
(2004) 11 GAU CK 0002

In the Gauhati High Court

Case No : Criminal Appeal No's. 279 of 2001, 198 (J) and 199 (J) of 2002

Abdul Hye @ Kalita and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 25-11-2004

Acts Referred:

Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302

Citation : (2006) GLT 658 Supp

Hon'ble Judges : P.G. Agarwal, J;A. Hazarika, J

Bench : Division Bench

Advocate : M.H. Choudhury, L.N. Choudhury, N. Dev Nath, A.K. Sarkar and B. Buragohain, for the Appellant; F.H. Laskar, for the Respondent

Final Decision : Dismissed

Judgement

P.G. Agarwal, J.—Heard Mr. M.H. Choudhury, Mr. A.K. Sarkar and Mr. B. Buragohain, learned Counsel for the Appellants and Mr. F.H. Laskar, learned Public Prosecutor for the Respondents.

2. The Criminal Appeal Nos. 198(J)/ 2002, 199(J)/2002 and 279/2001 have been heard together and disposed of by this common judgment as all the three appeals have arisen out of a common judgment passed by the Sessions Judge, Golaghat on 7.4.2001 in Sessions case No. 143/2000.

3. In the above sessions case altogether four accused persons were tried for commission of offence u/s 302 IPC and on conclusion of the trial, the learned Sessions Judge acquitted the accused Hoi To Sema and convicted the three accused Appellants u/s 302 IPC and sentenced each of them to suffer imprisonment for life and to pay fine of Rs. 10,000/- each in default imprisonment for two years each.

4. The prosecution case, in brief, is that Haren Das @ Islam Ali was the owner of a Maruti Van bearing registration number AS-05/1074. The said Haren Das had a

son aged about 10/11 years who was a bit mentally retarded. On 21.3.2000 at about 9/9.30 PM the said Haren Das took his son out for a drive in the said Maruti Van but he never returned. Next day morning the said vehicle was found abandoned near Thoramukh and the bodies of Haren Das @ Islam Ali and his son Baharul Islam were found on the either side of the road with injury marks. On FIR being lodged, the police took up the investigation and sent the dead bodies for post mortem investigation, which was conducted by Dr. K.K. Dutta PW 3. The doctor found the following injuries on the person of Baharul Islam:

Injuries

- 1) Four Nos. of penetrating sharp cut injuries present on the right side of the neck, on dissection of the wound, the underlying muscles, vessels are found affected. Larynx is lacerated. Clotted blood was present over the wounds.
- 2) One sharp cut injury about 5" in length and 3/4" depth on the right palm. On dissection of the wound the underlying muscle, vessels and bones were found cut. Clotted blood present on the wound.
- 3) One sharp cut injury about 4" in length, 1" in depth present on the left parietal bone. On dissection, the underlying muscles, vessels and bone were found cut. The membrane is lacerated. The brain matter is coming out from the wound. Clotted blood present on the wound.
- 4) One sharp cut injury about 3" in length and 2" in depth present on the occipital region. On dissection, the underlying muscles, vessels, bones were found cut. The membrane is cut and the brain matter is found coming out from the wound. Clotted blood present." In the opinion of the doctor the death was due to shock and haemorrhage caused by severe cut injuries.

5. The doctor also found the following antemortem injuries on the person of Haren Das @ Islam Ali:

Iniuries

- 1) One incised wound of about 5" in length and 3" in depth present on the right side of the face. On dissection, the underlying muscles, vessels and bone are cut. Clotted blood present on the wound.
2. One penetrating injury present on the post auricular region. On dissection of the wound, underlying muscles, vessels and bones were found cut. Altered blood was found present on the wound.
- 3) One incised wound present on the upper lip, on dissection of the wound, the underlying muscles, vessels and teeth are cut. Altered blood was found present on the wound.
- 4) One incised cut injury present on the face parallel to the right side of the nose. On dissection, the underlying muscles, vessels and bones were found cut.

In the opinion of the doctor, the death of Haren Das @ Islam Ali was due to

shock and haemorrhage as a result of the injuries sustained. The doctor also ruled out that the above injuries can be caused by any traffic accident.

6. The medical evidence has not been challenged and considering the fact that Baharul had sustained as many as seven penetrating and sharp cut injuries and Haren Das @ Islam Ali had sustained as many as four incised and penetrating injuries, we hold that the learned Sessions Judge rightly held this to be a case of homicidal death and we concur with the above finding.

7. In the present case, there is no eyewitness to the occurrence, i.e. no one saw the deceased persons being assaulted. The entire prosecution case is based on circumstantial evidence. Izazul Ali PW 1 has deposed that on the evening of the occurrence, the deceased Haren Das had gone out with his son in the Maruti Van belonging to him. The witness has further stated that the deceased used to take out his son Baharul often in the vehicle so that his son could improve and start speaking and on the evening of occurrence deceased Haren Das @ Islam Ali had gone out with his son in his vehicle and did not return in the night. The house of PW 1 is adjacent to the house of the deceased. On the next day, the vehicle was found abandoned and the dead bodies were found lying on either side of the road with injuries. PW 1 lodged the FIR. PW 2 has deposed about the recovery of the vehicle and the dead bodies at Thuramukh. Inamuddin Ali PW 5 and Mofida Begum PW 9 are the husband and wife and they have deposed that on the night of the occurrence while they were returning after visiting a patient at Golaghat Civil Hospital around 9.30 PM they saw the vehicle of their brother-in-law Haren Das @ Islam Ali , waiting near the Mosque. The deceased Haren Das along with his son were sitting on the front seats and the three accused persons Motizul Alij Rahim Ali and Abdul Hai were sitting on the rear seat. The two witnesses had a talk with their brother-in-law and thereafter they proceeded towards their own house. The accused Appellant Abdul Hai was known to them from before whereas the two other persons were strangers. However, they could see the accused persons well in view of the streetlight and also in view of the fact that the cable light of the vehicle was burning. The witnesses have also stated that Abdul Hai used to reside near the mosque in a rented house and he was found absconding from the next day. PW 5 and PW 9 have been cross-examined and we find that there is no meaningful cross-examination and except giving mere suggestions, defence has failed to bring out anything to discard their testimony. The three accused persons were identified by the witnesses during investigation and also before the court.

8. Mina Begum PW 6 is the neighbour of accused Abdul Hai and she has deposed that the said Abdul Hai used to reside in a rented house near her place but right after the incident, Abdul Hai left the rented house and fled. PW 7 Nur Hussain, Bhaiti Ali PW 8 and the Investigating Officer PW 10 have deposed about the recovery of the dead bodies. PW 10 has deposed that accused Motizul Ali was arrested in connection with a theft case No. 71/2000 of Golaghat Police Station and during investigation the said accused made a statement in respect of the

present incident implicating the co-accused. Thereafter the three accused Appellants along with the acquitted accused Appellant were arrested and their statements were recorded. Ext. 8 is the statement of Appellant Rahimuddin, Ext. 9 is the statement of Abdul Hai and in their statements, the accused persons confessed their guilt and offered to show and produce the weapon of assault and other articles. Accordingly the three accused persons led the police to the recovery of the blood stained sweater, which belonged to the accused Appellant Abdul Hai. They also led to the recovery of the kukri, which was hidden under the earth. The sweater and kukri were seized by seizure list Ext. 3. Material Ext. 1 is the seized sweater, whereas Material Ext. 2 is the seized kukri. The two seizure witnesses have also supported the statement of the investigating police officer as regards the recovery of fact and the seizure at the instance of the accused persons.

9. On perusal of the evidence on record we find that the prosecution has been able to establish the following circumstances by leading cogent and reliable evidence:

- a) On the night of the occurrence the two deceased persons had gone out in their own vehicle bearing registration No. AS-05/1074.
- b) The said vehicle and the dead bodies of Haren Das and Baharul were found on the next day morning.
- c) The accused persons were last seen together with the two deceased persons in the said vehicle.
- d) The accused persons led police for recovery of the weapon of assault.
- e) The sweater worn by the accused Abdul Hai was found stained with blood.
- f) The accused Abdul Hai was found absconding soon after the incident.

10. The law regarding basing conviction on circumstantial evidence has been well settled by a catena of decisions of the Apex Court and we do not propose to repeat the same. A recent decision in the case of Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, the Apex Court reiterated its earlier decision laying down the law.

11. So far the principle governing the theory of last seen together is concerned, the circumstances have been established from the evidence of PW 5 and PW 9 and we find absolutely no reasons to disbelieve these witnesses. In the case of State of Maharashtra Vs. Suresh, the Apex Court has held that the circumstance of last seen together is a serious circumstance and coupled with recovery of dead bodies at the instance of the accused can be considered sufficient for maintaining the conviction. In the case of Joseph Poulo Vs. State of Kerala, the Apex Court has further held that if the prosecution on basis of reliable evidence, establishes that the missing person was last seen in the company of the accused and was never seen alive thereafter, it is obligatory on the accused to explain the

circumstances in which the missing person and the accused parted company. This view was reiterated in the case of Sahadevan @ Sagadevan Vs. State rep. by Inspector of Police,

12. In the present case, PW 5 and PW 9 were the near relations of the deceased persons and when they saw them sitting in the vehicle at about 9.30 PM it was but natural on their part to have a tete-a-tete with them and in the process they saw the three accused Appellants sitting in the rear seat of the said vehicle and the source of light has also been brought on record by stating that the street lamp where the vehicle was parked, was burning and even the cabin light of the vehicle was burning. The identification of the accused Appellants has not been challenged.

13. The learned Counsel for the accused Appellant Abdul Hai, however, has submitted that these two witnesses had seen Abdul Hai going to his house and as such the benefit of doubt on this count may be given to the accused Appellant Abdul Hai.

14. We find that so far Abdul Hai is concerned; two other circumstances appear against him, one is the recovery of his bloodstained sweater and the second is abscondence soon after the occurrence.

15. The learned Counsel has submitted that the accused might have absconded apprehending police harassment.

16. We are conscious of the fact that on occasions apprehending police harassment some persons do abscond but in the present case there was no occasion for that as the police were not searching for any person and the arrest of the accused persons followed the statement of the accused Motizul in Anr. case and that too after a month or so. Whereas Abdul Hai absconded from the night of the incident itself. Besides the circumstances of last seen together there is discovery of fact u/s 27 of the Evidence Act and as stated above the weapon of assault the "kukri" Material ext. 2 and the sweater worn by Abdul Hai which got smeared with blood were recovered at the instance of the accused persons. Their statements were recorded by police later on. The law is now well settled that the discovery of fact referred to u/s 27 of the Evidence Act is not the body recovered but the fact of recovery embraces the place from where the body is recovered and the knowledge of the accused persons about it.

17. In the above matter, we may refer to the observations of the Apex Court in the case of State of Rajasthan Vs. Bhup Singh, as well as in the case of State of Himachal Pradesh Vs. Jeet Singh, On perusal of the evidence and materials on record and the circumstances established by the prosecution, we find that the cumulative effect of the facts and circumstances is consistent only with the hypothesis of guilt and rules out any hypothesis of innocence of the accused persons. The circumstances lead to only one conclusion that it was the three accused Appellants only and no one else who killed the deceased persons.

18. Hence, in view of the materials and evidence on record, we find nothing to interfere with the order of conviction and sentence. The appeals have got no merit and accordingly all the three appeals stand dismissed. Send down the records.