

GAHC010103752022



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

Case No. : CRL.A(J)/63/2022

NABIN BORO
S/O LATE NAREN BORO
RESIDENT OF DIPRANG KACHARI BASTI, PS MAYONG, DIST MORIGAON,
ASSAM 782105

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP ASSAM

2:SRI RANJIT BORO
S/O LATE SRI KANTA BORO
RESIDENT OF DIPRANG KACHARI BASTI
PS MAYONG
DIST MORIGAON
ASSAM 78210

For the Appellant : Ms. S. Roy, Legal Aid Counsel.

For the Respondent : Ms. S. Jahan, APP, Assam.

BEFORE

THE HON'BLE MR. JUSTICE SUMAN SHYAM
THE HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY

Date of hearing & judgement : 17/05/2024.
Date of Order : 17/05/2024

JUDGEMENT AND ORDER (ORAL)

Suman Shyam, J

1. Heard Ms. S. Roy, learned Legal Aid Counsel, appearing for the appellant. We have also heard Ms. S. Jahan, learned APP, Assam, appearing for the State. None is present on behalf of the informant.
2. This criminal appeal, preferred from jail, is directed against the judgement dated 15/12/2020 passed by the learned Sessions Judge, Morigaon, in Sessions case No. 184/2018, convicting the sole appellant under section 302 of the Indian Penal Code (IPC) for committing the murder of deceased Mantu Boro and sentencing him to undergo rigorous imprisonment for life and also to pay fine of Rs. 5,000/- with default stipulation.
3. The prosecution case, as unfolded from the materials on record, briefly stated, is that on 29/04/2017, Sri Ranjit Boro had lodged an ejahar with the Officer-in-Charge, Mayong Police Station, informing the Police that at about 9-30 a.m. on that day, while his neighbour Nabin Boro was assaulting his wife, his elder brother Mantu Boro intervened in the matter so as to separate them. However, without any rhyme or reason, Nabin Boro struck on the neck of his elder brother with a broken liquor bottle causing grievous injury to him which had resulted in the death of his elder brother. On receipt of the ejahar dated 29/04/2017, Mayong PS case No. 77/2017 was registered under section 302 of the IPC and the matter was taken up for investigation by the Police.
4. During the course of investigation, the Police had drawn sketch map of the place of occurrence ; conducted inquest; sent the dead body for post-mortem examination, recorded the statement of the witnesses; seized the broken liquor bottle recovered on being led by the accused and also arrested the FIR named accused Nabin Boro. Upon completion of investigation, charge sheet was laid against the accused/appellant under section 302 of the IPC.
5. The case being one triable by the Court of Sessions Judge, the matter was committed to the Court of learned District and Sessions Judge, Morigaon, who, after hearing the parties, had framed charge against the accused person under section 302 of the IPC

which was read over and explained to the accused. However, the accused Nabin Boro had pleaded not guilty. As such, the matter went up for trial.

6. The prosecution case was entirely based on circumstantial evidence. To prove the charge brought against the accused, the prosecution side had examined 7 (seven) witnesses including the Doctor (PW-5) who had conducted the post-mortem examination on the dead body of the deceased and the IO (PW-7), who had conducted the investigation in connection with the aforementioned Police case.

7. The defence side did not adduce any evidence. However, during his examination under section 313 Cr.P.C., the accused has denied all the incriminating circumstances put to him by the prosecution side and has pleaded innocence.

8. Upon completion of trial, the learned Court below had analyzed the evidence on record and came to the finding that the charge brought against the appellant has been proved beyond reasonable doubt. Accordingly, the appellant was convicted under section 302 of IPC and awarded sentence, in the manner, as aforementioned.

9. The basic argument of Ms. S. Roy, learned Legal Aid Counsel is to the effect that in the absence of any eye witness to the occurrence, it was incumbent upon the prosecution side to prove the charge brought against the accused by circumstantial evidence, thus, establishing each link in the chain of circumstances. However, according to Ms. Roy, the prosecution has failed to prove each link in the chain of circumstances so as to establish the charge. As such, submits Ms. Roy, it cannot be said that the charge brought against the appellant has been proved beyond reasonable doubt. In support of her above argument, Ms. Roy has placed reliance on a decision of the Hon'ble Supreme Court rendered in the case of ***Indrajit Das Vs. the State of Tribura*** reported in ***2023 LiveLaw (SC) 152***.

10. It is also the submission of Ms. Roy that if the prosecution story is to be believed then the genesis of the incident is a quarrel between the appellant and his wife, which took place inside the house of the accused/appellant. Therefore, the wife of the accused/appellant was a natural eye witness to the occurrence. Notwithstanding the same, the wife has not been examined as a witness in this case. According to Ms. Roy, the prosecution has also failed to furnish satisfactory explanation as to why, the wife of the appellant was not examined as a

witness. Therefore, submits the learned Legal Aid Counsel, the present is a fit case for drawing adverse inference against the prosecution. Ms. Roy further submits that the above would be sufficient ground for setting aside the conviction of the appellant. In support of her above argument, Ms. Roy has relied upon the decision of the Supreme Court rendered in the case of ***Takhaji Hiraji Vs. Thakore Kubersing Chamansing and others*** reported in ***(2001) 6 SCC 145***.

11. By way of an alternative argument, the learned Amicus Curiae has submitted that since there is evidence to show that a quarrel took place before the incident, this case would come within the ambit of Explanation 1 & 4 of section 300 of IPC.

12. Responding to the above arguments, Ms. S. Jahan, learned APP, Assam, has submitted that the evidence brought on record not only establishes the factum of homicidal death of the deceased but also the involvement of the appellant in the incident, leading to the death of the deceased. According to Ms. Jahan, each link in the chain of circumstances relating to the death of the deceased have been fully established in this case based on the circumstantial evidence brought on record during trial and, therefore, the argument that the charge has not been proved beyond reasonable doubt is wholly untenable in the eyes of law.

13. On the plea raised by the appellant's counsel as regards failure to examine the wife of the appellant as an eye witness, Ms. Jahan submits that the evidence available on record conclusively establishes the charge against the appellant based on circumstantial evidence and therefore, assuming that the wife is an eye witness to the occurrence, even then, failure to examine the wife of the appellant as a witness would be of no material consequences in this case. In support of the above argument, Ms. Jahan has relied upon the decision of the Supreme Court rendered in the case of ***Manish Dixit and others Vs. State of Rajasthan*** reported in ***(2001) 1 SCC 596*** as well as in the case of ***Davinder Singh Vs. State of Punjab*** reported in ***2023 0 Supreme (SC) 591***. The learned APP, Assam, has, however, submitted in her usual fairness that the record does not disclose any reason as to why, the wife of the appellant, was not examined as a witness.

14. We have considered the submissions advanced by the learned counsel for both the sides and have also gone through the materials on record.

15. As noted above, the prosecution case is based on circumstantial evidence. Therefore, we propose to briefly analyze the evidence brought on record by the prosecution so as to prove the charge against the accused.

16. Sri Jiten Das, who is a neighbour of the deceased as well as the accused, was examined as PW-1. He has deposed before the Court that the incident took place about 3 (three) years back at around 9-10 a.m. At that time, he was in his shop. He had heard a scream – “*Marile-Marile*”. On hearing the scream, he rushed to the place of occurrence and saw the deceased Mantu Boro lying on the ground with bleeding injuries over his ear, neck and mouth. This witness has further deposed that he had seen accused Nabin Boro at the place of occurrence with a broken bottle in his hand and there was blood stain on it. According to PW-1, the accused had assaulted the deceased with the broken bottle. The witness has further deposed that people had started assembling at that place. Somebody had telephoned the Police and the Police came at the place of occurrence. PW-1 has also stated that the accused had tried to escape but he was apprehended by the public and kept in tied up position. After the Police came, they took him away. Mantu Boro had died. In his cross examination, PW-1 has denied the suggestion that the deceased was a “*Gunda*” type person but had admitted that he used to take liquor and used to quarrel with his family members. This witness has further replied that the place of occurrence is very near to his shop. Although he has not seen the occurrence by his own eyes nor is he aware as to who had assaulted the deceased, yet, when he reached the place of occurrence after hearing the scream, one of his relative was present there.

17. Sri Ranjit Boro, who is the younger brother of the deceased, is the informant in this case. He was examined as PW-2. This witness has deposed that accused Nabin Boro is known to him as he is his cousin. According to PW-2, the incident took place at about 9 a.m. in the morning near his house. At that time, he was working in the neighbouring house. Upon hearing a hue and cry, he went to the place of occurrence which was near the shop of Jiten Das (PW-1) and saw that Mantu Boro was lying dead. He had seen cut injuries on his neck. Reaching there, on being told by Jiten Das, he had come to know that the accused had assaulted the deceased on his neck. Accordingly, he had informed the Gaonburah and the Police. This witness has further deposed that at the time of the incident, there was a quarrel

between the accused and his wife and the deceased had tried to intervene in the matter. At that time, the accused was under the influence of liquor and that is why, he had assaulted the deceased with a bottle.

18. During his cross examination, this witness has clarified that the statement made by him regarding assault of the deceased by the accused is on the basis of what he had heard from others and he had not seen as to who had killed the deceased by his own eyes. PW-2 has, however, denied the suggestion that at the time of the incident, the accused was not at home or that he had gone out for work. This witness has further stated that his house is adjacent to the house of the deceased and they share a common court-yard. PW-2 had also denied the suggestion that he had lodged a false FIR.

19. PW-3 Sri Paritush Mandal is an inquest witness. He also lived in the neighbourhood. PW-3 has stated that on the day of the incident, he had heard from the people that Mantu Boro had been killed. Accordingly, he went to the place of occurrence and saw that the accused had been tied up by the villagers. There, he had heard that the accused had killed Mantu Boro and that is why he was tied up. The Officer-in-Charge of the Police Station arrived at the place of occurrence and told him to put his signature on the inquest report, which he did. During his cross examination, this witness has remained firm.

20. PW-4 Sri Ratan Boro is another co-villager who had also deposed that the accused and the deceased were related and belonged to the same family. On the day of the incident, he had gone out for work in the morning and in the evening, when he came back home, he had heard from the villagers that the accuse had killed the deceased. This witness did not have knowledge about any other circumstances connected with the incident.

21. Dr. R. K. Mahanta, the Senior Medical & Health Officer, Morigaon Civil Hospital, Morigaon, had conducted the post-mortem examination on the dead body of Mantu Boro. The Doctor was examined as PW-5. According to the post-mortem report, the following injuries were found in the dead body of the deceased :-

“Injuries found – One cut injury seen on middle part of neck in left side, just medial to stenopledo muscle, produced by sharp weapon or object, the wound is oval shaped, size is 1 and half inch x half inch, depth of the injury was up to

esophageal orifice. Big vessel in the left side of the neck carotid artery is cut. No other injury is found."

22. The doctor (PW-5) has opined that the death was due to haemorrhage as a result of injury of neck caused by sharp object. The injury was ante-mortem. PW-5 has proved the post-mortem report (Ext-2) by identifying his signature therein.

23. Sri Dipak Deka was the Gaonburah of the village. He was examined as PW-6. This witness had deposed that on the day of the incident, he was informed as the Gaonburah, that there was an incident of *marpit*. He was told that the accused had killed the deceased. Accordingly, he went to the place of occurrence and saw that the public was trying to assault the accused. However, he somehow persuaded them from doing so. Subsequently, he had informed the Police. The testimony of this witness also could not be shaken during his cross examination.

24. Sri Gopal Borah, Sub-Inspector of Police was posted as the 2nd Officer at the Mayong Police Station at the time of the incident. He had conducted the investigation in connection with Mayong PS case No. 77/2017. Sri Gopal Borah was examined as PW-7. The IO has deposed that on 29/04/2017, at about 9-30 a.m., the Officer-in-Charge of Mayong PS had received one written ejahar from Sri Ranjit Boro and on the basis of the same, registered Mayong PS case No. 77/2017 under section 302 of the IPC. The matter was entrusted to him so as to carry out the investigation. After taking over the investigation in the aforesaid PS case, he had recorded the statement of the informant and then went to the place of occurrence. PW-7 has further stated that he had prepared a sketch map (Ext-3); recorded the statements of the witnesses found at the place of occurrence. According to the IO, the dead body of Mantu Boro was found lying in the *veranda*. The accused Nabin Boro was found to have been apprehended by the locals. The IO has further stated that inquest was conducted on the dead body by him and he had prepared inquest report (Ext-4). PW-7 has also deposed that during investigation, he had seized one broken glass bottle having label "*Imperial Blue*". On being shown by the accused, it was seized as the weapon of offence vide seizure list Ext-5. According to PW-7, the accused was arrested and brought to the Police station where he

had confessed that during a quarrel with the deceased, he had assaulted his brother with the glass bottle, due to which Mantu Boro had died.

25. Although PW-7 had conducted the investigation and collected evidence, yet, due to his transfer, he could not submit the charge sheet. As such, his successor S.I. Romen Bordoloi had collected the post-mortem report and submitted the charge sheet (Ext-6) against the accused under section 302 of the IPC. However, S.I. Romen Bordoloi has not been examined as a witness in this case.

26. From a careful analysis of the evidence available on record, we find that the incident took place in the morning hours i.e. between 9-10 a.m. on 29/04/2017 in the house of the appellant. Medical evidence brought on record by the prosecution side establishes beyond any doubt that the deceased Mantu Boro had suffered a homicidal death due to the grievous injuries sustained by him on his neck which went up to esophageal orifice. The injury was found to be of oval shape which normally would be caused by a broken glass bottle. The IO has seized the broken glass bottle of "*Imperial Blue*" by seizure list Ext-5.

27. The evidence on record also establishes beyond doubt that soon after the incident, the appellant was found inside his house. He was apprehended by the local people and ultimately handing over to the Police. Therefore, the fact that the incident happened inside the house of the appellant and that besides the appellant and the deceased, no other person was present at the place of occurrence, is also clearly established. From a careful examination of the evidence on record, we are of the considered opinion that each link in the chain of circumstances so as to prove the guilt of the appellant has been properly established in this case. The evidence brought on record by the prosecution side, excludes all hypothesis, save and except, one which is consistent with the guilt of the accused/appellant.

28. During his examination under section 313 Cr.P.C., the appellant had admitted, in reply to Question No. 18 that he was kept apprehended by the son of Moneswar and others but the appellant has failed to give any explanation as to the reason for doing so. As a matter of fact, the appellant had failed to offer any explanation whatsoever, even as to the circumstances under which the incident took place. Since the occurrence took place in the house of the appellant and in his presence, it was incumbent upon the appellant to offer a

plausible explanation as to the circumstances under which the incident took place. However, as noted above, the accused has failed to offer such explanation. In view of section 106 of the Evidence Act, failure on the part of the appellant to offer any explanation would, in our opinion, be an additional link in the chain of circumstances pointing towards the guilt of the appellant.

29. Coming to the next issue raised by the appellant regarding failure on the part of the prosecution to examine the wife of the appellant as an witness, we find that none of the witnesses examined by the prosecution side has mentioned about the presence of the wife of the accused/appellant at the place of occurrence when the incident took place. It is no doubt correct that the prosecution story proceeds on the premise that there was a quarrel between the appellant and his wife and when the deceased tried to intervene, he was fatally injured by the appellant by striking on his neck with a broken glass bottle. However, it is apparent that none of the witnesses had actually seen the occurrence.

30. It is also not clear from the evidence of PW-2 as to where from, he had come to know about the quarrel between the appellant and his wife had preceded the occurrence since he was also not present at that time. Under the circumstances, it is not possible for this Court to presume that the wife of the appellant was actually present inside the house at the time of the incident. On the contrary, we find from the evidence of PW-7 that the appellant had apparently confessed before the IO that the incident took place during a quarrel between himself and his brother Mantu Boro (deceased) and he had assaulted the later with a glass bottle.

31. It is no doubt correct that any confession made by the accused before the IO, while in custody of the Police would, be hit by section 25 of the Indian Evidence Act and, therefore, would not be admissible in evidence. However, the fact remains that there is no evidence available on record to even remotely suggest the presence of the wife of the appellant at the place of occurrence when the incident took place. During the cross-examination of the prosecution witnesses, no suggestion was ever put to them regarding the presence of the wife of the appellant at the place of occurrence.

32. In the case of ***Takhaji Hiraji (Supra)***, the Supreme Court had, no doubt

emphasized, that if a material witness who would be able to unfold the genesis of the incident or an essential part of the prosecution case, is not convincingly brought to the floor 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 could be termed as suffering from deficiency and the Court would be obliged to draw adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. However, in the case of ***Rajesh Yadav Vs. The State of Uttar Pradesh*** reported in ***(2022) 12 SCC 200***, it has further been observed that mere non-examination of the witness *per se* will not vitiate the case of the prosecution. It would depend on the quality and not the quantity of witness and its importance. If the Court is satisfied that the explanation given by the prosecution along with the adequacy of materials is sufficient enough to proceed with the trial and convict the accused, there cannot be any prejudice.

33. In the case of ***Manish Dixit and others (Supra)***, relied upon by Ms. S. Jahan, learned APP, the view expressed by the Supreme Court, as apparent from paragraph 11 of the judgement, is to the effect that if for some reason, the eye witness cannot be examined by the prosecution, then the case would be transformed to one of circumstantial evidence alone. As such, even if it is held that the sole eye witness i.e. the wife of the appellant was not examined by the prosecution without proper explanation, even then, the trial could have proceeded on the basis of circumstantial evidence.

34. From a careful analysis of the facts and circumstances of the case and the evidence on record, in the light to the decisions referred to herein above, we are of the considered opinion, that since there is a genuine doubt about the presence of the wife of the appellant at the place of occurrence and considering the fact that the prosecution case has been held to have been proved beyond reasonable doubt by adducing cogent circumstantial evidence, we are of the view that this is not a case where adverse inference ought to be drawn against the prosecution for failure to examine the wife of the appellant as a material witness.

35. Finally, coming to the alternative argument of Ms. Roy seeking conversion of the conviction and sentence of the appellant, we have noticed that PW-2, who was one of the

few persons to arrive at the place of occurrence earlier than others, had deposed that before the incident, there was a quarrel between the accused and his wife and the incident happened when the deceased tried to intervene. There is sufficient evidence on record to indicate that the appellant and the deceased were related to each other as cousins. There is no evidence to suggest any previous enmity between the appellant and the deceased nor is there any evidence to suggest that there was pre-meditation on the part of the appellant to cause death to the deceased. Rather, from the evidence led by the prosecution, it appears that the incident was preceded by a quarrel which took place, either between the appellant or his wife or between the appellant and the deceased and at that time the appellant was in an inebriated condition. Therefore, it is possible that due to the sudden quarrel, in the heat of passion and being deprived of the power of self-control under grave and sudden provocation, the appellant had caused death to the deceased by assaulting him with the broken glass bottle. However, it is to be noted herein that after the incident, the appellant did not act in a cruel or unusual manner nor did he try to flee the place of occurrence. The aforesaid circumstances, clearly go to show that it is not a case of murder having been committed by the appellant with any degree of premeditation. The appellant might have had the knowledge that the injury caused to the victim would cause death to him but in all likelihood, he did not have the intention to cause death to the deceased. We, therefore, find force in the submission of Ms. Roy that the case of the appellant would come within the explanations 1 & 4 of section 300 of the IPC.

36. In the result, this appeal succeeds in part. The conviction of the appellant under section 302 of the IPC as well as the sentence of rigorous imprisonment for life awarded to him by the learned trial Court is hereby set aside. The appellant is, however, convicted under section 304 Part-II of the IPC and sentenced to undergo rigorous imprisonment for 10(ten) years. The jail sentence as, awarded by this order, shall stand suitably adjusted against the period of prison sentence already undergone by the appellant pursuant to the judgement and order of the learned trial Court. The fine imposed by the learned trial Court upon the appellant would, however, remain unaltered.

Before parting with the case record, we wish to put our appreciation on record as regards the valuable assistance rendered by Mr. S. Roy, learned Legal Aid Counsel and

recommend that just remuneration, as per the notified rate, be paid to her.

Send back the LCR.

JUDGE

JUDGE

Sukhamay

Comparing Assistant