

(2023) 02 GAU CK 0061

In the Gauhati High Court

Case No : Criminal Petition No. 34 Of 2021

Azizur Rahman @ Aziz Ali

APPELLANT

Vs

State Of Assam And Anr.

RESPONDENT

Date of Decision : 22-02-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 307, 326, 341, 506
Code Of Criminal Procedure, 1973 — Section 161, 313

Citation : (2023) 02 GAU CK 0061

Hon'ble Judges : Michael Zothankhuma, J; Parthivjyoti Saikia, J

Bench : Division Bench

Advocate : U. Choudhury, B. Bhuyan, J. Das

Final Decision : Dismissed

Judgement

M. Zothankhuma, J

1. Heard Mr. U. Choudhury, learned Legal Aid Counsel for the appellant. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor assisted by Mr. J. Das, Advocate for the State.

2. This appeal has been filed against the Judgment & Order dated 09.01.2020 passed by the learned Additional Sessions Judge (FTC), Dibrugarh in Sessions Case No. 374/2013, by which the appellant has been convicted under Section 302 IPC and sentenced to undergo imprisonment for life, along with a fine of Rs. 20,000/-, in default, to undergo Simple Imprisonment for 6 (six) months.

3. The Prosecution case in brief is that the informant (father of the deceased) submitted an FIR dated 14.01.2013 to the In-charge, Amulapatty Police Outpost, Dibrugarh stating that at about 10:30 p.m. while his son Jitendra Rajak was coming from his shop with his friends viz. Raju Mahto (P.W. No.6), Muna Rajak (P.W. No.3) and Sumit Rajak (P.W. No.2), the appellant Aziz Ali along with two unknown associates attacked his son with deadly weapons viz. Iron Rod and Dagger and stabbed him three times in the belly, due to which he was admitted

in the Assam Medical College and Hospital. Pursuant to the FIR, Dibrugarh P.S. Case No.45/2013 under Sections 341/326/506/307/34 IPC was registered on 14.01.2013. The informant's son expired on 15.01.2013.

4. After investigation was carried out and charge-sheet filed, the learned Trial Court framed a charge under Section 302 IPC against the appellant. The appellant pleaded not guilty and claimed trial.

5. In the trial proceedings before the learned Trial Court, 13 (thirteen) Prosecution witnesses were examined. After the appellant was examined under Section 313 Cr.P.C., the learned Trial Court came to a finding that the appellant was guilty of the offence under Section 302 IPC and was accordingly convicted under Section 302 IPC, vide the impugned Judgment and Order dated 09.01.2020 in Sessions Case No. 374/2013.

6. The learned Counsel for the appellant submits that the statement of facts provided in the FIR dated 14.01.2013 contradicts the evidence given by the informant (P.W. No.1) during cross-examination and as such, the evidence of P.W. No.1 could not have been considered by the learned Trial Court for convicting the appellant. He submits that in the cross-examination, the informant (P.W. No.1) had stated that he did not know who lodged the FIR or the contents of the FIR. He also submits that while the informant in his FIR had stated that P.W. No.2, P.W. No.3 and P.W. No.6 were walking along with his deceased son at the time of occurrence, in his cross-examination, P.W. No.1 has stated that there was none at the time of occurrence, except the informant and his deceased son.

7. The learned Counsel for the appellant submits that the evidence of P.W. No.10, is to the effect that P.W. 10, P.W. No.2 and P.W. No.3 and others were having a feast in the paddy field near his house and that they came out on the road, only after being told by one Babu, that the appellant had assaulted the deceased. He submits that the above goes to show that P.W. No.2 and P.W. No.3 were not walking with the deceased at the time of occurrence of the incident as stated in the FIR. He further submits that while P.W. No.2 and P.W. No.3 had denied the suggestion that the street lights were not ON, on that particular night, the sketch-map of the place of occurrence does not show any street lights. He thus submits that the incident could not have been seen by P.W. No.2 and P.W. No.3 at night, in the absence of any street lights as per the sketch-map. Further, distance of the P.W. No.3 being around 50 to 60 metres from the place of occurrence, P.W. No.3 could not have seen the incident.

8. The learned Counsel for the appellant submits that while the witnesses have stated that they saw the appellant stabbing the deceased in his belly, the doctor's report shows that the injuries sustained by the deceased pertained only to the chest and back area and not to the area around the belly. He also submits that the inquest report dated 15.01.2013 which has been exhibited as Exbt.6 is inadmissible as evidence, in terms of Indian Evidence Act, inasmuch as, the maker of the said inquest report has not been examined by the learned Trial

Court. He accordingly submits that due to the discrepancy in the evidence of the witnesses, the impugned judgment and order should be set aside and the appellant should be acquitted.

9. Ms. B. Bhuyan, learned Additional Public Prosecutor, on the other hand submits that there were 5 (five) eye witnesses to the incident, who had seen the appellant stabbing the deceased. Further, Magh Bihu is celebrated on 14th January of every year. It is a time when the young and old are out in the streets till late in the night celebrating the Bihu festival. She submits that the evidence of the witnesses clearly show that the street lights in the village were 'ON' at the time of incident. She also submits that the evidence of P.W. No.3, which is to the effect that he saw the incident from a distance of 60 to 70 metres during his cross-examination cannot be disbelieved. She further submits that the evidence of P.W. No.4 is to the effect that he was around 30 metres away from the place of occurrence and had seen the appellant stabbing the deceased. Further, PW-6 had also seen the appellant stabbing the deceased. She also submits that the evidence of P.W. No.4 and P.W. No.6 have not been shaken by the appellant during cross-examination.

10. The learned Additional Public Prosecutor also submits that minor contradictions in consistencies, embellishments or improvements on trivial matters, which do not effect the core of the prosecution case, should not be made a ground on which the evidence should be rejected in its entirety. In this regard she has relied upon the judgment of the Apex Court in the case of State of U.P. vs. Naresh & Others, reported in (2011) 4 SCC 324.

11. The learned Additional Public Prosecutor also submits that just because the sketch-map does not show the location of the street lights does not mean there were no street lights. The same cannot be fatal to the prosecution case in view of the judgement of the Apex Court in the case of Central Bureau of Investigation vs Mohd. Parvez Abdul Kayyum etc., reported in (2019) 12 SCC 1.

12. We have heard the learned counsels for the parties.

13. The informant (P.W. No.1) lodged an FIR dated 14.01.2013 stating that at about 10:30 p.m., his son was attacked by the appellant and two unknown associates with deadly weapons i.e. Iron Rod and Dagger, while the deceased was walking with P.W. No.2 , P.W. No.3 and P.W. No.6. He also exhibited the FIR as Ext.1 and his signature as Ext.1(1).

The informant (P.W. No.1) in his evidence has stated that he saw the appellant stabbing his son (the deceased) on his stomach on 13.01.2013 at around 9:30/10:00 p.m. However, in his cross-examination, the P.W. No.1 has stated that he did not know who lodged the FIR and he did not know the contents of the FIR. He states in his cross-examination that the appellant stabbed the deceased in his stomach and on his back. Further, at the time of occurrence of the incident, there was no one except for himself and his deceased son. In this respect, one thing that stands out is that the signature of PW-1 in the FIR is in Hindi, which is

not expected of a person conversant in English.

14. The contradiction with regard to the FIR in the cross-examination of P.W. No.1 creates a doubt as to whether P.W. Nos.2, 3 & 6 were at all present at the place of occurrence. However, on perusing the evidence given by all the other prosecution witnesses, we find that P.W. No.2, P.W. No.3 and P.W. No.6 have all stated that they were walking together on the fateful night, though not with deceased and saw the occurrence. Though there is a doubt with regard to the credibility of P.W. No.1, keeping in view the fact that he has denied lodging the FIR or knowing the contents thereof, besides the factual dispute regarding the presence of P.W. Nos.2, 3 & 6 in his cross-examination we are of the view that as the evidence of P.W. No.1 was recorded 2 years after the incident, there could be some aspects of which he was not clear about, as memory fades with time. However, the evidence of PW-2, PW-3 and PW-6 make it clear that though they were not walking with the deceased, though they were in the vicinity of the place of occurrence and had accordingly seen the crime being committed by the appellant. The above being said, PW-1 being a villager, it is possible that he did not understand the question put to him in English or the recording of the same. On this aspect, it would be profitable to refer to the case of Naim Ahmed vs. State (NCT) of Delhi, reported in 2023 Live Law (SC) 66, Criminal Appeal No.257 of 2023, wherein the Apex Court has held that the evidence of the witness has to be recorded in the language of the Court or in the language of the witness as may be practicable and then get it translated in the language of the Court for forming part of the record. However, recording of evidence of the witness in the translated form in English language only, though the witness gives evidence in the language of the Court, or in his own vernacular language, is not permissible. The Apex Court thus added that the text and tenor of the evidence and the demeanor of the witness in the Court could be appreciated in the best manner only when the evidence is recorded in the language of the witness. It may be mentioned here that the statement of PW-1 under Section 161 Cr.P.C. is in the Assamese language. PW-1 was not confronted with the question whether a scribe had written the FIR. However, the evidence of PW-1 should be left out from consideration, as there are contradictions in his evidence vis-a-vis the FIR.

15. The evidence of P.W. No.2 is to the effect that after he went to the grocery store and was walking with PW-3 and PW-6, he saw the appellant stabbing the deceased in his belly at around 10 to 10:30 p.m. Thereafter the appellant fled away in a motor cycle. In his cross-examination, P.W. No.2 has stated that there was street lights and there were lights in the shops. Though P.W. No.2, i.e. Sumit Kumar Rajak has stated that he saw the appellant stab the deceased, the evidence of P.W. No.10 is to the effect that P.W. No.10 along one Munna, Sumit, Babu, Amit and a few others, were having a feast in the nearby paddy field near the house of P.W. No.10. Thereafter Babu appeared and told them that the appellant Aziz had assaulted the deceased Jitendra. On coming out on the road which was crowded with people, they saw the deceased lying on the road with blood on the ground.

The evidence of P.W. No.10 is not specific as to whether the name "Sumit" mentioned in his evidence pertains to P.W. No.2, Sumit Kumar Rajak and whether the name "Munna" pertains to PW-3, Munna Rajak. Assuming that P.W. No.10 is referring to P.W. No.2 and PW-3 in his deposition, it is probable that PW-2 and PW-3 had left the feast, as the incident occurred around 10:30 p.m. on 13.01.2013, while his evidence was recorded four years later on 06.05.2017. Further, the evidence of PW-2 and PW-3 is that they had witnessed the incident and as such, we are of the view that the discrepancy is minor and does not make the evidence of PW-2 and PW-3 unbelievable or unreliable.

16. P.W. No.3 in his evidence has stated that he had gone to purchase goods from a shop with P.W. No.2, P.W. No.6 and P.W. No.11. After purchasing the required items from the shop, they saw the deceased and the appellant talking loudly. P.W. No.3 saw the appellant stabbing the deceased with a Dagger as there was street lights. Thereafter the appellant fled away in his motorbike. In his cross-examination, P.W. No.3 has stated that the place of occurrence was at a distance of 60 to 70 metres from where he was standing and that there were street lights.

17. P.W. No.4 in his evidence has stated that he saw the appellant stabbing the deceased with a knife on his stomach three times and the incident occurred at a distance of 30 metres from the shop of P.W. No.4 at around 10/10:30 p.m. on 13.01.2013. The appellant then fled away in a motorbike and after calling 108 ambulance, the deceased was taken to a hospital. The evidence of P.W. No.4 was not shaken during cross-examination.

18. The evidence of P.W. No.5 is to the effect that the police seized the knife from the house of the appellant which had bloodstains. He also identified the seized knife in the Court which was exhibited as M.Ext.1.

19. The evidence of P.W. No.6 is to the effect that while walking with P.W. No.2 and P.W. No.3 at around 10:30 p.m. on the night of the incident, he saw the appellant stabbing the deceased on his abdomen with a knife. Thereafter the appellant fled the scene and 108 ambulance was called and the deceased taken to hospital. The evidence of P.W. No.6 was also not shaken or controverted.

20. The evidence of P.W. No.7 is to the effect that while the deceased was being brought in an injured condition to the casualty department of the Assam Medical College & Hospital, he also arrived in the said hospital. While the deceased was being treated in the casualty ward, the P.W. No.7 asked the deceased as to who assaulted him, to which the deceased replied that the appellant Aziz had stabbed him with a knife.

21. The evidence of P.W. No.8, who is the brother-in-law of the deceased, is to the effect that in the casualty department of the hospital, the deceased was asked as to what had happened, to which the deceased replied that his neighbour Aziz, the appellant had assaulted him with a knife.

22. The evidence of P.W. No.9 is to the effect that he did not witness the incident and that he gave his signature in the seizure list. He also states that he heard people saying that someone had assaulted the deceased and left. He was declared a hostile witness by the Prosecution.

23. The evidence of P.W. No.10 is to the effect that the incident took place at the time of Magh Bihu in 2013 and that while having a feast in the paddy field near his house with Munna, Sumit, Babu, Amit and a few others, Babu appeared and told them that the appellant had assaulted the deceased. On coming out on the road he saw that road was crowded with people and Jitendra was lying on the road with blood on the road. The evidence of P.W. No.10 is very vague as he has not clarified as to who are Munna, Sumit, Babu, Amit and a few others. Further, if Babu was one of the persons he was having a feast with, then who was the 'Babu' who had appeared and told them that the appellant had assaulted the deceased.

24. The evidence of P.W. No.11 is to the effect that he only heard about the incident and was not a witness to the same.

25. The evidence of P.W. No.12 who was a Doctor is to the effect that he performed Post Mortem Examination on the deceased on 15.01.2013 and in his opinion, death was due to shock as a result of injuries sustained, which were as follows :

"InjuryNo.1. One surgically incised over right paramedial incision of 25 cm in length with eleven silk thread present from xiphod.

Injury No. 2. One surgincally incised wound of 19.5 cm to the left, horizontally place from the xyphoid with 11 silk thread.

Injury No. 3. Surgical 2 cm x 1 cm over left lumber for surgical drain, 10 cm from Midline.

Injury No. 4. One stitched wound of size 25cm obliquily present over 7 intacostal space. 4 cm below nipple and 11 cm from the midline with 1 silk thread. On opening one eleptical wound clean cut margin present through the muscle, diaphragm and laterly placed, direction is from front to back, right to left and above downward.

Injury No. 5. Surgical drain over the left lateral aspect of the chest in the 5th intercostal space, in the mid auxiliary line and 9 cm from the nipple.

Injury No. 6 . Stiched wound over the left back of the chest of size 3cm in length with 2 silk thread. 4 L-1 vertibra level and 6cm from the midline.

Cranium and Spinal Canal

Scalp, skull, vertibra all healthy.

Thorax - Walls ribs cartilages as described.

Lyrinx, Trachea, both the lungs, heart- Pale. Plura - Cavity filled with liquid and clotted blood.

Abdomen - Peritonium filled with liquid and and clotted blood approximately 1 ltrs. All other organs are pale.

Liver - pale, Spleen- Missing, Stich- Surgically present.

Kidney - Left Kidney missing. Surgical stitch present.”

26. The evidence of P.W. No.13, i.e. the I.O. is to the effect that the appellant stabbed the deceased in his stomach and after examining the witnesses and visiting the place of occurrence, he found a prima facie case under Section 302 IPC against the appellant. He also states in his cross-examination that he made inquiries with regard to the two accomplices of the appellant, but could not apprehend them.

27. On considering all the evidences adduced, we find that the appellant had caused the death of the appellant, by stabbing him with a knife/dagger. Also, we find that the evidence of P.W. No.4 and P.W. No.6 inspires the confidence of this Court. They being independent eyewitnesses, there is nothing to show that their evidence is not reliable. There is also nothing to show that they are interested witnesses. As such, even if we do not consider the evidence of the other witnesses, on the basis of the evidence of P.W. No.4 and P.W. No.6 only, we find that the appellant is guilty of the offence of having stabbed the deceased.

28. Though the learned counsel for the appellant has stated that the eye witnesses could not have seen the incident as they had stated that the stabbing was done in the belly area, while the Doctor's evidence had shown that the injuries had occurred around the chest of the deceased and not in the stomach area as stated by the witnesses, we find that though the act of appellant stabbing the deceased is not in dispute, the mention of the wrong area in which the injuries were caused to the body of the deceased, cannot be construed to mean that the appellant did not stab the deceased.

29. Though there are minor inconsistencies in the evidence of the witnesses keeping in view the fact that the evidence was recorded by the learned Trial Court, 2 years after the incident, the factum of the appellant having stabbed the deceased is not in dispute, as the evidence of P.W. No.4 and P.W. No.6 is very reliable and convincing on this aspect. In the case of State of U.P. vs. Naresh & Others, reported in (2011) 4 SCC 324, the Apex Court has held that in all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or

improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

30. In the case of Leela Ram (Dead) Through Duli Chand vs. State of Haryana & Another, reported in (1999) 9 SCC 525 the Apex Court has held that discrepancies found in the ocular account of the witnesses unless they are so vital, cannot affect the credibility of the evidence of the witnesses. There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimensions, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable.

Trivial discrepancies ought not to obliterate an otherwise acceptable evidence.

Thus, on considering the decisions of the Apex Court, we are of the view that the discrepancies in this case do not affect the core of the prosecution case and hence, can be over-looked.

31. In view of the reasons stated above, we do not find any ground to interfere with the impugned Judgment & Order dated 09.01.2020 passed by the learned Additional Sessions Judge (FTC), Dibrugarh in Sessions Case No. 374/2013.

32. The appeal is accordingly dismissed. Send back the LCR.

33. In appreciation of the assistance provided by the learned Legal Aid Counsel, his fee is fixed at Rs.8,500/-, which should be paid by the State Legal Services Authority.