

(1993) 05 GAU CK 0022
In the Gauhati High Court
Case No : Criminal Appeal No. 33 of 1987

Abdul Rouf and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 10-05-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 313
Evidence Act, 1872 — Section 145
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1993) 2 GLR 306

Hon'ble Judges : S.N. Phukan, J;J. Sangma, J

Bench : Division Bench

Advocate : A.F.G. Osmani and H.R.A. Choudhury, for the Appellant; H.N. Sarma, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

J. Sangma, J.—The three Appellants--(1) Abdul Rouf. (2) Siddique Ali and (3) Nuruj Ali--brought this appeal from the judgment of dated 30.1.86 passed by Sri A. Sarkar, Sessions Judge, Karimganj, in Sessions Case No. 52 of 1986. The learned Sessions Judge convicted them u/s 302/34 I.P.C. for committing the murder of one Abdul Jalil; and sentenced each of them to R.I. for life. No fine was imposed in addition to the R.I.

2. The charge framed on 6.1.87 against the Appellants was as follows:

I, Sri A. Sarkar, Sessions Judge, Karimganj, hereby charge you--(1) Abdul Rouf, (2) Siddique Ali and (3) Nuruj Ali as follows: that you on or about 3rd day of August, 1984 at village Dukhipur under Ratabari P.S. in furtherance of common intention committed offence punishable u/s 302/34 I.P.C. within the cognizance of Court of Sessions.

Charge explained to the accused who pleaded not guilty.

3. The Appellants and P.W. 1-6 were residents of the same village (Dukhipur).

The deceased was a resident of village Balicherra. F.I.R. was given by the deceased's elder brother Abdul Kalam of Balicherra, but subsequently he also died, so the prosecution could not examine him at the trial. Nobody was named as accused in the F.I.R. According to prosecution, P.W. 1 and 3 were the eye-witnesses; so besides examining u/s 161 Code of Criminal Procedure the I/O got their statements recorded also by a Magistrate u/s 164 Code of Criminal Procedure. The Magistrate who recorded the statement u/s 164 was not examined. In all the prosecution examined 8 P Ws which include the two eye witnesses (P.W. 1 & 3), the doctor (P.W. 2) who did the autopsy of dead body the scribe of FIR (P.W. 7) and the I/O (P.W 8).

4. The doctor (P.W. 2) who did the autopsy and the 2 eye witnesses (P.W. 1 & 3) were examined on 9.1.87. The eye witnesses did not support the prosecution and resiled from the statement which they earlier made before the I/O and a Magistrate. So, the prosecution declared them hostile and cross examined. P.W. 3 was cross-examined also by the defence. A complaint being made for giving false evidence, the Chief Judicial Magistrate sent PW 3 to hazot. On following day, P. Ws 1 and 3 made application to the Sessions Judge stating that they would now speak the truth and praying for examining them once again. The learned Sessions Judge accepted the application and examined them as C. Ws. 1 and 2 on 12.1.87. When on 21.1.87, the prosecution examined P. Ws 4-8 and closed the prosecution case the trial Court recorded the defence statement of the Appellants u/s 313 Code of Criminal Procedure. The defence did not examine D. Ws.

5. On 30.1.87, the learned Sessions Judge delivered the judgment. He accepted the evidence of doctor (PW-2) as to the injuries and cause of death. Then saying that a Court has to logically decide a case by exercising "judicial justice" like Krishna Iyar, J. of Supreme Court and Lord Denning, he found that all the 3 accused persons were running away in highly suspicious manner with identified or unidentified weapons in their hands and the P. Ws. definitely told the names and identified the Appellants. On this finding, he concluded that even if the evidence of C. Ws. 1 and 2 be eliminated from consideration, the prosecution, by preponderating evidence, has proved the case against the Appellants "to the hilt and beyond any reasonable scope of doubt" that the Appellants, in furtherance of common intention, committed culpable homicide amounting the murder. Accordingly, he convicted the Appellants u/s 302/34 I.P.C. and sentenced each of them as aforesaid. Hence, this appeal.

6. This Court by order passed on 10.3.87 in M.C. No. 91/87, granted bail to the Appellants pending determination of the appeal.

7. Mr. A.F.G. Osmani, learned Counsel for the Appellants, argues that nobody was named in the F.I.R. and having failed to catch the real culprits, the prosecution, on afterthought, falsely dragged the Appellants to the case because there was an enmity between P.W. 4 and the Appellant Nuruj Ali. He pointed out that for not supporting the prosecution case P.W. 3 was sent to hazot and thereby the

prosecution compelled P.W. 1 and 3 to give evidence against the Appellants by getting them examined as C.W. 1 and 2. On this premises be submitted that there was no evidence to prove the charge and the learned Sessions Judge committed grave error in thinking that the prosecution by preponderating evidence proved the charges to the hilt and beyond reasonable scope of doubt. He submitted that in any view the conviction is illegal and liable to be set aside. To rebut this contention, Mr. H.N. Sarma, learned Public Prosecutor, strongly submitted that the evidence of P. Ws clearly indicated that the Appellants alone were the persons who dealt the fatal blows to Abdul Jalil. He also submitted that the evidence of C.W. 1 and 2 are also admissible because the defence had Cross-examined and failed to break, their evidence. He, therefore, supported the conviction. We, therefore, now recast the evidence on record to decide the appeal.

8. According to the F.I.R. the occurrence took place at 8 a.m. of 3.8.84 (Friday). The F.I.R. was lodged on the next day (4.8.84). The informant was the elder brother of the deceased Abdul Jalil. He lives in village Balicherra and came to Dukhipur, where occurrence took place, after getting information. He has stated in the F.I.R. that he went to the place of occurrence and found his brother dead on the field with injuries caused by sharp weapon and that from the people who assembled there he also came to know that at the time of occurrence Sunur Ali (PW. 1) alone was there with the deceased and other people came there on hearing. Sunur Ali's shouts. As the informant died, he could not be examined at the trial; but the F.I.R. has been exhibited (Ext. 2) and proved by its scribe, P.W. 7 (Rafiquddin). P.W. 2 Dr. H. Sanyashi, who performed the post-mortem of the deceased on 5.8.84 found injuries on the deceased and gave the opinion and these injuries were caused by repeated piercing by sharp weapon and that death was due to cardio respiratory failure as a consequence of shock and hemorrhage due to multiple injuries which were note mortem. In cross examination, he stated that from the injuries found and recorded. It could be presumed that the attack was from the front. P.W. 1 (Sunur Ali) who, according to prosecution was the eyewitness, admitted that he made a statement before a Magistrate u/s 164 Code of Criminal Procedure. He stated that Abdul Kalam, Habibur Rahman, Ataur Rahman and Jalil came to the house of Tejai Mia to settle land dispute between Tejai Mia and Nuruj Ali; but because Nuruj Ali refused to come, the Meeting failed and Abdul Jalil was going back to his own house. After this he stated that sometime after Abdul Jalil called him to come and save his life as he was being done to death and he (P.W. 1) at that time focused his torch light and saw accused Nuruj Ali but could not say what instrument he had in his hand and that Nuruj Ali rebuked him not to come to the place of occurrence. He stated that he also saw 2 other persons chasing Abdul Jalil. Then he stated that the occurrence was at the paddy field of Makay Mia and as be raised alarm others came and he went with Abdul Kalam, Abdul Rakib, Habibur Rahman, Suleiman, Tejai Mia and Motiur Ali. After this, he stated that inspite of focusing light from his torch light he could not recognise the culprits. At this, he was declared hostile. In cross-

examination by prosecution, he stated that he found the deceased by the side of a "nala" near his own house and he found Nuruj Ali inside Makoi's "Khat" at a distance of 6/7 nals from the place of occurrence, with weapon of assault in his hand which looked like Jatha but he did not tell Kalam, Rakib, Tejai, Habibur Rahman, Motahir and Jalil's brother (informant) as to who assaulted the deceased. P.W.3 (Abdul Kalam) was also said to be eye witness. He stated that in the evening he heard Sunur Ali shout that a marpit was going on and on going there, saw dead body of Jalil; but all the villagers present at the place of occurrence did not know who assaulted the deceased. At this stage, he was also declared hostile. In cross-examination by prosecution, he admitted to have deposed before police and before a Magistrate (Under Section 164 Code of Criminal Procedure); but he stated that he did not depose before him (Magistrate) that Sunu. Ali had told him that Abdul Rouf, Siddique Aii and Nuruj Ali (Appellants) chased and assaulted the deceased with Jatha. He also denied that he saw three people assaulting the deceased and that in the focus of Sunur Ali's torch light, he could recognise the Appellants while they were running towards their own houses. When defence cross examined, he stated that he gave deposition before a Magistrate as instructed by Kalam (informant). P.W. 4 (Tejai Mia) stated that on his asking Abdul Jalil came to their village and went to call Nuruj; but as Nuruj did not come, the Bichar failed; so, Abdul Jalil came to his house and when at sunset, he left and was going back to his own house Sunur Ali shouted that Abdul Jalil was being done to death. He stated that he immediately went and found Sunur Ali and Abdul Kalarn who then reported to him that the Appellants committed murder and that with focus of Sunur Ali's torch light he saw Siddique Ali going back to his own house with a Jatha in hand and saw Abdul Rouf and Nuruj also running towards their own house. In cross examination by defence, he stated that Sunur Ali did not announce the name of persons who committed the crime. P.W. 5 (Suleiman) lives at a distance of 150/200 nals from the place of occurrence. He stated that by focussing his torch light, he saw Siddique Ali returning to his house with instrument in his hand and saw 2 other persons running away from the place of occurrence whom Sunur Ali (P.W. 1) identified as Abdul Rouf and Nuruj and that on his asking Abdul Kalam (P.W. 3) and Sunur Ali (P.W. 1) told him that those 3 persons committed murder. In cross examination by defence, he denied the suggestion that he did not tell those things to the I/O. P.W. 6 (Abdul Rakib) stated that on coming to the place of occurrence he could know that Abdul Jalil was done to death and that he saw Nuruj Ali and 2 other persons who escaped from the place of occurrence. In cross examination by the defence, he stated that on his asking Sunur Ali named the Appellants as murderers. P.W. 8 (Sri R.R. Sen) is the O/C of Ratabari P.S. who registered the case at 8.15 A.M. of 4.8.84 u/s 302 I.P.C. showing the accused as unknown. He himself as I/O, investigated the case. In examination in chief, he has only stated that he registered the case, prepared the inquest report, sketch map, made seizure of articles, arrested the accused persons, examined the witnesses and got the statement of P.W. 1 and 3 recorded by Magistrate u/s 164 Code of Criminal Procedure. He did not state what P.W. 1 and 3 stated to him

when he examined them u/s 161 Code of Criminal Procedure. It is only in cross examination by defence that he told that they (meaning P.W. 1 and 3) stated before him that they found three persons assaulting Abdul Jalil and that he (P.W. 1) was cautioned by Nuruj Ali not to come to that place and that P.W. 3 told him that he (P.W. 3) heard Sunur Ali's shouts that Abdul Jalil was being done to death but in that shout he (Sunur Ali) did not announce the names of the recused, After that, he told that P.W. 3 stated to him that Sunur Ali told witnesses that the 3 named accused persons committed murder of Abdul Jalil with the help of Jatha. So, his evidence does not of help to the prosecution.

9. From the evidence of P. Ws. we find that P.W. 1 alone was present near the place when the occurrence took place. Other P. Ws. including P.W. 3 came to know only from him. After declaring hostile, P.W. 1 and 3 were cross-examined by prosecution but prosecution did not put question either to P.W. 1 or P.W. 3 that they had earlier stated to the I/O that they saw the Appellants dealing blows to Abdul Jalil and that the saw thorn running away from the piece of occurrence after the assault. As already stated in examination-in-chief the I/O also did not say that when he examined u/s 161 Code of Criminal Procedure he had told him that they saw the Appellants dealing the blows and running away after that. If the prosecution say that P.W. 1 and 3 are eyewitnesses bat declare them hostile, Section 145 of the Evidence Act permits the prosecution to ask leading question. The Public Prosecutor in cross-examination must suggest to them that they earlier deposed before the I/O that they saw the occurrence etc. Similarly, the I/O also must say in examination-in-chief that P.W. 1 & 3 deposed before him that they saw the occurrence. This is necessary to show that they were eye witnesses.

10. In our opinion the evidence in far from being satisfactory. The learned Sessions Judge was wrong in thinking that the prosecution has proved the case by preponderating evidence. It may be stated that the term "preponderating evidence" are used only in civil case. It cannot be applied in a criminal case more particularly, in a case u/s 302 I.P.C. The learned Sessions Judge did not consider the evidence of C.W. 1 and 2 and in our opinion rightly because they came to give second evidence out of fear after P.W. 3 went to hazot from where he was brought to give second evidence. This evidence is contrary to the evidence which they gave as P.W. 1 and 3. So, on applying the principle that if one evidence goes in favour of the accused and the other against them, the one in favour of the accused has to be accepted.

11. In the result, we find that the prosecution has failed to prove the case beyond reasonable doubt. The Appellants, therefore, are entitled to get the benefit of doubt. Accordingly, we allow the appeal by setting aside the conviction and acquit them of the charge. Their bail bonds are discharged.