
(1977) 02 GAU CK 0001
In the Gauhati High Court

Birsingh Majhi and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 08-02-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 288

Evidence Act, 1872 — Section 145, 154

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (1977) CriLJ 1349

Hon'ble Judges : S. Rangarajan, J;B.N. Sharma, J

Bench : Division Bench

Judgement

S. Rangarajan, J.—The three appellants, namely, Bir Singh Majhi, Mohan Majhi and Chutu, have been convicted u/s 302 read with Section 34, I. P. C. and sentenced to undergo imprisonment for life by the learned Sessions Judge, Nowgong, in the following circumstances :

2. The case for the prosecution is that on 20-1-1972 at about 7/8 P. M., Mohan Barik (deceased) of village Gohaingaon (within the limits of Samaguri Police Station) was sitting in the courtyard of his house near a fire for the purpose of warming himself along with his young son aged about 8 years Bulu Barik (P. W. 3) ; the wife of the deceased Mustt. Moina Barik (P. W. 2) was taking her meal inside the house. At this juncture all the abovenamed three appellants came in a body armed with lathi, axe and dao, respectively, and assaulted the deceased, on seeing which P. W. 3 shouted. On hearing the alarm, P. W. 2 came out and saw the three appellants running away from the courtyard after having assaulted the deceased. P. W. 3 told his mother P. W. 2 about all the three appellants (by naming them) having assaulted his father and having gone away. Mohan Barik died on the spot and fell down near the fire. Rengta Majhi and Bhim Kanda (P. Ws. 4 and 5, respectively) and Bharat (not examined), who were neighbours came there on hearing the alarm. P. W. 2 mentioned the names of the three appellants as the assailants ; P. W. 3 was with them there but, young as he was, he did not say anything.

3. P. W. 2 thereupon went to the Secretary of the V. D. P. Bubul Kalindi (P. W. 8) accompanied by P. W. 3, and informed him about the occurrence, mentioning the names of three appellants as the assailants, P. W. 8 informed 2/4 persons of the V. D. P. who were residing near him. P. W. 8 went to the place of occurrence along with p. Ws. 2 and 3 saw the body of Mohan Barik lying in the courtyard by the fireside with cut injuries on the head ; he was lying dead in a pool of blood on the ground. Since they were afraid of going out that night P. W. 8, accompanied by P. W. 2, went to Samaguri Police Station where P. W. 2 gave an ejahar (Ext. 6) at about 10.30 A.M. on 21-1-1972 ; the distance between the place of occurrence and the police station is said to be ten miles. As the ejahar reads P. W. 2 had seen the appellants assaulting her husband by giving blows which were said to have been with dao. It may be noted that there is no reference therein to either the axe or the stick (lathi). The evidence which P. W. 2 gave before the trial Court shows that when she came out of the house on hearing the alarm of P. W. 3 she saw her husband lying "on the fire" (the other evidence is it was near the fire) and three persons running away. The deceased had no burns ; he must, therefore, have only fallen near the fire as stated by P. W. 3. P. W. 3 told her that the appellant Chutu had cut with dao and appellant Mohan with axe (para-shu).

4. Miss Das who argued the ease amicus curiae for the appellants drew our attention to the fact that there is a statement in the committal order about P. W. 2 having been declared hostile by the prosecution (vide page 6 of the paper book). But it does not appear from the evidence of P. W. 2, as it reads, that the prosecution had either sought permission to treat her as hostile or that the Court declared her "hostile". The fact that no question had been addressed to P. W. 2 even as a preliminary to seeking to treat her as hostile, would indicate that notwithstanding her being treated as hostile in the committing Court she was examined by the public prosecutor in the trial Court and that she was not put forward as an "unfavourable" witness. P. W. 2 was not confronted with any contradictions between her testimony in the committal Court and in the trial Court. The statement of P. W. 2 before the committing Court had not been transferred to the record u/s 288, Cr. P. C. (old). Even the Investigating Officer Ananta Charan Dawka (P. W. 10) who had recorded the ejahar was not questioned about any variation between her testimony before the Court and the ejahar which he had recorded himself. Neither P. W. 2 nor P. W. 10 have been confronted, as they ought to have been, u/s 145 of the Evidence Act, in this respect, if there was any intention to treat her as hostile in the trial Court. Besides, we are unable to even exclude the possibility of the ejahar itself having been recorded in that manner somewhat inaccurately by the Investigating Officer having understood P. W. 2 as having herself actually seen the assault when she had, as she stated before the trial Court spoken only of her son (P. W. 3), who purports to have actually witnessed the assault mentioning the names of the assailants to her, so soon after the occurrence. It does not, therefore, appear proper to treat P. W. 2 as a witness who, in the conventional sense, was "hostile"

to the prosecution.

5. Even if it is possible to so regard her it has now been held by the Supreme Court in *Sat Paul Vs. Delhi Administration*, that the discretion conferred on the Court u/s 154 of the Evidence Act is unqualified and untrammelled, quite apart from the question of any "hostility". The legal positions both in England and in India have been discussed at great length (vide paras. 29 to 51) Sarkaria, J., who spoke for the Supreme Court (Bhagwati, J. with him) came to the conclusion that the mere fact of a witness being treated as hostile would not result in the testimony of the witness being squarely and totally discredited. It will be a matter for the Judge to consider, in each case, whether the testimony of the said witness could be safely acted upon and whether there was sufficient corroboration in respect of the same. Applying the same principle to the present case we have far less difficulty in considering P. W. 2, to whom no motive of any kind was even suggested, as a witness of truth ; she gave her evidence in a natural and unsophisticated manner. Her testimony concerning the appellants being the assailants, a fact which she learnt from P. W. 3, has also been corroborated by Rengta Majhi (P. W. 4) and Bhim Kanda (P. W. 5) ; P. Ws. 4 and 5, along with Bharat (not examined) went to the house of the Gaonbura of Gohaingaon Lolow Tamuli (P. W. 6) that very night and reported about the incident. According to P. W. 6, it was Bharat (not examined) who told him that Mohan Majhi (the appellant) had cut Mohan Barik and that P. Ws. 4 and 5 also accompanied Bharat. P. W. 6 had asked them to go home and come next morning when they would all go to the Police Station ; he was then suffering from fever ; hence he could not go to the place of occurrence the same night. P. W. 6 also stated that even before P. Ws. 4 and 5 and Bharat (not examined) came to his house when he was sleeping and informed him about the occurrence mentioning the names of the appellants as the assailants. Earlier the appellant Mohan Majhi had called him from outside the house stating that he had cut Mohan Barik. P. W. 6 enquired from the appellant Mohan Majhi whether Mohan Barik had died, to which Mohan Majhi replied that he was not dead. P. W. 6 did not go out of the house but was able to recognise the voice of the appellant Mohan Majhi, who used to address him as "Kaka". The other two appellants were talking with the accused Mohan Majhi outside his house ; he could recognise their voices also,

6. Gokul Bora (P. W. 7). the president of Borjuri Gaon Panchayat stated that P. Ws. 4, 5 and Bharat (not examined) went to his house at about 10. A. M. and told him that all the three appellants had cut Mohan Barik. P. W. 7 was also informed that information had been sent to the V. D. P., who had sent his men to the scene of occurrence. Since his wife was suffering from illness, P. W. 7 was not able to come out that night and expressed his inability to the persons who came to him.

7. Ananta Charan Dawka (P. W. 10), the officer-in-charge of the Samaguri Police Station, who recorded the ejahar from P. W. 2 at 10-30 A. M. on 21-1-1972, took

up the investigation and arrested all the three appellants at their residence on the same day. According to him, the appellant Mohan Majhi brought out an axe which he seized under list Ext, 1 ; appellant Chutu brought out a dao, which he seized under Ext. 2 ; appellant Bir Singh brought out a lathi, which he seized under Ext. 3. P. W. 10 also seized some other articles like burnt clothes, two wooden pirahs etc, on which the deceased and P. W. 3 were sitting at the time of occurrence. It was further elicited in the cross-examination of P. W. 6 that Mohan Majhi had brought out a dao and axe from his house. But the seizure list (Ext. 1), which P. W. 6 has attested, shows that the axe alone was seized, when it was produced by Mohan Majhi ; Ext. P-2, which also has been attested by P. W. 6, shows that Chutu produced the Dao from his house. That these facts were not brought out in the re-examination of P. W. 6, as they ought to have been, is just a sample of the scant attention which is being paid by Public Prosecutors even to Sessions Trials ; numerous such lapses on the part of Public Prosecutors have come to our notice. This feature does not, fortunately for the prosecution, affect the credibility of concerned witnesses in this case.

8. The doctor p. W. 1 (Dr. A. Nayak), who conducted the autopsy noticed the following injuries on the deceased :

1. One cut mark over the scalp in the region of occipital bone, cutting the occipital bone and also the brain matter of the size 6" X1".
2. One cut mark over the back left scapular region muscle deep of the size 2" X1".

9. P. W. 1 was specific that he had not detected any other injury. Death, in his opinion, was due to shock and haemorrhage as a result of both the injuries, which, he said, were sufficient, in the ordinary course of the nature, to cause death. During cross-examination it was specifically elicited from him that he did not find any injury caused by a blunt weapon. P. W. 1 said that injury No. 1 could be caused by a weapon like an axe (material Ext. 1) and injury No. 2 could be caused by the weapon marked as material Ext. 2. Neither the axe nor the dao which was recovered by P. W. 10 were sent for serological examination ; this is probably due to P. W. 10 not detecting blood on those two weapons. It is not unusual for assailants to wash the weapons used to kill somebody before or after they are taken home, when they are so taken. This only means that we do not have the advantage of any further corroboration which would be there if human blood-stains had been detected on the two weapons. The positive evidence of P. W. 3 (the son of the deceased) aged about 8 years is that Chutu gave a blow with dao on his father's head ; Mohan Majhi assaulted him with the axe ; in respect of them there were corresponding injuries on the deceased. But P. W. 3 also added that Birsingh Majhi assaulted his father on the back and head with lathi ; this portion of his testimony does not get any support from the testimony of P. W. 1, who did not detect any other injury than the above injuries 1 and 2. P. W. 3 mentioned the places where the dao landed ; he could not mention where the axe landed. This would depend on the power of observation, particularly of a

young boy ; this very minor discrepancy would not impair the evidence of P. W. 3, which otherwise commends itself to us, as it did to the trial Judge. The value to be attached to minor discrepancies, as distinguished from major discrepancies, contradictions and improbabilities, has been explained by Bhagwati, J., speaking for the Supreme Court in *Caetano Piedade Fernandes v. Union Territory of Goa, Daman and Diu* AIR 1977 SC 123 : 1977 Cri LJ 167. In that case, unlike in the present, the evidence of a child witness suffered from serious infirmities and contradictions. It was in that connection Bhagwati, J. discussed (vide para. 5) the various factors that led to disbelief of the child witness and took care to point out that they were not "contradictions" of a "minor character." A criticism was levelled by Miss Das that the evidence of this child witness had not been recorded in the form of questions and answers but only in the narrative form. There has, nonetheless, been a clear and cogent record of his evidence by the learned trial Judge who has apparently been able not only to follow his evidence closely but also to record it carefully. Yet another criticism of Miss Das was, that even if the learned trial Judge had satisfied himself about P. W. 3 being able to answer and that the witness appeared to be quite intelligent and understood what was right or wrong, he had not again recorded the questions which he put to the witness and the answers which he gave in order that the appellate Court would be able to appreciate whether the estimate by the trial Judge, of this witness's capability was correct. But having regard to the fact that the learned trial Judge has expressed himself unequivocally and very clearly on the question of the ability of the witness to understand and to distinguish between right and wrong and the clear record of P. W. 3's evidence which he has made, we do not think we would be justified in taking a different view of the witness's intelligence of his capacity to distinguish between right or wrong, merely because the questions and answer which enabled the trial Judge to say so have not been recorded. It seems to us that there is no cogent reason for discarding the testimony of P. W. 3, especially to the extent to which it also receives corroboration from P. W. 2 also, particularly when the names of all the three assailants had been given to the neighbours, among whom were P. Ws. 4 and 5, shortly after the occurrence, despite the ejahar having been given the next day. P. W. 4 and P. W. 5 had also, in turn, communicated what they had learnt from P. W. 2 to P. Ws. 6 and 8. The evidence of the prosecution in this respect, including that of P. Ws. 2 and 3, seems to us to be quite acceptable and points to the appellants Mohan and Chutu having dealt blows with the weapons attributed to them on the deceased. On account, however, of the doubt which arises by reason of the lathi blow, attributed to appellant Bir Singh Majhi, not being supported by the medical testimony we consider it appropriate to give the benefit of that doubt to the said appellant, though we do not disbelieve his presence at the scene of occurrence. There can be no doubt that when the appellants Mohan and Chutu attacked the deceased in the manner they did and caused injuries which are sufficient in the ordinary course of nature to cause death, they did so with the common intention of killing Mohan Barik ; the offence which they committed was one of murder, in pursuance of their common

intention to commit the said offence, an offence punishable u/s 302 read with Section 34, I.P.C. The convictions and the sentences (the minimum that could be imposed) on appellants Mohan and Chutu are, therefore, confirmed and their appeal is dismissed so far as they are concerned. The conviction and sentence of appellant Bir Singh Majhi are set aside and his appeal is allowed. Appellant Bir Singh Majhi is directed to be set at liberty forthwith unless he is liable to be detained for any other cause.