
(2016) 07 GAU CK 0044
In the Gauhati High Court
Case No : Criminal Appeal (J) No. 33 of 2015

Babu Garh @ Sarubabu

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 25-07-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2016) 5 GauLJ 233 : (2016) 4 GauLT 847

Hon'ble Judges : Mr. Ajit Singh, CJ. and Mr. Suman Shyam, J.

Bench : Division Bench

Advocate : Mr. S. Borgohain, Amicus Curiae, for the Petitioner; Ms. J. Jahan, Addl. AG, for the Respondent

Final Decision : Partly Allowed

Judgement

Mr. Suman Shyam, J.(Oral)—The appellant Babu Garh has been convicted under Section 302 of the Indian Penal Code for murdering his brother Jiten Garh and sentenced to life imprisonment with fine of Rs. 2,000/-, in default whereof, to undergo rigorous imprisonment for another 02 months.

2. The prosecution case is that on 16-03-2014 at about 06:00 p.m. there was a quarrel between the appellant and his deceased elder brother Jiten Gorh in the house of the appellant whereby the appellant had dealt blows on the nose, head and the face of the deceased with a solid bamboo lathi as a result of which Jiten Gorh has suffered grievous injuries which ultimately led to his death.

3. On 17-03-2014 an ejahar was lodged before the Officer-in-Charge, Barpathar Police Station by Sri Puna Garh, the brother of both the appellant and the victim, reporting the incident. On the basis of the said ejahar, Borpathar P.S. Case No. 40/2014 was registered under Section 302 of the Indian Penal Code and investigation was carried out by the police. On completion of the investigation, charge-sheet was submitted against the appellant. The Trial Court had thereafter framed murder charge against the appellant under Section 302 of the Indian

Penal Code and the matter was put to trial. Eventually the Trial Court had convicted the appellant under Section 302 of the Indian Penal Code.

4. Smti. Bobita Gogoi is a neighbour of the appellant and was examined as a witness (PW-1). Bobita Gogoi had deposed before the court that on the date of the incident at about 06:00 p.m. she heard a quarrel having been taken place between the appellant and the deceased Jiten Garh. Thereafter on the following day Jiten Garh was seen by her lying dead on the courtyard of Babu Garh's (appellant) house. The witness has also deposed that she had heard that the appellant had killed Jiten Garh with a bamboo lathi.

5. Sri Jogeswar Das (PW-2) is the husband of Bobita Gogoi who also lives in the neighbourhood of the appellant and the deceased. Jogeswar Das had deposed that on the date of the incident at about 06:00 p.m. he had heard quarrel between the deceased Jiten Garh and the appellant in the house of the appellant. At about 08:00 p.m. on that night he had heard that Jiten Garh had died and that Bhoni Garh had told him that the appellant had killed her elder brother Jiten Garh. Similarly, Smti. Anima Garh (PW-3) another neighbour of the appellant and the deceased had testified before the court that the incident had taken place during the festival of "Phakua" (Holi). The witness had deposed that on the date of the incident at about 06:00 p.m. she heard sound of beating in the house of the accused and later on she found deceased Jiten Garh lying in the courtyard of Babu Garh's house. The witness had also deposed that she saw the appellant standing near the gateway in his house with a lathi in his hand. The informant Puna Garh (PW-4) had also corroborated the fact that the place of occurrence was the house of Babu Garh and that on the date of the incident he found the dead body of Jiten Garh lying in the courtyard of appellant Babu Garh.

6. Smti. Manju Garh (PW-5) is the wife of the deceased Jiten Garh. She had deposed before the court that about 03 months prior to the incident she left her husband's house and had been residing in her mother's house. Manju Garh had testified before the court that while she was in her mother's house, Bhaiti Garh, the brother of the deceased/ appellant, had informed her that the appellant had killed her husband and that the dead body was lying in the gateway of Babu's house. During her cross-examination, the PW-5 has stated that her husband had beaten her earlier due to some discrepancies with her brother-in-law (Babu Garh) with regard to the money he had sent from Bangalore and that is why she had left for her paternal house.

7. There is no eye witness to the incident and the prosecution case is based on circumstantial evidence. However, from the testimony of the aforementioned witnesses it is established that Jiten Garh was found dead in the courtyard of the appellant and that there was a quarrel that had broken out between the appellant and the deceased prior to that. PW-3 Anima Garh had also deposed that on the date of the incident at about 6:00 she had heard sounds of beating from the house of the appellant and later on she had seen the appellant standing with a lathi in his hand.

8. The Post Mortem Report (Ext-3) indicates the existence of three fractures i.e. on the i) left perital bone, ii) left half of mandible and iii) left lower 3 ribs. According to Dr. Pranjal Saikia (PW-8) who had conducted the Post Mortem examination on the dead body, the cause of death is due to shock and hemorrhage as a result of head injury sustained by the deceased. The medical report corroborates the testimony of the witnesses that the appellant had hit the deceased by a bamboo lathi. Therefore, from the evidence available on record, it is established beyond doubt that the deceased Jiten Garh was killed by appellant in his courtyard by dealing blow upon the deceased by a bamboo lathi.

9. Mr. Borgohain, learned counsel for the appellant has submitted that he is not pressing for acquittal in this case as there is no scope for denying the fact that the appellant is responsible for causing homicidal death to his elder brother Jiten Garh. The Learned counsel, however, submits that the incident took place due to the sudden quarrel that had taken place between the appellant and his deceased brother Jiten Garh and it was out of heat of passion, that the appellant had dealt a blow on his brother with a bamboo lathi that was available in the place of occurrence. The learned counsel, therefore, submits that this case would be covered under Exception-4 of Section 300 of the Indian Penal Code. The learned Public Prosecutor has also fairly admitted that the case of the appellant might fall under exception 4 to section 300 of the Indian Penal Code.

10. We have considered the submission made by the learned counsel for the parties and have also carefully scrutinised the evidence available on record. From the testimony of PWs- 1 to 6 it is established beyond any doubt that on the date of the incident, just prior to the assault having been made by the appellant upon the deceased, there was a quarrel that had occurred between the two brothers. There is nothing to show that the deceased had gone to the house of the appellant armed with any weapon or with any ill intention. That apart, the evidence on record also indicates that it was "phakua" (Holi) at that time, which also shows that it was a season of festivity. In such circumstances, we are of the view that quarrel that had broken between two brothers was sudden and it was out of heat of passion that the appellant had assaulted his brother Jiten Garh with a bamboo stick.

11. In the case of Murlidhar Shivram Patekar & Anr. v. State of Maharashtra reported in (2015) 1 SCC 694 the Supreme Court had held that in cases covered by Explanation- 4 of Section 300 of the Indian Penal Code the cause of the quarrel is not relevant nor is it relevant as to who offered the provocation or started the assault. Since we have already found that the incident was preceded by a quarrel between the two brothers, hence, having regard to the facts and circumstances of the case, we are of the opinion that the case of the appellant is covered under Exception-4 of the Section 300 of the Indian Penal Code. Therefore, in our view, the conviction of the appellant under section 302 of the Indian penal Code was not just and proper in the facts of the present case.

12. That brings us to the next question as to whether this is a case covered

under Section 304 Part-1 or Part-2 of the Indian Penal Code. From a perusal of the Post Mortem Report (Exhibit-3) it is seen that following injuries had taken place:

"Wounds-position and character:

1. Lacerated wound extending from upper part of forehead on left vertex region of scalp of size 7 x 3 x 1 c.m. directed backward (fatal).
2. Lacerated injury over left mandibular region of size 3 x 2 x 1 c.m.
3. Abrasion extending from middle part of sternum upto anterior lower part of chest of size 7 x 5 c.m.

Fracture:

1. Fracture left parietal bone.
2. Fracture left half of mandible.
3. Fracture left lower 3 ribs."

13. Dr. Pranjal Saikia (PW-8), who had conducted the Post Mortem Examination, had opined that the cause of death is due to shock and haemorrhage as a result of head injury sustained by the deceased. From the medical evidence, we find that there are fractures in three different areas of the dead body including the parietal bone, mandible and the lower three ribs. Rib cage of a person is a very protected area and unless some extra effort to hit that region is put in by a person, it is not possible to strike at that place and cause such grievous injury very easily. In such view of the matter, we are of the opinion that there was clear intention on the part of the appellant to cause death to the deceased. As such the present is a case covered under Section 304 Part-1 of the Indian Penal Code.

14. We, accordingly set aside the conviction of the appellant under section 302 of the Indian penal Code as well as the sentence of life imprisonment imposed upon the appellant by the trial court and instead, convict him under Section 304 part-1 of the Indian Penal Code and sentence him to undergo rigorous imprisonment for 10(ten) years. The sentence of fine, however, stands affirmed. The appeal stand partly allowed.