

GAHC040011212019



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

Case No. : CrI.A./8/2019

SRI BAI BAM
AGE 34 YRS. S/O SRI K.BAM, RESIDENT OF MOWB-I, TYPE 1 QTR NO. 63,
UNDER ITANAGAR POLICE STATION IN THE DIST. PAPUM PARE, AP.
MOBILE NO. 9436412264

VERSUS

1:THE STATE OF A.P. AND ANR. REPRESENTED BY P P OF AP.

2:SRI TAJUM CHIRAM S/O LT. CHITU CHIRAM RESIDENT OF TAPO
VILLAGE UNDER BASAR POLICE STATION IN THE DIST. OW WEST SIANG
AP. PRESENTLY RESIDING AT MAUZA KGS SECTOR ITA UNDER
ITANAGAR POLICE STATION DIST. PAPUM PARE AP

- B E F O R E -

HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY
HON'BLE MR. JUSTICE KARDAK ETE

For the Appellant : Mr. D. Panging, Adv

For the Respondents : Mr. G Tado, Addl. PP

Date of hearing : 08.01.2024

Date of judgment : 11.01.2024

JUDGMENT & ORDER (CAV)

Arun Dev Choudhury, J.

1. Heard Mr. D. Panging, learned counsel for the appellant. Also heard MR. G Tado, learned Additional Public Prosecutor for the State of Arunachal Pradesh.
2. The present criminal appeal is filed against the Judgment & Order dated 15.03.2019, passed by the learned Sessions Judge, Yupia in Session Case No. 213/2013 wherein and whereby, the appellant was convicted under Section 302 of IPC and sentenced to imprisonment for life with a fine of Rs. 20,000/-.
3. The prosecution was launched on the basis of an FIR dated 28.06.2012 filed by the elder brother of the deceased victim to the effect that some unknown person had murdered his younger brother Tunya Chiram and dumped his dead body in the drain of M/s Sango Motor Shop near Shiv Mandir, Itanagar-Naharlagun Road on the intervening night of 27th and 28th of June, 2012.
4. Upon receipt of the FIR dated 28.06.2012, the Itanagar Police Station Case No. 140/2012 under Section 302 of IPC was registered and the matter was entrusted to SI D. Bagra of Itanagar Police Station for carrying out the investigation. During the course of investigation, the accused was arrested. Inquest and post mortem of the dead body was conducted. At the

conclusion of the investigation, the Investigating Officer (IO), had submitted a charge sheet against the appellant under Section 302 of IPC.

5. Since the case was triable by the Sessions Court, the matter was committed to the learned Court of Sessions Judge, Yupia, West Sessions Division, Papum Pare District. Charges were framed against the appellant under Section 302 of IPC by the learned trial Court and the same was read over and explained to the accused person but since he had denied the charge brought against him and claimed to be tried, the matter went up for trial.
6. The prosecution case is entirely based on circumstantial evidence, more particularly on the basis of the last seen theory. In order to bring home the charge, the prosecution had examined as many as 12 (twelve) witnesses including the I.O., who conducted the investigation as PW-11, the Doctor who conducted the Post Mortem upon the dead body as PW-8.
7. After recording of the evidence of the prosecution witnesses, the statement of the accused person was recorded under Section 313 of the Cr.P.C. The accused denied all the incriminating circumstances put to him and also offered an explanation how and when he parted with the company of the deceased. The accused adduced his evidence as DW-1.
8. On conclusion of the trial, the learned trial court below, convicted the accused person/appellant for the offence punishable under Section 302 of the IPC and sentenced him in the manner described hereinabove.
9. Mr. D. Panging, learned counsel for the appellant argues that the prosecution has failed to establish the "last seen together" circumstance so

as to implicate the accused person/appellant. It is the further case of the appellant that there is no other circumstances except the fact that the appellant and the deceased were last seen together and in that view of the matter, learned Court below ought to have considered that the prosecution has failed to bring on record any motive on the part of the accused/appellant in committing the offence inasmuch as the accused/appellant in his statement recorded under Section 313 of Cr.P.C. as well as in his defence evidence has explained how and when he parted the company of the deceased.

10. Mr. Panging, learned counsel further submits that the evidence brought on record by the prosecution is insufficient to prove the charge brought against the accused/appellant by means of circumstantial evidence and therefore, the accused/appellant deserved to be acquitted.
11. Responding to above, Mr. G. Tado learned APP, Arunachal Pradesh, submits that from the testimonies of PW-1, PW-4 and the evidence of the accused/appellant as DW-1, it has been established beyond any doubt that the accused appellant along with PW-4 and the deceased drank local beer in a shop and thereafter, the accused appellant and the deceased left the shop leaving behind the PW-4 and dead body was found next morning. According to Mr. Tado, learned Additional Public Prosecutor, through such evidence, the circumstance that the accused/appellant was lastly seen together with the victim and that the dead body was found on the next day morning had been firmly established by the prosecution.
12. Mr. Tado. learned Additional Public Prosecutor, further contends the

accused person/appellant had committed a gruesome crime and therefore, taking note of the evidence on record, the learned Court below has rightly convicted the appellant and such decision do not call for any interference from this Court.

13. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties and have also analysed the evidence available on record.

14. Now let this Court consider the evidence on record.

I. PW-1 (Shri Tajum Chiram) is the informant and from his evidence it is seen that the PW-4 informed him that in the intervening night of 27.06.2012 and 28.06.2012, said PW-4, the deceased and the accused/appellant met near Cinema Hall, Naharlagun. The accused/appellant asked for a Class -VIII pass certificate for his wife from the PW-4 and the PW-4 agreed to issue a certificate on payment of Rs. 2000/-. Thereafter three of them went to a local beer bar near Arunachal Hotel, where they took two bottles of beer. Thereafter, the PW-4 left for his house and the accused/appellant and the deceased left for Itanagar by one motorcycle.

During cross examination, he deposed that the accused and deceased were friends and they were also clan brothers in relation. He further deposed that he did not suspect anybody for committing murder of his brother i.e deceased victim.

II. PW-2 (Smt. Mibi Chiram) is the wife of the deceased. During her examination-in-chief, she also deposed that her deceased husband

went with the accused. She further deposed that on the fateful day, her husband did not pick her phone after leaving for Naharlagun, however, the PW-4 once picked her phone call and informed her that her deceased husband and the accused person were sitting in a restaurant. She further deposed that the PW-4 informed her that they were moving out from the restaurant at that point of time. However, when her husband did not come back home that night, she made a call to her deceased husband but his phone was switched off. Again she called him in the early morning but that time also the phone was switched off. Around 08:00 AM, (PW-9) called her and enquired about her husband whether he had come back home and she replied in negative. Later on, she received a phone call from the Police and Police informed her that her husband had been killed by somebody and he was in Naharlagun Hospital. She rushed to the Hospital and in the hospital she saw the dead body of her husband having injurymarks on the back side of his head, cheek and on chin. Thereafter a post mortem was conducted and the body was handed over to her.

During her cross examination, she deposed that she had never seen any quarrel between the accused and deceased and they are good friends.

- III. PW-3 (Smt. Kingam Kamcham) is the restaurant owner where the accused, the victim and the PW-4 had ordered beer. He deposed that he knew the PW-4 but other two persons were strangers to him.

According to him, these three people had two bottles of beer and after finishing the beer, they left the restaurant. He identified the accused in the dock as one of the persons accompanying the PW-4. Exhibit-1, Photograph of the dead body was identified as of the deceased by the PW-3.

During cross examination he deposed that he could not exactly remember how many bottles of beer PW-4 and his friends took and it was probably two or three. He further deposed that, though these three persons had taken beer there was no quarrel or fighting between them.

- IV. PW-4 (Shri Nyakar Ada) is the third person with whom the accused and the victim had drunk together in the restaurant of PW-3. According to him, on 27.06.2012 in the evening around 05:30 PM to 06.30 PM, he met the accused and the deceased, near National Cinema Hall, A. Sector, Naharlagun. The accused requested the PW-4 to provide him a school certificate and PW-4 agreed to provide such a certificate. The deceased was a relative of the PW-4. The deceased requested the PW-4 to provide some food as he was feeling hungry and then, they went to the restaurant of PW-3. There, they took three bottles of beer. They did not sit long in the restaurant and after finishing their beer, PW-4 departed the other two. The time was between 07.00 to 8:00 PM. On the next date, at around 10-11:00 AM, one TigoChirang informed him over telephone that the dead body of the deceased was found near Chango Motors in between Naharlagun-

Itanagar Road.

During cross examination, he deposed that they took beer at the insistence of the deceased. He further deposed that the deceased used his phone and called one KarmoNgomdir (PW-9). He further deposed that in the evening, the wife of the deceased (PW-2) also called him. He expressed his lack of knowledge regarding having any problem of the deceased with one KeniEte.

- V. PW-5 (Mrs. Bai Bam) is the sister of the accused. Her evidence is not very relevant as she was a hearsay witness. However, she deposed that she went to the Naharlagun General Hospital along with the accused and on Mrs.Ijum Bam (PW-6) after getting the information of murder of the deceased. She is the seizure witness to the seizure of the motor cycle of the accused. She denied the suggestion that the deceased was having a relationship with the PW-6 (wife of the accused) and affirmed that the PW-6 treated the deceased as her brother.

During cross-examination, she deposed that she called his accused brother around 09:30 to 10:00 PM and his accused brother informed her that he was coming back.

- VI. PW-6 (Mrs. Ijum Bam) is the wife of the accused. During her Examination-in-Chief, she affirmed that both the accused and deceased left their house from Naharlagun around 03:00-04:00 PM on 27.06.2012. According to her, they went to Naharlagun to meet the PW-4 to obtain a Class-VIII pass certificate for herself. She further

deposed that around 10:00 PM, her husband again came back home. He was drunk. After coming back home, the accused played with children and later went to bed. Next morning around 10:30 AM, her accused husband informed her that the deceased was found dead in between Itanagar and Naharlagun road. Then the accused also informed the PW-5 (sister of the accused). thereafter, the PW-5, accused and herself went to the Naharlagun Hospital to see the body of the deceased. She further deposed that on the date of incident about 09:00 PM, she messaged the accused to bring medicine.. She also sent an SMS around 10:30 PM and by that time, the accused reached back home. Her mobile handset was seized by the police. She further deposed that she had a quarrel with her husband over telephone and that at around 10:20 PM to 10:27 PM, the accused made a call to her. During cross-examination, she deposed that she knew the deceased and treated him as a brother.

VII. PW-7 (Shri Bishnu D. Thakur) is the seizure witness of the seizure of sale register of the R.K. Wine shop. He was not cross-examined by the defence.

VIII. PW-8 (Dr.Divakar Phinya) is the Doctor who conducted the Post Mortem examination over the body of the deceased. He conducted the post-mortem upon the body on 28.06.2012 at 02:30 PM and the body was brought for post mortem around 01:00 PM. In his opinion, death was due to intracranial hemorrhage and fracture of skull bone resulting from blunt force injury on the head. He further opined that

the death was homicidal in nature.

During cross-examination he deposed that he cannot say with what specific blunt weapon, the blunt injury on the head might have been caused. Such injury could not have resulted having fallen down by self.

- IX. PW-9 (Shri Karmo Ngomdir) is the employer of the deceased. The job of the deceased was to collect money on behalf of the PW-9 and 28.07.2012, the deceased was to go to Aalo from Itanagar in the vehicle belonging to the PW-9. After making arrangements for the next day's trip, on the request of the deceased, the PW-9 and one Bomde Bagra, dropped the deceased at the residence of the accused. On the same date in the evening, the deceased called the PW-9 from an unknown number and informed that he went to Naharlagun for some work with the accused. On the next date, when at around 09:30 AM to 10:00 AM, the deceased did not come to the residence of PW-9, the PW-9 called the deceased on his phone but it was found to be switched off. He also called the wife of the deceased and his wife informed that the deceased had not come the whole night. Later, around 10:00 AM, wife of the deceased informed that she had heard about the death of her husband. Accordingly she went to the Naharlagun General Hospital, to see the body.
- X. PW-10 (Shri Jayanta Phukan) is the wine shop owner from whom the Ext.-5, (sale registered) was seized.
- XI. PW-11 (SI, Dutto Bagra) is the IO of the case. According to him

on 28.06.2012 at around 06:30 AM one Shri Taba Ayo informed the police station telephonically that one unidentified body was lying in the drain of M/S Sango Motor shop. Thereafter, the duty officer went to the place of occurrence and found the dead body and subsequently, the same was identified by one Shri Perde Gameh (PW-12). ASI, R. K. Jha, held the inquest over the dead body, took photographs and sent the body for post-mortem examination to the General Hospital, Naharlagun. Subsequently, the FIR was lodged by the PW-1. During the investigation, he arrested the accused person, seized the mobile handset with SIM from the wife of the accused. CDRs of both the accused and his wife's mobile were collected. He further deposed that though a written request to the concerned authorities for CDR was made, however the letter was not found on the record. According to him, as per the CDR collected, at about 10:13 PM on 27.06.2012, the accused was in between Ziro Point and Shiv Mandir and during the time he also received a message from wife asking him his whereabouts and to bring medicine. The said message was sent at 09:05 PM and was received by the accused around 10.13 PM. According to the I/O CDR also revealed that at about 10:28 PM, the accused reached his residence at Itanagar.

- XII. PW-12 (Shri Perde Gamesh) is the photographer and witness to the inquest. He was not cross-examined.
- XIII. PW-13 (Shri Afa Phssang) is another officer who conducted further investigation in the case. She filed the charge-sheet only and

examined two witnesses i.e. PW-5 and PW-6.

15. As noted earlier, there is no eye witness in this case. Based on the circumstantial evidence, the learned trial Court found the appellant guilty and convicted and sentenced him.
16. Law is well settled that the circumstances from which the conclusion of guilt is to be drawn should be fully established, in the first instance. It is also a requirement that all the facts so established, should be consistent only with the hypothesis of the guilt of the accused and should be such to exclude every hypothesis but the one sought to be proved. Such circumstances should also be conclusive in nature and the chain of evidence should not have any reasonable ground for a conclusion consistent with the innocence of the accused.
17. Section 106 of the Evidence Act, 1872, in no unambiguous terms lays down the principle that when any fact is especially within the knowledge of a person, the burden of proving such fact is upon him. On the basis of such principle, law is by now to be settled that in the event, a person is lastly seen with the murdered deceased, he has to offer an explanation as to how and when, he parted with the company of such deceased and such explanation must appear to the Court to be probable and satisfactory for an acceptance. In the event, such satisfaction is arrived at by the Court, it shall mean that the person has discharged his burden.
18. From the evidence as discussed hereinabove, the prosecution has established through the evidence of PW4, that the accused and victim were lastly seen together at Naharlagun. The time of such last seen together

stated by PW4 was in between 07:00 to 08:00 PM on 27.06.2012. As per the evidence of the I/O (PW-11), one Taba Ayo informed the police station regarding discovery of the body of the deceased in the drain of M/S Sango Motors shop in the morning of 28.06.2012. However, said person has not been examined by the prosecution to ascertain the actual time of discovery of the dead body.

19. There are no other circumstances except the last seen together prior to discovery of the dead body. The learned trial court relied on such a single circumstance and held the petitioner guilty of murder.
20. The sole reason for convicting the appellant is that the deceased was lastly seen in the company of the appellant prior to recovery of the dead body. There is a time gap of almost 12 hours between last seen and discovery of the body in the next morning. The prosecution evidence, including the evidence of IO clearly establishes that the accused reached Home by 10.30 pm. According to the PW8 Doctor, he conducted the postmortem around 2.30 pm on 28.06.2012 and according to him death occurred 12 to 24 hours prior. That will mean the death occurred between 2.30 pm on 27.06.2012 and 2.30 am on 28.06.2012. However, as discussed hereinabove, it was established that the accused and the victim were last seen together around 07:00-08:00 PM on 26.06.2012. Therefore to hold the appellant guilty, it must be established that the death is caused in between 07:00 PM and 10:30 PM on 27.06.2012 and the probability of any third party committing the crime is ruled out. However, as per prosecution evidence, crime might also have been committed between 10:30 PM on

27.06.2021 and 02:30 AM on 28.06.2012. And it is proved by the prosecution that the accused reached home around 10.30 pm of 28.06.2012. Therefore, it can neither be held that there is close proximity between the time of discovery of the dead body and the lastly seen together nor it can be said that the prosecution has been able to establish proximity between the time of death and last seen together. On the basis of the aforesaid material, it cannot be concluded beyond reasonable doubt that it is the accused who committed the crime and none other.

21. Another aspect of the matter is total absence of motive. It is well settled that in a case where the conviction is based on circumstantial evidence, motive assumes a great significance. It is true that absence of motive alone cannot be a ground for acquittal, even in a case based on circumstantial evidence. However, in a case when the circumstances leading to the guilt of the accused is not proved beyond doubt and there is complete absence of motive, then such complete absence of motive assumes a serious significance and such absence of motive is required to be weighted in favour of the accused.
22. In the case in hand, from the evidence led by prosecution it has become crystal clear that there is complete absence of motive. Rather from the prosecution evidence it is clear that the accused and victim were close friends and clan brothers and that they did not have any quarrel at any point of time. It is also established from the evidence of the Bar owner PW-3 that when these three persons, the accused, the victim and PW4 were together having their drinks, there was no quarrel amongst them. The

informant PW1 even has not doubted the death of his brother to be a murder. The wife of the deceased (PW2) during her examination deposed that the accused was a good friend of her deceased husband and that she had never seen any quarrel between the accused and the deceased. Therefore, such evidence and absence of motive need to be weighted in favour of the accused. However, the learned trial Court has lost sight of such aspect of the matter.

23. It is by now well settled that the object of recording statements of an accused under Section 313 (1)(b) Cr.PC. is intended to ensure a direct dialogue between the court and the accused, which is a valuable safeguard for the accused to establish his innocence. It is equally well settled that any explanation furnished by the accused cannot be considered in isolation but has to be considered in conjunction with the evidence adduced by the prosecution. If the accused takes a defence and offers any alternate version of events or interpretation, the court has to carefully analyze and consider his statements. Any failure to consider the explanation given by the accused regarding incriminating circumstances, in a given case, may vitiate the trial and/or endanger the conviction.
24. It is true that it is a special knowledge of the accused in the backdrop of the established fact that accused and victim was lastly seen together and therefore, he is to offer an explanation as to how and when he parted the company of the victim. In the case in hand in his statement recorded under Section 313 Cr.P.C. the accused made a categorical statement that after leaving the beer shop, the victim wanted to go to residence of PW4 and he

went to recharge his TV near the daily market and deceased left for the residence of PW4 and also stated that he dropped the victim at Naharlagun and returned back home. He also stated in his statement recorded under Section 313 that he did not return back to Itanagar with the victim. He also laid defence witness through himself and deposed similarly which remained unshaken. Such explanation given by accused appears to this court to be probable and satisfactory, in view of the other prosecution witnesses as discussed herein above, including absence of motive, lack of proximity between the time last seen and recovery of the dead body. To sum up, explanations furnished by the accused if considered in conjunction with the evidence adduced by the prosecution, can be treated as a satisfactory explanation. However, the learned trial Court has miserably failed even to consider the explanation given by the accused in his statement recorded under section 313 Cr.P.C and thus vitiated the trial endangering the conviction

25. In the backdrop of the established fact discussed herein above and in absence of any motive, it cannot be concluded that the circumstance of last seen together and the discovery of the dead body on the next date and interference of guilt has cogently and firmly established. These two circumstances cannot also be said to have a definite tendency pointing towards the guilt of the accused. It also cannot be concluded that these two circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and the explanation given by the

accused in his statement recorded under section 313 Cr.P.C. and in his defence evidence is an incapable explanation or a hypothesis and these two circumstances establish the guilt of the accused and inconsistent with his innocence. Further, the trial has also been vitiated for failure on the part of the learned Trial Court to even consider the explanation given by the accused in his statement recorded under section 313 Cr.P.C

26. For the reasons stated above, the appeal deserves to be allowed and is accordingly allowed by setting aside and quashing the impugned Judgment & Order dated 15.03.2019, passed by the learned Sessions Judge, Yupia in Session Case No. 213/2013.
27. The appellant accused, Shri Bai Bam is acquitted from the charge levelled against him. He is directed to be set free forthwith, if not in custody in other cases.
28. Registry is directed to do the needful for release of the accused. Registry to communicate a copy of this order to the concerned Jail Authority at the earliest.

JUDGE

JUDGE

Comparing Assistant