
(2021) 09 GAU CK 0009
In the Gauhati High Court
Case No : Criminal Appeal No. 48 Of 2011

Bitupan Borah

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 02-09-2021

Acts Referred:

Indian Penal Code, 1860 — Section 302, 304II
Code Of Criminal Procedure, 1973 — Section 164, 281, 313

Citation : (2021) 09 GAU CK 0009

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : A. K. Gupta, B. B. Gogoi

Final Decision : Allowed

Judgement

1. Heard Mr. A. K. Gupta, learned counsel for the appellant and Mr. B. B. Gogoi, learned Addl. Public Prosecutor, Assam.

2. This criminal appeal is preferred against the judgment and order, dated 20.12.2010, passed by the learned Sessions Judge, Jorhat in Sessions Case No. 114(JJ) of 2008, whereby the appellant is convicted under Section 304, Part II of the IPC and sentenced to undergo rigorous imprisonment for 5 (five) years and to pay a fine of Rs. 5,000/- (Five Thousand) only, in default to undergo rigorous imprisonment for 3 (three) months.

3. The prosecution case in brief is that one Sri Babul Borah lodged an Ejahar before the Officer-in-Charge of Pulibor Police Station, stating inter-alia that his uncle Lakhi Kanta Borah had quarrelled with his son, i.e. the appellant and that the appellant inflicted blow on his father by means of a Lathi, used for hanging mosquito net, causing injury to the head of Lakhi Kanta Borah, which resulted into his death. On receipt of the said FIR, Pulibor P.S. Case No. 130/2007 under Section 302 of the IPC was registered against the appellant and police commenced investigation.

4. After completion of investigation, the police laid a charge-sheet under Section 302 of the IPC against the appellant. After committal, the learned Sessions Judge, Jorhat framed a charge as charge sheeted. The appellant pleaded innocence. Thereafter, the prosecution examined 7 (seven) witnesses and the appellant was examined under Section 313 Cr.P.C. The appellant did not adduce any defence evidence. On conclusion of trial, the learned Sessions Judge convicted and sentenced the appellant, as stated above.

5. A perusal of the evidence of P.W.1, Babul Bora, son of Nila Kanta Bora, the informant and cousin brother of the appellant, it is revealed that he did not witness the alleged occurrence that took place at the house of the deceased and the appellant at about 9.30 P.M. and, as such, he could not say how the deceased died. The prosecution declared him as a hostile witness. Likewise, P.W.2, Babul Bora @ Gogoi, son of Lakhan Bora, stated that he also did not witness the alleged occurrence. However, he testified to have seen the deceased lying on the floor and the appellant on the bed, when the police arrived. Turning to the evidence of P.W.3, Kanduri Bora, the mother of the appellant, it is revealed that her husband was alcohol addict and was suffering from hypertension. At the relevant time of the occurrence, she was outside home and after return, she, finding her husband lying, raised hue and cry. She could not say as to how her husband died. The prosecution declared her as a hostile witness. P.W.4, Reben Bora, who rushed to the house of the deceased hearing from the villagers to the effect that Lakhi Kanta died and found him lying dead and did not find the appellant. On the other hand, the evidence of P.W.6, S.I., Nidamul Islam, the Investigating Officer of the case, testified to the steps he had undertaken during investigation. P.W.5, Dr. Shyamanta Madhab Sharmah, the doctor, who performed the post-mortem examination on the deceased, on 01.08.2007, held the opinion that the cause of death of the deceased was coma as a result of head injuries sustained vide Ext.4, his said report and further added that M.Ext.1, one piece of mosquito stand may cause such injuries.

6. The Supreme Court held that merely because a witness is declared hostile, his entire testimony cannot be excluded from consideration. Here, it is noticed from the evidence of P.W.1 and P.W.3, who were declared as hostile witnesses, did not witness the alleged occurrence, more particularly, by P.W.3, the deceased's wife. Even P.W.3 hinted that her deceased husband was alcohol addict, who consumed alcohol everyday since morning and suffered from hypertension. Further, as noticed above, neither P.W.2 nor P.W.4 could say how the incident took place. However, the evidence only reveals that Lakhi Kanta died inside his dwelling house and died due to coma as a result of sustaining head injuries.

7. The entire prosecution case rests on the confessional statement of the appellant under Section 164 Cr.P.C. vide Ext.6, he, of course, retracted in his statement under Section 313 Cr.P.C. P.W.7, M. K. Saikia, the learned Judicial Magistrate, 1st Class, Jorhat, recorded the aforesaid confessional statement of the appellant on 02.08.2007. His evidence shows that the appellant was

produced before him on the previous day at around 4 P.M. and after cautioning him about the legal consequences of making a confessional statement remanded in judicial custody for reflection with direction to reproduce him on the following day, that is, on 02.08.2007 and accordingly, the appellant was produced at 11:00 A.M. by the Court constable. Thereafter, the learned Magistrate again cautioned him as before and allowed him 3 hours time for reflection. Then on being satisfied that the appellant wished to make the statement voluntarily, his confessional statement was recorded.

8. A perusal of the confessional statement of the appellant vide Ext.6, it appears that since his childhood, he witnessed his father (the deceased) torturing his mother and on 31.07.2007 at about 10 P.M., when his father wanted to cut his mother, P.W.3, after a chase, he wanted to resist him by a mosquito stand at his dao wielding hand, accidentally, it stuck on his head.

9. By the impugned judgment and order, the learned Trial Court has accepted the aforesaid confessional statement. It is noticed from the evidence of P.W.7 that the provisions of Section 164 Cr.P.C. were complied with in form, but not in essence inasmuch as no enquiry was made from the appellant regarding the treatment he had been receiving in custody in order to ensure that he was not subjected to any extraneous influence or police influence and further, he, aged about 20 years, was apparently not given sufficient time (not even 24 hours) for reflection to satisfy that he really wanted to make the confession voluntarily to meet the necessary compliance of Sections 164 and 281 Cr.P.C. beyond doubt. Therefore, this Court is constrained to hold that in the backdrop of prosecution evidence aforementioned, it is hard to place any reliance on the confessional statement of the appellant to warrant his conviction of the offence under Section 304, Part II of the IPC, attributing on him culpable homicidal act not amounting to murder of his father.

10. Accordingly, the appeal stands allowed setting aside the impugned judgment and order. The accused/appellant is set at liberty.

11. Return the LCR.