

GAHC010297902019



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 29 of 2020

1. Sri Arun Deka,
Aged about 35 years,
Son of Late Girin Deka,
Resident of village Rangamati,
P.S.-Mangaldai, District-Darrang, Assam.

2. Sri Hema Deka @ Bhotok Deka,
Aged about 40 years,
Son of Late Girin Deka,
Resident of Village-Rangamati,
P.S.- Mangaldai, District – Darrang, Assam.

..... Accused/Appellants

-Versus-

1. The State of Assam,
Represented by P.P. Assam.
2. Sri Kandarpa Deka,
Son of Sri Deben Deka,
Resident of Nij Rangamati,
P.O.-Rangamati, P.S.- Mangaldai,
District- Darrang, Assam.
Pin – 784529.

.....Respondents

Advocates for the appellants : Mr N Mahajan

Advocate for the respondent : Ms S Jahan, Addl. P.P.

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

Date of Judgment : 17.03.2023

JUDGEMENT AND ORDER (CAV)

(Malasri Nandi, J.)

Heard Mr N Mahajan, learned counsel for the appellants and Ms S Jahan, learned Additional Public Prosecutor for the State of Assam/respondent No. 1.

2. This appeal has been preferred challenging the Judgment and Order dated 27.09.2019, passed by the learned Additional Sessions Judge (FTC), Darrang, Mangaldoi, in Sessions Case No. 142 (DM)/2016, whereby the accused appellants have been convicted under Section 302/323/34 IPC and sentenced to undergo Rigorous Imprisonment for Life and to pay a fine of Rs. 10,000/- each, in default, to undergo Simple Imprisonment for one year each for the offence under Sections 302/34 IPC and to further undergo Simple Imprisonment for 3 (three) months each for the offence under Section 323/34 IPC. Both the sentences were directed to run concurrently.

3. The brief facts of the case is that on 04.10.2015, one Kandarpa Deka lodged an FIR before the OC, Mangaldoi Police Station, stating inter alia that on 03.10.2015, at about 04:30

pm, his elder brother Kamala Deka and his uncle Saruram Deka, while returning home from Khodoumara Chapori, the accused persons, namely, Arun Deka and Hema Deka @ Bhotok Deka, killed his elder brother Kamala Deka by hacking him on his neck. They also caused grievous injuries to his uncle Saruram Deka, with a sharp cutting weapon.

4. On receipt of the complaint, a case was registered vide Mangaldoi PS Case No. 851 of 2015, under Sections 302/326/34 IPC and investigation has been commenced. During investigation, the Investigating Officer visited the place of occurrence, recorded the statements of the witnesses and seized the weapon of offence. After completion of investigation, charge sheet was submitted against both the accused appellants, before the learned JMFC, Mangaldoi, under Sections 302/323/34 IPC. As the offence under Section 302 IPC is exclusively triable by the Court of Sessions, the case has been committed accordingly.

5. During trial, 13 (thirteen) witnesses were examined to prove the case of prosecution and exhibited six documents before the learned trial Court. After completion of trial, statements of the accused appellants were recorded under Section 313 CrPC, wherein incriminating materials found in the evidence of the witnesses were put before them to which they denied the same. According to them, they have been falsely implicated in this case. After hearing the arguments advanced by the learned counsel for both the parties, the learned trial Court has delivered the judgment by convicting the accused appellants as aforesaid.

6. Being highly aggrieved and dissatisfied with the aforesaid judgment, the appellants have preferred this appeal.

7. Learned counsel for the appellant, Mr N Mahajan has argued that the learned trial Court

has heavily placed reliance on the evidence of PW-6, who claimed to be an injured person, but no medical evidence of PW-6 was proved by the prosecution to establish the fact that PW-6 had also sustained injury in the same set of incident along with the deceased.

8. It is also submitted by the learned counsel for the appellants that there is vital contradiction regarding time of the incident. According to PW-6, the incident occurred at 04:30 pm and after that the appellant No. 1, Arun Deka went to the residence of PW-9, whereas PW-9 categorically stated in his evidence that the appellant No. 1 came to his residence at about 01:30 pm and threw the dao in his courtyard and after taking water went away. That being the position, the learned trial Court ought to have given benefit of doubt to the accused appellants.

9. It is also the submission of the learned counsel for the appellants that the Medical Officer (PW-13) stated in his evidence that he examined the injured Saruram Deka, PW-6 on 08.10.2015 and he found the injury fresh and simple, caused by blunt weapon, whereas the alleged incident had occurred on 03.10.2015. As such, the injury sustained by the victim, Saruram Deka cannot be related to the incident of 03.10.2015. As such, the conviction and sentence of the accused appellants is bad in law and is liable to be set aside.

10. Learned counsel for the appellants also submitted that the evidence of PW-6 is not reliable as because, according to him, he was examined by the Police on the date of occurrence, i.e., on 03.10.2015 and he told the Police about the occurrence on that day, but no such witness was examined by the prosecution and the evidence of the Investigating Officer shows that he recorded the statement of PW-6 on 08.10.2015, i.e., after five days of the incident.

11. It is further submitted that as per evidence of Investigating Officer, he went to the place of occurrence on the same day, i.e., on the date of occurrence, i.e., on 03.10.2015, after recording of G D Entry No. 302 of 2015, but the said GD Entry was not exhibited before the learned trial Court, which makes the prosecution case doubtful. As such, the accused appellants deserve to be acquitted on benefit of doubt.

12. In support of his submission learned counsel for the appellants has placed reliance on the following case laws:-

- 1) (2010) 3 SCC 721; (*State of Uttar Pradesh –vs- Guru Charan & Others*).
- 2) (2016) 4 SCC 96; (*Shahid Khan –vs- State of Rajasthan*).
- 3) (2016) 16 SCC 701; (*Dhal Singh Dewangan –vs- State of Chhattisgarh*)
- 4) (2020) 12 SCC 605; (*State of Uttarakhand –vs- Darshan Singh*)
- 5) 2022 SCC OnLine SC 991; (*Khema @ Khem Chandra etc. vs- State of Uttar Pradesh*).

12. Per contra, Ms S Jahan, learned Additional Public Prosecutor has opposed the submissions of the learned counsel for the appellants and has argued that PW-6 is the injured witness, who had accompanied the deceased at the relevant time of incident and his evidence cannot be brushed aside on the basis of some contradictions or omissions found in the evidence of the witnesses and his presence cannot be doubted on the basis of some stray incident as mentioned by the learned counsel for the appellants. Under such backdrop, there is no infirmity in the Judgment of the learned trial Court on convicting the accused appellants. Hence, Judgment of the learned trial Court calls for no interference by this Court.

13. In support of her submissions, the learned Additional Public Prosecutor has cited the following case laws-

- 1) (1996) 5 SCC 369; (*Alil Mollah & Another –Vs- State of West Bengal*).
- 2) (2006) 11 SCC 323; (*Bhimapa Chandappa Hosamani & Others –Vs- State of Karnataka*).
- 3) 2022 0 Supreme(SC) 569; (*Shahaja @ Shahajan Ismail Mohd. Shaikh –Vs- State of Maharashtra*).

14. We have heard the learned counsels for the parties, who have taken us through the evidence in the matter. We have also given our thoughtful consideration to the submissions, which have been made before us.

15. Prior to the dealing with the rival contentions raised at the bar, we deem it appropriate to revisit the law on the evidentiary value of the injured witness.

Evidentiary value of injured witness

16. Undoubtedly, the testimony of injured witness cannot be brushed aside lightly. The injuries sustained by the injured witness at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. The Courts have time and again emphasized that the deposition of an injured witness should be relied upon unless there are strong reasons for rejection of his evidence on the basis of major contradictions and discrepancies therein. It is highly improbable that the injured witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence.

17. In the case of *Harender Singh vs. State of Delhi*, reported in 2016 SCC Online Delhi 1368, wherein the evidentiary value of testimony of injured witness was discussed. It was observed by the Court that the testimony of an injured witness is a highly corroborative piece of evidence. Unless highly compelling circumstances are established by the accused, which casts a reasonable doubt over the statement of the injured witness, such statement can be safely relied upon by the Courts to convict the accused persons.

18. Coming back to the case in hand, a perusal of the judgment of the learned trial Court would reveal that the conviction is based solely on the evidence of PW-6, who claimed to be injured on the same set of incident alongwith the deceased. The learned trial Court has sought corroboration to the testimony of PW-6 from the recovery made on the testimony of other witnesses. The learned trial Court observed that the dao was seized on the basis of identification done by PW-9, in whose house the accused Arun Deka came immediately after the incident and threw the dao in his courtyard and left the place.

19. To examine the correctness of these findings, we will first assess the testimony of PW-6, Saruram Deka, who is the uncle of the deceased. As such, he would fall in the category of interested witness, being related to the deceased. However, his testimony cannot be discarded only on the ground that the PW-6 is an interested witness. The only requirement would be that the evidence of such witness is required to be scrutinized with greater care and circumspection.

20. PW-6, Saruram Deka states that deceased Kamala Deka was his nephew, the son of his brother Deben Deka. The accused persons and the deceased were cousins. The incident took place at around 04:00 to 04:30 pm, one day about 2 ½ years back at Khodoumara Chapori.

Kamala Deka and he were sowing lentils at Khodoumara Chapori. After completion of the task, at about 4:00 to 4:30 pm, while they were returning home and when they crossed about half a mile, Arun and Bhotok came out from the house of Sri Hari Charan Deka. Kamala was ahead of him. At that moment, Arun hacked Kamala Deka, with a dao. When Bhotok Deka hacked him (PW-6) on his right arm from behind, he turned around and saw Bhotok, who was about to assault him for the second time and he ran away therefrom. Kamala Deka remained there. He went to the house of his elder brother, Deben Deka at Medhichapori and informed them about the incident. Having seen him in injured condition, someone took him to village Rangamati by crossing the river. There, he was in search of Gaonbura (the village headman), but he could not find him. Then he went to President Minaram's house, but there too, he did not get the numbers of Gaonbura and the Police Station. Again he went to Gaonbura's house, while he had been sitting there, somebody called 108 Ambulance and took him to Civil Hospital. In the meantime, Police vehicle also reached there and he was taken to the hospital. Doctor treated him and gave him stitches in the hospital. Subsequently, his statement was also recorded by the Magistrate under Section 164 CrPC.

21. In his cross-examination, PW-6 replied that the accused persons used to do cultivation on Premoda's land, but since they did not give her any share of the crops, Premoda had asked them to cultivate her land and since then, they were doing the cultivation on his sister's plot of land. It was suggested that at the time of incident, he had dispute with Kamala in connection with doing cultivation with regard to Premoda's land, as a result of which, he killed Kamala and to save himself, he implicated the accused persons.

22. The other witnesses, Kandarpa Deka, PW-1 who is the informant of the case, PW-2,

Deben Deka, who is the father of the deceased and PW-3, Hari Chandra Deka, and PW-5, Ratneswar Deka are the neighbours of the informant and the deceased as well. PW-4 is the Gaonbura of Nijrangamati Village, admittedly were not present at the relevant time of incident. According to PW-1 and 2, they came to know about the incident from PW-6, Sri Saruram Deka. PW3, PW-4 and PW-5 stated that they came to know that an incident of assault took place at Chapori and as a result of which, Kamala Deka died.

23. The Medical Officer, Dr Phanindra Choudhury, was examined in the case as PW-13. He deposed in his evidence that on 04.10.2015, he was working at Sub-Divisional Medical and Health officer at Mangaldoi Civil Hospital and on that day, at 12:30 am , he conducted Post-Mortem examination on Kamala Deka on police requisition. On examination of the deceased, he found the following-

External appearance:- A male dead body, aged 38 years. Eyes are open and mouth closed. Rigor mortis present. A cut injury seen on right side of neck. Exposes trachea and oesophagus Vertebrae is transected at cervical region. Cut mark seen on right and left scapular region.

I) Cranium and Spinal canal: Scalp, skull – Intact, vertebrae- transected at cervical region.

Membrane, Brain – Intact. Spinal Cord- transected at cervical region.

III) Thorax: Walls, ribs and cartilages – Intact, Pleurae- Intact.

Larynx and trachea- Transected, right lung, Left lung Pericardium, Heart vessels – Intact.

IV) Abdomen- Walls – Intact, Peritoneum – Intact.

Mouth, Pharynx Oesophagus- Oesophagus transected.

Stomach and its contents – Mucosa – Intact.

Large Intestine and its contents – Intact.

Liver – Intact.

Spleen and Kidneys- Intact.

Bladder – Intact.

Doctor opined that the cause of death was due to shock and hemorrhage as a result of injuries sustained. The injuries were ante-mortem.

24. It is not in dispute that due to the alleged incident, Kamala Deka died. The Medical Officer also supported the fact by stating that he found a cut injury on right side of the neck of the deceased, exposed trachea and oesophagus, vertebrae is transected at cervical region. Cut mark is seen on right and left scapular region. The doctor opined that death was due to shock and haemorrhage as a result of injuries sustained.

25. Admittedly, except PW-6, there is no eye-witness to the incident. PW-6 alleged that on the date of incident, when they were returning home, Arun Deka inflicted injury with a dao towards Kamala Deka. When the other accused Bhotok assaulted him on his right arm from behind, he turned around and having seen Bhotok attempting to hack him, he ran away from the place of occurrence. According to PW-6, on the date of incident, he was treated by a doctor, stitches were given to him in the hospital and he remained in the hospital for a day. It transpires from the evidence of PW-6 that on the date of incident, i.e., on 03.10.2015, after the incident, he was taken to the hospital for treatment. But no medical report is available in the record to show that PW-6 was examined by any doctor on 03.10.2015 in the hospital.

26. The Medical Officer, PW-13, in his deposition also stated that on 08.10.2015, at 02:40 pm, while he was serving as Sub-Divisional Medical and Health Officer at Mangaldai, he examined Saruram Deka, aged 56 years, son of Dhireswar Deka, of village Nijranagamati, PS-Mangaldoi, in connection with Mangaldoi PS Case No. 851/2015 and found lacerated injury on

his right arm. The doctor opined that the nature of injury was fresh, simple and weapon was blunt.

27. In his cross-examination, PW-13 replied that he had not mentioned the depth and measurement of lacerated injury. Such type of injury may be caused by falling on a hard object.

28. The version of PW-13 is that he had examined PW-6 on 08.10.2015, i.e., after 5 days of the incident and found lacerated injury on his right arm. According to the Medical Officer, the injury was fresh. It transpires that the injury sustained by PW-6 was not related to the incident, which occurred on 03.10.2015, which is totally inconsistent with the testimony of PW-6.

29. We are conscious that on the ground of minor inconsistencies, the evidence of PW-6 cannot be brushed aside. However, it is to be noted that there are material improvements in his evidence. His evidence, therefore, is required to be scrutinized with greater caution and circumspection. It is further to be noted that according to the prosecution, there is previous enmity between the accused and the deceased and his family members.

30. As held by the Honble Supreme Court in *Ramashish Rai vs. Jagdish Singh*, reported in (2005) 10 SCC 498, previous enmity is a double edged sword. On one hand, it provides motive to the crime and on the other, there is a possibility of false implication. In the case of *Vadivelu Thevar vs. State of Madras*; reported in 1957 SCR 981, Hon'ble Supreme Court has observed thus-

“.....Hence, in our opinion it is a sound and well established rule of law that the Court is

concerned with the quality and not with the quantity of the evidence, necessary for proving or disproving a fact. Generally speaking, oral testimony in this context, may be classified into three categories, namely, -

- i) *Wholly reliable*
- ii) *Wholly unreliable*
- iii) *Neither wholly reliable nor wholly unreliable.*

In the first category of proof, the Court should have no difficulty in coming to its conclusion either way-it may convict or may acquit on the testimony of single witness if it is found to be above reproach or suspicion of interestedness, in competence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in the third category of cases that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.....”

31. We find that the testimony of Sri Saruram Deka, PW-6 would fall under the third category, i.e., his evidence can be said to be neither wholly reliable nor wholly unreliable. As such, it will be necessary that there is some corroboration to his ocular testimony.

32. The trial Court had relied on the recovery of the weapon, which was left by the accused, Arun Deka in the courtyard of PW-9. As per seizure list, vide Exhibit-2, three persons were present at the time of seizure, i.e., Prabin Sarma, Minaram Saharia and Dhan Sarma, on being shown by Dineswar Saikia.

33. PW-9 is Dineswar Saikia, who deposed in his evidence that on the date of incident,

around 01:30 pm, Arun Deka came to his house and threw away one dao near his courtyard, asked for water and left after drinking water. Later, he saw the dao, left by Arun Deka, near his courtyard. When uproar erupted about one hour, thereafter, he came to know that Arun Deka had killed Kamala Deka. Then out of fear, he crossed the river, which is at some distance from his house and threw the said dao in the field and returned back home. After 2/3 days, Police came to his house and he had shown the Police the place, where he had thrown the said dao. Accordingly, the Police seized the same and obtained his signature in the seizure list vide Exhibit- 2 (1). Prabin Sarma, Dhanmani Sarma and another person also put their signatures in Exhibit-2.

34. In his cross-examination. PW-9 replied that blood was not sticking to the dao. He came to know about the incident much later.

35. PW-10 is Dhanmani Sarma @ Dhan Sarma. He deposed in his evidence that on the date of incident when he was sitting in a shop at the chowk of their village, the Police called him and asked him to put signature on seizure list, whereupon he put his signature. He heard that a dao was recovered. Police went on searching for the dao on the land of Gaonbura, Prabin Sarma. After recovering the dao, Police obtained his signature in the seizure list.

36. In his cross-examination, PW-10 replied that he did not know to whom the said dao belonged to. Since the Police asked him to put signature, he did so.

37. PW-11 Prabin Sarma, is the headman of village Dotiapara. From his deposition, it reveals that in the year 2015, he was called to Mangaldoi Police Station over phone, asking him whether he knew Dineswar Saikia or not and took PW-11 to the house of PW-9. Having

found Dineswar Saikia in his house, Police had a discussion with him in his house. On being asked, PW-11 replied that he heard Dineswar Saikia stating that the accused Arun Deka came to his house and asked for water, threw one dao and left the place. Then Dineswar Saikia showed the place where the said dao was thrown and accordingly, the Police recovered the said dao from the field near the river. Subsequently, the Police seized the said dao and obtained his signature.

38. In his cross-examination, PW-11 replied that he did not know about the incident. He put his signature since Police asked him to do so by saying that a dao has been recovered.

39. From the evidence of PW-9, PW-10 and PW-11, it reveals that the weapon of offence, i.e., the dao was not recovered from the possession of the accused/appellants or on being led by the accused appellants. According to PW-9, after the incident, accused/ appellant Arun Deka came to his house, threw away the dao in his courtyard. Subsequently, having known the fact that appellant Arun Deka had killed Kamala Deka, he (PW-9) threw the said dao in the cane-field of Village- Headman PW-11. After seven days, Police came to the house of PW-9 and on being led by him, he had shown the place to the Police and thereafter, the dao was recovered. PW-9, PW-10 and PW-11 were not present when the incident took place. The seized dao was not shown to PW-6, who could identify the said dao, whether it was used by the accused/ appellant, Arun Deka, at the time of assaulting the deceased, Kamala Deka. As such, the said recoveries cannot be said to be free from doubt.

40. PW-12 is the Investigating Officer. He deposed in his evidence that on 04.10.2015, he was working as the attached Officer at Mangaldai Police Station. On that day, the informant Kadarpa Deka lodged a written FIR at Mangaldoi Police Station, and a case was registered

vide Mangaldoi PS Case No. 851/2015, under Sections 302/326/34 IPC and he was entrusted with the investigation of the case. On 03.10.2015, the information about the incident was received over phone and accordingly a GD Entry was made vide Mangaldoi P.S.GD Entry No. 102, dated 03.10.2015. Accordingly, he visited the place of occurrence, recorded the statement of the witnesses, drew the sketch map of the place of occurrence and the dead body was sent to Mangaldoi Civil Hospital for Post-Mortem Examination. The inquest on the dead body was held with reference to the GD Entry. He did not find the accused in his house. The dao used in the incident could not be found. On 05.10.2015, accused Hem Deka @ Bhotok Deka, appeared at the Police Station, whereupon he was interrogated. He was arrested and forwarded to the Court. After questioning injured Saru Ram Deka, he was produced in the Court on 08.10.2015, and a prayer was made for recording his statement under Section 164 CrPC and accordingly, his statement was recorded. On 07.10.2015, Arun Deka surrendered in the Court. On 10.10.2015, on being shown by Dineswar Saharia, he recovered the dao from a jungle at Dotiapara Mainaghat Chapori and seized the same in presence of witnesses. Subsequently, he collected the Post-Mortem Examination report, injury report and submitted charge sheet against the two appellants.

41. In his cross-examination, PW-12 replied that he visited the place of occurrence at about 06:50 pm on 03.10.2015 on the basis of GD Entry. As per sketch map of the place of occurrence, farm house of Hari Chandra Deka is in the east, River Mora Suti is in the west, road leading to the Rangamati is in the north and Khodoumara Chapori is in the south of the place of occurrence. Saruram Deka got treated of his own. He did not go for treatment on Police requisition. Saru Ram Deka was interrogated at the Police Station on 08.10.2015, subsequent to his release from Civil Hospital. He saw lacerated injury on the right arm of Saru

Ram Deka. It was lightly swollen. Except Saruram Deka, there is no other eye-witness. He investigated the case on the basis of his statement.

42. Though the Investigating Officer also indicated that the injured Saruram Deka was interrogated on 08.10.2015, subsequent to his release from Civil Hospital, but nothing is available on the record to show that since after the incident on 03.10.2015, he was under treatment in the Civil Hospital for the injuries sustained by him in the incident, which occurred on the same date, i.e. 03.10.2015.

43. In the present case, we notice that the trial Court has failed to take into consideration the vital discrepancies and inconsistencies in the evidence of the prosecution witnesses.

44. From the perusal of the evidence as well as the finding of the learned trial Court, it is clear that PW-6 cannot be said to be an eye-witness to the incident. Though PW-6 Saruram Deka is an injured eye-witness, but there are serious discrepancies and inconsistencies with regard to the time of the injuries sustained by him and time at which he was medically examined. The Medical Officer, PW-13, in his evidence clearly stated that he had examined PW-6 on 08.10.2015, i.e. after five days of the incident. There is no explanation from the side of the prosecution as to why the prosecution has not produced the relevant medical documents to show that PW-6 was treated by the doctor on the date of incident and he was hospitalized. According to PW-12 (IO), PW-6 was interrogated by him on 08.10.2015. It has also come from the evidence of PW-12 that PW-6 was treated on his own. He was not forwarded to the hospital on police requisition. Under such a backdrop, it will not be safe to base the conviction on the sole testimony of PW-6, though he is an injured witness.

45. The corroboration sought by the prosecution with regard to alleged recovery of the weapon used in the crime is also not free from doubt. Neither the station diary entry with regard to telephonic intimation received by the Police of Mangaldai PS on the date of incident has been brought on record nor has been exhibited during trial. It is true that one person, namely, Kamala Deka died in connection with the alleged incident, but prosecution has failed to prove that both the accused persons had committed the said crime on the date of incident. It is an admitted fact that the incident occurred near the farm-house of Hari Chandra Deka, which is a lonely place. Except PW-6, according to Investigating Officer, no other person was present at the relevant time of incident. He had investigated the case on the basis of the statement of PW-6. As it appears that the statement of PW-6 is not reliable, we, therefore find that this is a case, wherein, the appellants are entitled to the benefit of doubt.

46. In the result, the appeal is allowed. The Judgment and Order dated 27.09.2019, passed by the learned Additional Sessions Judge (FTC), Darrang, Mangaldoi, in Sessions Case No. 142 (DM)/2016,, is set aside. Both the accused appellants are acquitted and set at liberty forthwith. The accused/appellants are in jail hazot. Release the accused/ appellants accordingly, if not wanted in any other case.

47. Send down the LCR.

JUDGE

JUDGE

Dorothy