a crowd from the garden. He also states that he did not know if the deceased was tied up or not. He also states that Bapu Uria did not tell him

that the accused persons were involved in the assault and killing of the deceased.

10. The submission made by the learned counsel for the applicants with regard to whether the prosecution has established the continuity in the links of the chain of circumstances, which resulted in the conviction of the applicants would be considered at the time of hearing the final appeal. At this stage, we are not inclined to decide the said question, which would in all respects be a decision on the merits of the appeal, in the absence of the Paper Book.

11. On considering the fact that the deceased was taken out from his house by the applicant No. 2 and apparently taken to the house of the applicant No. 1, which ended with the dead body of the deceased being fished out from the river, we find that the offence is very serious. Further the medical evidence having shown that the death of the deceased occurred due to head injury caused by blunt weapon, we are of the view that due to the nature of accusation and gravity of the offence, the sentence should not be suspended at this stage. Accordingly, the application is rejected. The observations made in this order should not be considered to be a finding on merits at the time of hearing of the appeal.

JUDGE

JUDGE

Comparing Assistant