
(2012) 05 GAU CK 0060
In the Gauhati High Court
Case No : Criminal Appeal No. 84 (J) of 2005

Bholen Boro

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 04-05-2012

Acts Referred:

Criminal Procedure Code, 1973 — Section 457A
Criminal Procedure Code, 1973 (CrPC) — Section 457A
Penal Code, 1860 — Section 302
Penal Code, 1860 (IPC) — Section 302

Citation : (2012) 4 GLT 1128

Hon'ble Judges : A.K.Goel, C.J. and C.R.Sarma, J

Bench : Division Bench

Advocate : Mr. A.K. Phukan, Amicus Curiae?? Advocate appeared for the
Respondent: Mr. D. Das, Addl. PP, Advocates appearing for Parties

Judgement

C.R. Sarma, J.—This appeal is directed against the judgment and order, dated 12.07.2005, passed by the learned Sessions Judge, Kamrup, at Guwahati, in Sessions Case No. 1 (K)/2004 (arising out of G.R. Case No. 4480/2002), whereby and whereunder, the learned Sessions Judge, Kamrup, convicted Shri Bholen Boro (hereinafter called the "appellant") under Section 302 of the Indian Penal Code (in short, "IPC") and sentenced him to suffer rigorous imprisonment for life and pay fine of Rs. 3,000/, in default suffer rigorous imprisonment for another period of 1 (one) year for his conviction under Section 302 IPC.

2. Prosecution case, in brief, is that in the evening of 11.09.2002, at about 8.00 p.m., the informant's husband, Narayan Boro (in short, "deceased"), while returning home from market, was assaulted by some miscreants in front of the gate of his house. Hearing scream of her husband aforesaid, the informant came out from her house and saw the deceased, lying unconscious, in injured condition. In the focus of torch light, she saw the appellant running away from the place of occurrence. The deceased was taken to the Hospital, but he succumbed to the injuries, on the same night. On the next day, Smti Lakhima

Boro, wife of the deceased (PW 1), as informant, lodged an FIR (Ext. 6) with the police. On receipt of the FIR, police registered a case under Sections 302/34 IPC and launched investigation into the matter.

3. During the course of investigation, police visited the place of occurrence, prepared a sketch map (Ext. 7), examined the witnesses and forwarded the dead body of the deceased for postmortem examination and recorded the statement of the witnesses. At the close of investigation, police submitted charge sheet (Ext. 11), under Section 302 IPC, against the appellant.

The offence, being exclusively triable by the court of sessions, the learned Judicial Magistrate, 1st Class, Guwahati, committed the case to the court of Sessions.

The learned Sessions Judge framed charge, under Section 302 IPC, against the appellant. The charge was read over and explained to the accused person, to which he pleaded not guilty and claimed to be tried.

4. In order to prove their case, prosecution examined, as many as, 13 (thirteen) witnesses, including Dr. A.J. Patowary, medical officer (P W 12), who performed the autopsy of the deceased and the investigating officers (PW Nos. 11 and 13).

At the close of the evidence for prosecution, the accused person was examined, under Section 313 of the Code of Criminal Procedure (in short, "Cr. PC."). He denied the allegations, brought against him and declined to adduce defence witnesses.

5. Considering the evidence on record, the learned Sessions Judge held the appellant guilty of committing the offence of murder of the deceased and accordingly convicted and sentenced him, as indicated hereinabove.

6. Aggrieved by the said conviction and sentence, the convicted person, as appellant, has come up with this appeal.

7. We have heard Mr. A.K. Phukan, learned Amicus Curiae, appearing for the appellant and Mr. D. Das, learned Addl. Public Prosecutor, appearing for the Staterespondent.

8. Mr. AK Phukan, learned Amicus Curiae, appearing for the appellant, referring to the evidence on record, has submitted that there is no substantive evidence indicating the involvement of the appellant with the murder of the deceased. It is also submitted that the conviction has been based only on suspicion and that the learned trial Judge committed error by recording the conviction and sentence without sufficient substantive evidence.

9. Controverting the said arguments, advanced by the learned Amicus Curiae, Mr. D. Das, learned Addl. Public Prosecutor, appearing for the State respondent, supporting the impugned conviction and sentence, has submitted that there is sufficient materials including the evidence of PW 1 i.e. the wife of the deceased to show that the appellant had caused fatal blows, resulting the death of the

deceased. The learned Addl. Public Prosecutor, referring to the evidence of PW 2, has submitted that the deceased made dying declaration, indicating the involvement of the appellant and as such, the learned trial Judge committed no error by convicting and sentencing the appellant.

10. Having heard the learned counsel, appearing for both the parties and considering the evidence, on record, we find no difficulty in understanding that the occurrence had taken place in the evening of 11.09.2002 and the deceased sustained fatal injuries, resulting his death.

11. Dr. A.J. Patowary, Medical Officer (PW12), who performed the autopsy in respect of the dead body of the deceased on next day i.e. on 12.09.2002, found the following injuries:

"Injuries1. Laceration of size 4 cm x 1cm, scalped deep in left side of the head, 2 cm left of parietal eminants. 2. Laceration of size 2 cm x 1 cm scalped deep over the left partial eminants of the head"

The said medical officer opined that the death of the deceased was caused due to comma, as a result of the head injury, which was ante mortem, caused by blunt force. The said Medical Officer further opined that the death was caused approximately 12 to 24 hours, prior to the autopsy. He also opined that the injuries aforesaid were sufficient to cause death of a person, in ordinary course.

12. The prosecution version is that the deceased sustained injuries aforesaid at about 8.00 p.m., on 11.09.2002. The wife of the deceased, who deposed as PW 1, in her FIR (Ext. 6) as well as in her evidence, given as PW 1, stated that at about 730 to 8.00 p.m., she hearing cry of her husband, rushed to the road, with a torch light in her hand and saw her husband lying in front of their gate, with bleeding injuries on his head. She also stated that, focusing her torch light, she could see the appellant, running away from the place of occurrence. The other prosecution witnesses, i.e. PWs 2, 3, 4, 6 and 8 stated that they visited the house of the deceased and found him in injured condition. All the nonofficial prosecution witnesses aforesaid stated that the deceased died in the hospital. The investigating Officer PW 11 (Shri Lalit Buragohain) also stated that he visited the place of occurrence and came to know that the deceased was first shifted to Hospital for treatment.

In view of the above discussed evidence, couple with the medical evidence, rendered by PW 12, there is no difficulty in understanding that the deceased died due to the injuries sustained by him, on his head.

Now the question is as to who had inflicted the said fatal blows. The prosecution version is that the appellant had caused the said injury.

13. Smti Lakhima Boro, wife of the deceased, deposed as PW 1, she stated that, hearing alarm raised by her husband, she came out from her house and found the deceased lying in injured condition, in front of their gate. She also stated that, focusing the torch light, which was in her hand, she could see the appellant

running away from the place of occurrence. She further stated that they had no enmity with the appellant.

In her crossexamination, she (PW 1) admitted that she did not state before the police that she had seen the appellant, running away from the place of occurrence. She also stated that she did not disclose that she could recognize the appellant in the focus of the torch light. However, she stated that she suspected that the appellant and Shri Rajot Boro had killed her husband.

The investigating officer (P W11), who examined PW 1, under Section 161 Cr. P.C. confirmed that the said witness did not tell him that she could recognize the appellant, in the focus of the torch light. In the FIR lodged by PW 1, she mentioned "certain miscreants had assaulted her husband. Therefore, it is found that the informant, who claimed to have seen the appellant, running away from the place of occurrence, neither in the FIR (Ext. 6), nor in her statement given under Section 161 Cr. P.C., made any whisper about the involvement of the appellant. If she had seen the appellant, in the focus of the torch light, there could be no reason for withholding such vital information from the FIR as well as the statement made before the I.O. Even she did not disclose such vital fact, if any, to the other persons of her family. Failure to reveal such vital information, at the initial stage, i.e. at the time of lodging the FIR, as well as making her statement under Section 161 Cr. P.C., raises doubt about the veracity of her said statement, which was made, for the first time, in the court, at the time of giving evidence. Therefore, it is not safe to believe the uncorroborated evidence of PW 1, that she had seen the appellant, running away from the place of occurrence.

14. Shri Babul Boro (Son of late Lahit Boro), brother of PW 1, deposing as PW 2 stated that, hearing hue and cry of his sister; he rushed to the house of the deceased and found him lying in injured condition. According to this witness, the deceased was in a position to speak and he (deceased) disclosed that he was assaulted by the appellant.

In his crossexamination this witness stated that he was neither examined by the police nor did he report to any body about the dying declaration, made by the deceased. Normally, vital information, received from the deceased, immediately after the occurrence, should have been revealed to others. But from the evidence of PW 2, it is clearly found that he did not disclose such vital information to any body. Therefore, his statement made, for the first time, in the court, regarding dying declaration aforesaid, is not believable, for want of corroboration.

15. Shri Babul Boro (son of Laban Boro), deposing as PW 3, stated that he found the deceased lying in injured condition and that the injured was taken to the Hospital in unconscious condition. According to this witness, he arrived at the place of occurrence before arrival of PW 2 (Shri Babul Boro, Son of late Lahit Boro), and Shri Fazal Boro (PW 4). He clearly stated that the deceased was not in a position to speak.

In view of the evidence, given by PW 3, regarding the state of health of the

deceased, the evidence of P W 2 that the deceased made dying declaration is not believable. This witness stated that he was reported by his sister i.e. PW 1 that the appellant had assaulted the deceased. PW 1 did not state that she had informed PW 3 about the involvement of the appellant. Even, PW 2, who also appeared in the place of occurrence after P W 3, did not state any thing regarding disclosure made by PW 1.

16. Shri Fazol Boro (PW 4), who appeared in the place of occurrence, stated that he was informed by PW 1 that the deceased was assaulted by the appellant. But his evidence that he was informed by PW 1 has not been corroborated by PW 1 herself. Hence, we do not find it safe to believe that the evidence of PW 3 and PW 4 that they were informed by PW 1 regarding involvement of the appellant.

17. Smti Monju Boro, wife of the appellant, deposing as P W 5, stated that she did not know as to how the deceased died. Of course, she stated that he had told the police, out of fear, that her husband had assaulted the deceased. There is nothing, on record, to show that this witness was present at the time of incident. Therefore, her evidence, that her husband had assaulted the deceased, lacks corroboration. That apart, she explained that she made the statement before the police, implicating her husband, out of fear. Therefore, we find no force in the evidence of PW 5 to believe that the appellant had given the fatal blow.

18. Shri Ranjit Boro, brotherinlaw of the deceased, deposing as PW 6, stated that he was informed by his brother Shri Babul Boro that some one had assaulted the deceased. This witness gave a new story by saying that the appellant had confessed before him that he had assaulted the deceased with a piece of wood. He also stated that the appellant led police to the place where he had kept the said piece of wood and that on being shown by him, police had seized the said wood vide Ext. 1.

In his crossexamination, this witness stated that he met the appellant, when the later was taken to the village by the police.

From the above evidence, given by PW 6, it appears that the deceased had made the alleged confession, while he was in the custody of the police. Therefore, the same being hit by Section 26 of the Evidence Act, his evidence regarding the said extra judicial confession cannot be accepted.

19. Shri Suren Boro, deposing as PW 7, stated that the appellant was murdered by some body. He was a witness to the seizure of a piece of wood (Material Ext No. 1) by police.

20. Shri Gopal Boro, another brotherinlaw of the deceased, deposing as PW 8, stated that hearing alarm, raised by PW 1 and others, he rushed to the house of the deceased and found the later lying in injured condition. He also stated that, on being asked, the deceased told him that he was assaulted by the appellant, with a piece of wood.

In his crossexamination, this witness stated that he did not state before the

police about the dying declaration made by the deceased. This witness again stated that he stated before the police about the involvement of the appellant and Shri Rajot Boro.

From the evidence of PW 3 (Shri Babul Boro), it has been found that the deceased was in unconscious state. Therefore, the evidence of PW 8 that the deceased made dying declaration is not believable. That apart, P W 8 has admitted that he did not state before the police that the deceased had made dying declaration. His failure to disclose such vital information, at the initial stage, i.e. at the time of giving statement, under Section 161 Cr. P.C., raises doubt about the veracity of the evidence given by PW 8.

21. Shri Saban Boro, another brotherinlaw of the deceased, deposing as PW 9, stated that he came to know that the appellant had assaulted the deceased. His evidence appears to be hearsay evidence. He further stated that after about 15 to 20 days of the occurrence, police had taken the appellant to the village and that the appellant confessed that he had assaulted the deceased. From his evidence it is found that the said confession was made by the appellant, in the custody of the police, as such the same being hit by Section 26 of the Evidence Act, cannot be accepted as evidence.

22. Shri Angad Rajbangshi, SubInspector of police, deposing as P W 10, stated that he conducted the inquest in respect of the dead body of the deceased. He has exhibited the inquest report, as Ext. No. 2.

23. Shri Lalit Buragohain (PW 11) and Shri N.K. Baruah (PW 13) are the investigating officers, who conducted investigation.

24. From the above discussed evidence, we find that none of the prosecution witnesses saw the appellant assaulting the deceased. Only PW 1, i.e. the wife of the deceased stated that in the focus of torch light, in her hand, she could see the appellant running away from the place of occurrence. But she did not disclose such vital information before the police, at the time of giving statement under Section 161 Cr.P.C. Therefore, her subsequent statement, given at the time of trial, that she had seen the appellant, running away from the place of occurrence, is not free from doubt and as such the same cannot be accepted as substantive and reliable evidence to hold that, none other than the appellant, had caused the fatal injuries to the deceased. PW 1, nowhere stated that she had seen the appellant either inflicting injuries.

25. Though PWs 2 and 8 stated that the deceased had made dying declaration, involving the appellant. PW 3 stated that P W 2 and PW 4 (Shri Fozal Boro) followed him to the place of occurrence. PW 3 and PW 4 did not make any whisper, regarding dying declaration, made by the deceased. The evidence of PW 3 and PW 4, that the deceased was found in unconscious state, indicates that he was not in a position to speak. Hence, it is not believable that the deceased had made dying declaration.

That apart, in view of the evidence, given by PW 3, who met the deceased, prior to PW 2, if the deceased had made any dying declaration, PW 3 should have heard the same or came to know about the same, but P W 3 was silent about such dying declaration. Shri Fozol Boro (PW 4) negated the possibility of making any dying declaration by the deceased; in as much as, he clearly stated that the deceased was in unconscious condition. Therefore, it is not believable that the deceased had made any dying declaration. That apart, in the FIR (Ext. 6), no mention has been made about the dying declaration. Failure to disclose such vital information in the FIR also raises doubt with regard to the prosecution version regarding dying declaration.

26. Though PW 6 and PW 9 stated that the appellant had made confession, it is found that the appellant, at the time of making the alleged confession, was in the police custody and as such, the same, being hit by section 26 of the Evidence Act, cannot be accepted as legal evidence.

27. In view of the above discussion, we find that the prosecution failed to establish, by adducing substantive evidence, that the appellant caused the fatal injury on the fateful evening. Law is well settled that in a criminal trial, the prosecution is required to prove the case, beyond all reasonable doubt and the benefit of doubt should always go in favour of the accused person(s). Therefore, we are inclined to hold, in the present case, that the appellant is entitled to get the benefit of doubt.

28. In view of what has been discussed above, we find sufficient merit in this appeal, requiring interference with the impugned conviction and sentence. Accordingly, the appeal is allowed. The impugned conviction and sentence are set aside. The appellant is acquitted. He set at liberty forthwith, if not required in any other case.

29. Return the LCR.

30. For the sake of brevity, without repeating the discussions made in the Criminal Appeal No. 93(J) 72005 (disposed of on 22.12.2011), with regard to the victim compensation, as provided by Section 357A Cr.P.C, we make the following directions :

(1) As an interim relief, and without prejudice to the right of the dependants of the victim to claim higher amount, an amount of Rs.50,000/ be deposited by the State Government with the District Legal Services Authority of Kamrup District within a period of two months from this date. The District Legal Services Authority, on receipt of the said money, shall make an enquiry to ascertain as to whether, there is dependant(s), who suffered loss and injury as a result of death of the deceased and also if such dependent(s) or legal representative(s) need any rehabilitation."

(2) Upon such enquiry, if it is found that the dependent(s), if any, need rehabilitation, then the District Legal Services Authority shall initially release the

said interim amount and thereafter direct payment of adequate compensation, as may be prescribed by the scheme to be prepared by the State Government. It is made clear that if the District Legal Services Authority, after due enquiry, arrive at the findings that there is no dependent(s) or that the dependent(s) of the deceased/victim does not require any rehabilitation, then the District Legal Services Authority, shall refund the said amount of Rs. 50,000/, without delay, in favour of the State Government.

31. Let a copy of this judgment and order be furnished to the Chief Secretary to the Government of Assam, for doing the needful.

32. We record our appreciation for the services, rendered by Sri A.K. Phukan, as Amicus Curiae and direct that an amount of Rs. 5,000/ be paid to him as his remuneration, by the State Legal Services Authority.