
(2011) 06 GAU CK 0002
In the Gauhati High Court
Case No : Criminal Appeal No. 70 of 2003

Brajalal Deb and Others

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 17-06-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 154
Penal Code, 1860 (IPC) — Section 302, 304, 323, 326, 34

Citation : (2011) 4 GLR 103

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : M. Kar Bhowmik and Ms. S. Sarkar, for the Appellant; R.C. Debnath, Spl. PP., for the Respondent

Final Decision : Dismissed

Judgement

Hrishikesh Roy, Judge

1. Heard Mr. M. Kar Bhowmik, learned Senior Counsel appearing for the accused appellants. The State is represented by Mr. R.C. Debnath, the learned Spl. Public Prosecutor.

2. This appeal is presented against the judgment dated 29.08.2003 in Sessions Trial No. 47(NT/K)/1998 rendered by the First Track Court (Addl. Sessions Judge), North Tripura, Kailashahar. By the impugned judgment, the appellants have been convicted u/s 304 Part-II read with Section 34 IPC and sentenced to suffer R.I. for 4 years. They have also been convicted u/s 323 read with Section 34 of IPC and have been sentenced to suffer S.I. for 6 months.

3.1. According to the prosecution story, on 21.08.1996 at about 5 O'clock in the morning in the village West Kanchanbari, Brajalal Deb along with his younger brothers Bikash and Bimal and servant Brajendra Sabdakar, attacked Banka Behari Dey (hereinafter referred to as "the deceased"), his wife (PW 5) and

daughter (PW 14) with various farming implements in the paddy field, on the eastern side of Brajalal's house over a dispute on cutting of paddy. The attackers hit victim on their head, chest, back and other parts causing bleeding injuries and the injured were dispatched for medical treatment to Kanchanbari PHC. The seriously injured Banka Behari Dey was thereafter referred to R.G.M. Hospital at Kailashahar, where he succumbed at about 12 noon on the next day i.e. on 22.08.1996.

3.2. On the basis of the FIR lodged by a neighbour Sushen Majumder (P.W. 13) the Fatikroy P.S. Case No. 83/1996 under Sections 325/326/34 of IPC was registered. The Investigation Officer (I.O.) visited the place of occurrence (P.O.) and, inter alia, seized cut bundles of paddy and several (different size) Hujas (made of heavy bomboos tapering from the centre with pointed ends) commonly used by farmers, for carrying bundles of ripe paddy. Some bloodstained garments including 2 bloodstained chadars used for shifting the deceased and his wife Bina Rani Dey, were seized from the Hospital. The I.O. questioned the witnesses and arranged for Post Mortem examination when the deceased died in the next day.

4. The accused after absconding initially, surrendered and were arrested by the police on 19.09.1996. They were charge sheeted under Sections 323/326/302 read with Section 34 of the IPC and since the accused claimed to be innocent, the case was put to trial where the prosecution introduced 19 witnesses, the defence did not examine anyone from their side.

5.1. In the trial P.W.1, P.W.2, P.W.3, P.W.4 and P.W. 8 were presented as eyewitnesses whereas, P.W.5 and P.W.14 were the injured wife and daughter, of the deceased.

5.2. P.W. 1 Mantu Sen stated that on 21.08.1996 at about 5/5.30 a.m. while he was proceeding to his own field, Niyoti Dey, the daughter of the deceased called him from the paddy field (P.O.) adjacent to Niyoti's house and informed that her parents are injured and they be shifted to the hospital. The witness stated that he saw the 3 accused Brajalal, Bikash and their servant Brajendra, fleeing to their house, from the eastern direction of the P.O. The P.W. 14 Niyoti informed the witness that 3 accused had assaulted her parents. She told the same thing to P.W. 2, P.W. 3 and P.W. 4 who also arrived at the P.O. immediately, on the cries raised by the injured daughter. The witness accompanied the injured victims to Kanchanbari PHC where Niyoti and her mother were admitted. But the deceased was referred to R.G.M. Hospital at Kailashahar. The witness also stated that the deceased was the uncle of the accused Brajalal and Bikash and there was an ongoing land feud between them.

In his cross-examination, P.W.1 stated that the paddy land where the deceased and his wife were lying injured, belongs to accused Brajalal Deb. The witness saw 10 bundles of cut paddy at the P.O. and stated that the paddy field in question, was under possession of the accused.

5.3. While they were going to their respective paddy fields in the early morning for ploughing their lands, P.W. 2, P.W. 3 and P.W. 4 also reached the P.O. by responding to the cries of Niyoti, the daughter of the deceased. When they reached the P.O. they found the deceased and his wife lying in unconscious condition with blood injuries on various parts of their body and were informed by Niyoti that the accused had made the assault. The 3 witnesses along with P.W.1 accompanied the injured to the Kanchanbari PHC. They stated that the deceased and his wife had to be carried from the P.O. to the hospital.

But since these PWs retracted from their earlier Section 161 CrPC statement where they claimed that they saw the 3 accused fleeing from the P.O., they were declared as hostile and were subjected to cross-examination by the prosecution.

The retracted portion of their respective statements given to the police were proved as Exbt. P.2, Exbt. P.3 & Exbt. P.4. In these exhibits, it was reflected that PW2, PW3 and PW4 had stated to the police that when they were rushing to the P.O., they could see the accused Brajalal, Bikash and their servant Brajendra, running away and entering the house of Brajalal.

5.4. Bina Rani Dey is the injured wife of the deceased who deposed as PW 5. She stated that in the early morning on the day of incident, while she was at the pond, she heard sounds on rushing towards the courtyard she found that, the deceased was being dragged out from their hut by Brajalal, Bikash, Brajendra and acquitted accused Bimal. Her husband was dragged to the paddy field and was assaulted by the accused. She raised alarm and rushed to protect her husband and she was hit with Lathi by Brajalal and other accused and she fell down unconscious, But before she lost her senses, she saw the accused hitting her husband with different farming implementations like Huja, Jhata, Lathi etc. On gaining her senses, she found herself with her injured daughter Niyoti, at the Kanchanbari PHC and learnt that her husband was shifted to R.G.M. Hospital at Kailashahar. She remained in the hospital for about 7 days.

In her cross-examination, she admitted that the paddy at the P.O. was grown by the accused Brajalal.

5.5. The daughter of the deceased Niyoti was presented as P.W. 14 in the trial. She was also at the pond with her mother and followed her mother to the P.O. to protect the deceased, who was being assaulted by the accused. She too was hit with a Lathi by Brajalal and sustained injuries on her head and other parts of the body. She saw Bikash keeping her father in a stranger hold in between his knees and Brajalal and Brajendra assaulting the deceased. On hearing her cries, PW1, PW2, PW3, and PW4 came to the P.O. and shifted the injured to the Kanchanbari PHC.

In her cross-examination, she conceded that the accused Brajalal and Bikash came for harvesting the paddy grown by the accused themselves. But the P.O. was claimed by the witness to be owned by the victim party. She stated that because it was early morning, apart from the 4 PWs, other villagers were not

present at the P.O.

5.6. The son of the deceased is Binoy Krishna Dey (PW.8), who had gone for his tuition when the incident occurred. He stated that after hearing alarm, he returned back and found the accused assaulting his parents and sister. He claimed to have witnessed the occurrence from a distance of 200/300 cubits. He left the place out of fear and went to Kanchanbari hospital where he found his parents in unconscious and injured condition. He accompanied his father when he was shifted for better treatment to Kailashahar Hospital. Next day at about 12 noon, his father expired. The witness stated that the accused Brajalal, Bikash and Bimal are his cousins and the incident occurred over a land feud.

In his cross-examination, the witness stated that while on his way from Kanchanbari PHC to Kailashahar hospital, since the road goes via the Fatikroy police station, the incident was orally reported to the police, while they were carrying the deceased to the Kailashahar hospital.

5.7. PW 13 is Sushen Majumder who lodged the FIR, which was written by PW. 15 Naresh Ch. Basak. He was a witness to the seizure of the "Jhatas" and the Lathi as well as the cut paddy, from the P.O. and is a signatory to Exbt.P.1.

5.8. PW. 15 was the scribe who wrote the FIR at about 1 p.m., on being directed by PW13 Sushen Majumder and one S.I. of police. The scribe and the informant however doesn't state when the written FIR was given to the police. But the O.C. of the Police Station testifies that the FIR Exbt. P. 10 was received at the Kanchanbari PHC in the late evening, on the day of the incident.

5.9. Shri Gopal Sinha, Officer-in-charge of Fatikroy Police Station was examined as PW 12. He stated that while he was on patrol duty at about 20:15 hours on 21.08.1996, he received informant about an incident in West Kanchanbari village. But since details were lacking and he learnt that the victims were admitted at Kanchanbari PHC, he reached the hospital at about 20:25 hours along with his patrolling staff. He found the injured in the hospital and received a written FIR from PW13 (Sushen Majumder) and entrusted S.I. Jaydeb Goswami for investigation. The FIR received by the O.C. is marked as Exct.P-10 and the same was formally registered as Fatikroy P.S. Case No. 83/1996, after the O.C. returned back to the police station, at about 23:00 hours.

6. The Post Mortem on the deceased was conducted by PW 16 who at the relevant time, was posted as the Medical Officer at R.G.M. Hospital at Kailashahar. In his Post Mortem Report (Exbt. P.12), he recorded 6 injuries on the deceased and the relevant portion of the Exbt.P-12 is reproduced hereinbelow for ready reference:

1. There was one lacerated injury over the right parietal occipital region size 3"X 1/2"X 1/2".

2. There was another lacerated injury over the right arm 1"X 1/4"X 1/4.

3. Another lacerated injury over the right lumbar region 1"X 1/2"X 1/2".
4. One penetrating injury over the chest wall in ventral aspect in eighth inter costal place. In right side piercing the muscles, pleura liver. Lower lobe of the right lungs, right diaphragm. Blood and blood clot and bile is seen in peritoneal cavity size of the said wound 1" X 1" deep to the liver direction of the track was oblique.
5. There were four nos. of abrasions seen in right forearm each 1/2".
6. Two nos. of abrasions seen in lateral aspect of the left forearm each 1/2".

The cause of death- hemorrhage shock and biliary peritonitis due to injury to liver and right lung.

Since injury No. 4 was a penetrating injury, one seized Huja was showed to the doctor and he affirmed that it was possible to cause the injury No. 4 with the exhibited farming implement (Huja).

7.1. Mr. M. Kar Bhowmik, learned Senior Counsel submits that accused were cultivating paddy for last several years at the paddy field land where the incident occurred, and therefore, it was the deceased and the injured, who trespassed into land under possession of the accused. Accordingly he contends that provocation was given by the injured party by entering the P.O. and interfering with cutting of the ripe paddy, which led to the alleged assault.

7.2. The Counsel refers to the testimony of PW. 15 to show that as a scribe he claims to have written the FIR at about 1 p.m. on 21.08.1996 but since the FIR was stated to have been received by the O.C (PW.12), only in the evening at about 2025 hours at the Kanchanbari hospital, the original FIR written by the PW.15 was not produced by the prosecution. He refers to the evidence of PW.8 (son of the deceased) to show that the earliest information of the incident was given to the police at about 10 a.m on 21.08.1996, when the deceased was being shifted to Kanchanbari hospital and the FIR of the case stated to have been received at about 2300 hours on 21.08.1996, is contended to contain an improved version of the case.

7.3. Mr. Kar Bhowmik reads out the testimony of the injured wife and daughter (PW.5 and PW.14) to show that although the witnesses had claimed that they rushed from the pond to the P.O. to protect the deceased, there is no mention of the pond in the sketch map (Exbt.P.14) prepared by the I.O. and accordingly their version of the incident is said to be not believable. He points out further that while the wife (PW.5) stated that from the pond she rushed to the courtyard of her house and then to the P.O., the daughter (PW.14) stated that the mother rushed straight to the P.O.

7.4. Referring to the Exbt. P. 1 which shows that apart from the Hujas and Lathi, a more lethal Jhata (a lathi with one iron hami attached to its thick end), was also seized from the P.O. and considering that the accused had not used the Jhata with its sharp iron end, the case according to the Counsel, doesn't fall u/s

304 Part-II of IPC and should be considered appropriately as one, u/s 335 of IPC. To show that the accused never intended the death of the deceased, the learned Counsel submits that the death was not instantaneous and the deceased succumbed at the hospital, only on the next day after the assault.

7.5. Mr. Kar Bhowmik submits that the evidence of the hostile witnesses (PW.2, PW.3 & PW.4) can't be used to prove that the accused had assaulted the deceased and the injured, as they were not eyewitnesses to the assault.

8.1. Mr. R.C. Debnath, learned Public Prosecutor at first refers to the evidence of the injured wife and the daughter of the deceased, to project that conviction can be based on the testimony of these 2 eyewitnesses only. He submits that the medical evidence on the injuries on the deceased, corroborates the testimony of PW. 5 and PW. 14 on the blows given by the accused and the farming implements used on the deceased and accordingly Mr. Debnath submits that interference with the conviction will not be justified in the Appeal.

8.2. On the earliest information given to the police, the P.P. points out that the information stated to have been given by the son to the Fotikroy Police Station, while the deceased was being shifted to the Kailashahar Hospital, mayn't be comprehensible and since the vagueness of the first information is reflected in the evidence of the O.C. who stated that no details was given in the earlier information and accordingly the case was later registered on the basis of the written FIR received at the hospital by the O.C. The P.P. further submits that in any case, an FIR has limited evidentiary value and if the case can be proved through other evidence, the defects in registering the FIR, will not prove fatal for the prosecution.

8.3. To show the presence of the accused at the place of occurrence, the learned P.P. submits that the injured witnesses had given clear testimony on the assault being made by the accused persons and their testimony is also corroborated by the evidence of the neighbourhood witness Mantu Sen (PW. 1), who reached the spot on hearing the cries of Niyoti. PW.1 had also testified that he saw all the 3 accused fleeing from the eastern side of the P.O. to the house of the accused Brajalal. He further submits that the retracted portion of the statement given by the other eyewitnesses (PW.2, PW.3 & PW.4), can't entirely be discarded and can be used for corroboration of evidence, of other prosecution witnesses.

8.4. On the absence of pond in the sketch map (Exbt. 14) prepared by the I.O., the P.P. submits that the normal practice of the I.O. is to highlight the P.O. and its surroundings and since the paddy field and the adjacent house of the deceased are reflected in the Exbt. P. 14, the non-indication of the pond in the sketch map from where PW 5 and PW 14 rushed to help the deceased, can have no material bearings, on the conclusion. He also submits that the PW.5 and PW. 14 clearly corroborates each other on this point since they stated that, they were at the pond when the incident started.

9. Mr. M. Kar Bhowmik, learned Senior Counsel has relied upon the decision in

Sevi V. State of Tamil Nadu reported in 1981 Cri. L.J. 736 to project that when the original FIR is suppressed and is substituted by another, the case presented by the prosecution becomes suspicious and adverse inferences should be drawn against the prosecution. In this case where the earliest information (given while the deceased was being shifted to the Kailashahar hospital) being incomprehensible, for O.C. to treat the written complaint received at about 8:15 p.m. in the hospital as the F.I.R. of the case may be an irregularity. In such cases, the Court has to shift the evidence with greater caution to examine the credibility of the prosecution witnesses. But considering the evidentiary value of an FIR, I feel that the prosecution case can't be rejected outright merely because, the police had not registered the case on the inadequate information received earlier, about the incident at West Kanchanbari village.

10. Before other aspects of the case are considered, it may now be appropriate to note the evidence of the investigating officer (PW. 18) of the case. In his evidence, the I.O. stated that although the police learnt of an incident at West Kanchanbari village, none could give any details of the occurrence. Therefore since the patrol party learnt that the injured were admitted to the Kanchanbari PHC, they visited the hospital where they received a written FIR. Amongst the articles seized by the I.O. (Exbt. P.1), the bamboo Hujas with pointed ends were mentioned. Significantly the I.O. testified about the marks of struggle in the courtyard of the deceased's house corroborating the injured PW.5 and PW.14 who stated that, the deceased was dragged out from the courtyard, to the P.O. in the adjacent paddy field.

On reading the testimony of the I.O. I feel that sufficient explanation for not considering the information earlier received at the Police Station (the same being devoid of any details of the occurrence) is given by the I.O. The absence of details could be because, the PW.8 was rushing to the hospital at Kailashahar, with his seriously injured father (deceased).

11. I find that the 2 material witnesses in the case are the 2 injured witnesses. They (PW.5 and PW.14) corroborate each other on all material particulars and what is important is that the medical evidence supports the testimony of the injured witnesses. As regards the minor discrepancy pointed out by the appellants that the PW.5 stated that she rushed to the P.O. via the courtyard of the house and PW.14 stated that her mother rushed straight to the P.O., I find from the Exbt. P.14 sketch map that the house of the deceased and the paddy field where the incident occurred, are adjacently located and a person rushing to the P.O. from the pond may also be passing via the courtyard of the deceased's house. Accordingly I see no material difference on the conclusion to be drawn, on the minor discrepancy on the route taken by the mother (from pond straight to P.O. or via the courtyard).

12. On the absence of the pond in the sketch map Exbt. P.14 of the I.O., one has to bear in mind that, the site sketch map mayn't have all details as the emphasis is on the P.O. and its immediate surroundings. During that stage of the

investigation, the I.O. mayn't be aware of the signifivance of the pond and that the injured witnesses had rushed from the pond to the P.O. Accordingly since the P.O. and its immediate surroundings have been noted in the Exbt. P.14, I think that not mentioning of the pond in the sketch map, will have no material bearing on the evidentiary value of the 2 injured witnesses.

13. In so far as the contention made by the appellants" Counsel that considering the choice of the farming implements used for the assault, it can't be said that the accused were aware that the resultant bodily injury is likely to cause death and therefore their conviction u/s 304 Part-II of the IPC is not sustainable, it must be noted that Huja which caused fetal injury on the deceased, although made of bamboo, can be used as a lethal weapon. Since Huja is used by farmers to shoulder carry the cultivated paddy, they are made of strong and heavy bamboos with sharp pointed ends and when assault is made with a Huja resulting in the 4th injury on the deceased, the assailants must be held to be aware that the resultant injury is likely to cause death. Furthermore the assault had felled the deceased and his wife and made them senseless at the P.O. and they had to be carried to the hospital in makeshift stretchers. This shows the intent of the assailants. Accordingly I see no reason to hold that conviction u/s 304 Part II is unjustified in the present case.

14. In this case although the son (PW.8) claims to be an eyewitness, considering that he claims to have seen the occurrence from a distance of 200/300 cubits and avoided rushing to aid his injured parents and sister and went to the hospital instead of the P.O., it is clear that he was not present near the crime scene but belatedly learnt of the incident. Accordingly, I do not consider him to be an eyewitness and reject that part of his testimony.

15. On the claim that the P.O. was under the possession of the accused where they were cultivating paddy for last several years, it is found from the evidence that deceased was dragged to the place of occurrence and there is no evidence to show that the deceased voluntarily went to the paddy field to either provoke or attack the accused. Therefore the deceased and the injured can't be said to be the aggressors who instigated the assault.

16. On the evidentiary value of the statement of the 3 hostile witnesses, considering the Sub-Section 154 of the Evidence Act, inserted through amendment made by Act 2 of 2006, I feel that the evidence of 3 hostile witnesses (PW.2, PW.3 & PW.4) can't entirely be discarded and can be used for the limited purpose of corroboration of the other evidence on record. Therefore considering the evidence of the independent eyewitnesses i.e. PW. 1 as well as the evidence of the 2 injured witnesses i.e. PW.5 and PW.14 to be consistent, I told that the statement given u/s 161 of CrPC by the 3 hostile witnesses (Exbt.P.1, Exbt.P.2, Exbt.P.3 and Exbt.P.4), have corroborative value, for the evidence given by the other prosecution witnesses and the same can be used for this limited purpose.

17. In so far as the specific deficiencies pointed out by Mr. Kar Bhowmik, on the earliest information received by the police not being the starting point of the criminal process or where the pond from where the injured witnesses rushed to the P.O., not being reflected in the I.O's. sketch map, these undoubtedly are deficiencies in this criminal investigation. But the important question is, whether the accused will have to be acquitted on that score. In my opinion the answer has to be in the negative since, truthfulness of the prosecution case has to be judged on the basis of the evidence available. The only rider in such cases is that, the Court is required to be cautious, while evaluating the evidence. Defective investigation need not necessarily lead to rejection of the prosecution case when the incident is otherwise proved. This approach finds support from the decision in *Visveswaran Vs. State Rep. by S.D.M.*,

18. In the context of not registering the earliest information as the FIR as submitted by the learned Senior Counsel, the Court in such situation, shouldn't place reliance on the FIR and treat it as a substantial piece of evidence. But if the other evidence are reliable and the case can be proved on that basis, irregularity in registering the FIR can't mean that other evidence are also tainted. A Criminal Court is required to assess whether the prosecution case is proved beyond reasonable doubt on the basis of the available evidence. When the Court can reach the necessary conclusion, without even considering the FIR, the consequence for the prosecution in my view, would not be fatal and accused are not entitled to acquittal on that score. The Apex Court in *Krishna Mochi and Others Vs. State of Bihar*, has also held that, if the First Information Report is not proved, it would not necessarily be a case for acquittal as the case will rest on the entire evidence, lead by the prosecution.

19. For the foregoing discussions, no merit is found in this Appeal and the same is dismissed. In view of this dismissal order, the accused appellants are ordered to surrender before the learned Trial Court on or before 8.8.2011, to serve out remainder of their sentence. They shall be given the benefit of set off, for the period earlier spent in custody. L.C.R. be returned forthwith.