
(2006) 09 GAU CK 0068
In the Gauhati High Court
Case No : Criminal Appeal No. 27 of 2005

Chagir Mia and Ors.

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 15-09-2006

Acts Referred:

Citation : (2008) 2 GLR 370

Hon'ble Judges : A.B.Pal, J and I.A.Ansari, J

Bench : Division Bench

Advocate : J.M.Choudhury, P.Sarkar, Advocates appearing for Parties

Judgement

I.A. Ansari, J.—By judgment and order, dated 24.3.2005, passed, in Sessions Trial No. 55(WT/A)/2003, the accused appellants stand convicted under section 302 read with section, 34 IPC and sentenced to undergo imprisonment for life and pay a fine of Rs. 10,000 each and, in default of payment of fine, suffer rigorous imprisonment for a period of one year.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be described, thus: There was a difference of opinion with regard to theft of some bags of cement, which allegedly took place at the construction site of Dipu, Amal and Uttam, who were friends and contractors and they suspected that accused Sankar and Ranjit might be involved in the said theft. On 27.10.2001, Dipu and Uttam went to their site, which was near the factory of accused Raimohan Sarkar and they met there accused Parimal, Raimohan Sarkar, Ranjit and Himangshu. An altercation took place between the two groups on the issue of theft of cement and the accused threatened Uttam and Dipu, whereupon Dipu and Uttam went to the house of Amal and informed him as to what had happened. Till about 7 p.m., all the three friends remained at Amal's house and, then, they came to the teastall of one Sishu Biswas at Bankumari Chowmuhani and when, sitting at the said teastall, at about 8:00 p.m., they were discussing the matter, accused Sahadeb came there in an autorickshaw and started instigating the other accused, namely, Sagir Miah, Latu Miah, Sajal Sarkar, Parimal Sarkar, Raimohan

Sarkar, Sankar Sarkar, Ajit Sarkar, Himangshu and uihers to do something. On noticing that the situation might become dangerous for them, Dipu, accompanied by Amal and Uttam, started from the said teastall for their respective houses. As Dipu and Amal wanted to, first, escort Uttam to his home, they proceeded towards Uttam's house; but when they reached near Raimohan Sarkar's factory, the present appellants, accompanied by the accused persons, came running and some of them were raising cries like "catch, catch". On hearing the shouts, Amal, Uttam and Dipu started running to save their lives, but the accused chased Amal, Uttam and Dipu and caught hold of, first, Amal, whereupon Amal was assaulted by accused Sagir Miah, Ranjit, Kami and Ajit with iron rods and lathis. Having been seriously injured, Amal fell down on the grund. From the place, where, Amal had so fallen, when Uttam and Dipu had covered barely a distance of 20 metres, accused Parimal, Raimohan Sarkar, Sankar Sarkar and Latu Miah started assaulting Uttam with iron rods and lathis and killed him on the spot. While Uttam was being so assaulted, the remaining accused chased Dipu; but Dipu, somehow, managed to hide himself behind the bushes, which were standing at a distance of about 20 yards from the place, where Uttam had been assaulted and killed. The bushes, so standing there, covered a distance of about oneandahalf kilometres. The assailants got together and conducted a search to trace out Dipu and they continued their search till about 11:00 p.m. In the meanwhile, on being informed that some incident had taken place at Bankumari Chowmuhani, Amal's brother, Bidur Lodh, came, along with some others, to Bankumari Chowmuhani and found dead bodies of Amal and Uttam lying there. On receiving information about the occurrence, police arrived, at 9:20 p.m., at the place of occurrence. The police held inquest over the said dead bodies and prepared a sketchmap. On the arrival of the police, at the place of occurrence, Bidur Lodh lodged a written Ejahar with the police. Based on this Ejahar and treating the same as the First Information Report, East Agartala P.S. Case No. 193/2001 under section 302/34, IPC was registered and, on completion of investigation, police laid chargesheet against all the accused under section 302/34, IPC.

3. To the charges framed against them under section 302 read with section 34, IPC, at the trial, all the accused aforementioned pleaded not guilty.

4. In support of their case, prosecution examined as many as 17 witnesses. The accused were, then, examined under section 313, Cr.PC and in their examination aforementioned, the accused denied that they had committed the offence alleged to have been committed by them, the case of the defence being that of denial. No evidence was adduced by the defence.

5. Having, however, found the present appellants guilty of the charge framed against them, the learned trial court convicted them accordingly and passed sentence against them as mentioned hereinabove. Aggrieved by their conviction and the sentence passed against them, the appellants are before this court with the present appeal. However, while convicting the present appellants of offence under section 302 read with section 34, IPC, the learned trial court acquitted

accused Sajal Sarkar, Himangshu Majumder and Sukdeb Debnath by according them benefit of doubt.

6. We have heard Mr. J.M. Chowdhury, learned senior counsel, appearing on behalf of the appellants and Mr. D. Sarkar, learned Public Prosecutor, Tripura.

7. While considering the present appeal, what may be noted, at the very outset, is that it is Dipu (P.W. 13) only, who has been examined by the prosecution as an eyewitness to the alleged occurrence of assault on and killing of, Amal and Uttam, though it is not the prosecution's case that P.W. 13 was the sole eyewitness to the occurrence. Be that as it may, since the evidence of P.W. 13 is the evidence of a solitary eyewitness, it is his evidence around which revolves the entire case of the prosecution. At this stage, it is necessary to recall the principles of law governing appreciation of evidence of solitary witness. When the case of the prosecution rests on the evidence of a solitary eyewitness, his evidence must be found to be wholly reliable if his evidence were to be relied upon for forming basis for conviction of an accused. It is also important to bear in mind that the witnesses fall, in general, into three distinct categories, namely, wholly reliable, wholly unreliable and neither wholly reliable nor wholly unreliable. There is no difficulty in placing implicit reliance on the evidence of a wholly reliable witness. Similarly, the evidence of a wholly unreliable witness can be easily discarded. It is, however, the evidence of witnesses, who fall in the middle category, that is, when they are neither wholly reliable nor wholly unreliable that the court must make an endeavour to find out if the evidence of such a witness stands corroborated in material particulars, by other evidence, direct or circumstantial. If on such corroboration, the evidence of such a witness inspires confidence, there is no impediment, in law, in placing reliance on the evidence of such a witness.

8. Observed the Supreme Court, in the case of Lallu Manjti and Another v. State of Jharkhand, (2003) 2 SCO 401, thus: "The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness."

9. In the case of Anil Phukan v. State of Assam, (1993) 3 SCO 282, too the Apex Court held as follows:

"This case primarily hinges on the testimony of a single eyewitness Ajoy P.W.3. Indeed, conviction can be based on the testimony of a single eyewitness and there is no rule of law or evidence which says to the contrary provided the sole

witness passes the test of reliability. So long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eyewitness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eyewitness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect. It is in the light of these settled principles that we shall examine the testimony of P.W.3 Ajoy."

10. Bearing in mind the principles governing appreciation of evidence of witnesses, in general and of the solitary witness, in particular, let us, now, examine the evidence given by P.W.13 and ascertain if his evidence can be regarded as wholly reliable. The evidence of this witness is that he, Amal and Uttam were contractors and friends and on 27.10.2001, at about 8 p.m., while he, Uttam and Amal were taking tea in the teastall of Sishu Biswas, accused Sukdev came there in, an autorickshaw and started instigating the other accused persons against P.W.13, Amal and Uttam. It is in the evidence of P.W.13 that on realizing danger to their lives, he (P.W. 13), Amal and Uttam decided to leave the said teastall for their respective houses; but they wanted to, first, escort Uttam to his house and with this object in view, when they started from the said teastall, they noticed the accused persons standing under a tree at a distance of about 35 feet to 40 feet away. It is also in the evidence of P. W. 13 that as they proceeded and reached near the factory of accused Raimohan Sarkar, the accused came running raising cries "catch, catch". P. W. 13 has deposed that on noticing the accused coming, he, Amal and Uttam started running to save their lives, but the accused chased them and managed to apprehend Amal and, then, accused Sagir, Ranjit, Kanu and Ajit started assaulting Amal with iron rods and lathis and, on being seriously injured, Amal fell down on the ground in front of the gate of Raimohon's factory. P.W.13 has also deposed that when he and Uttam had barely covered a distance of about 20 metres, accused Parimal, Raimohan, Sankar and Latu started assaulting Uttam with iron rods and lathis killing him on the spot. P.W. 13 has further deposed that the remaining three accused, i.e., Sajal Sarkar, Himangshu and Sukdev chased him (P.W.13), but he, somehow, managed to go behind the bushes, which were standing by the side of the road, at a distance of about 20 yards from the place, where Uttam had been killed. According to the evidence of P.W.13, the accused conducted a search for him in the said bushes and continued their search till about 11 p.m., but when they could not trace him out, they loudly declared that they would kill him by entering into his house. P.W.13 claims that he remained inside the jungle for about oneandahalf hours and, then, he went, on foot, to the house of a relative of Amal; but they did not agree to give him shelter, whereupon he kept himself hidden in a rubber garden and when it was dawn, he went to one of his friends, Kanu Baishnab, at Chanmari and through Kanu Baishnab, he sent a message to

his house and also to his friend, Ranjan Chowdhury, of Abhoynagar and, on receiving information, so sent by him to Ranjan, Ranjan met him at the house of Kanu Baishnab, whereupon he left Kanu's house, on a motor cycle, with Ranjan for Bamutia, where he stayed at the house of Bindu Banik. P.W.13 also claims that he remained, out of fear, at Bindu Banik's house for 4 to 5 days and, then, came back to his house and, on being informed there that the police wanted to record his statement, he went to the police station.

11. We may pause here to point out that according to the evidence on record, this witness (P.W.13) was examined by police on 2.11.2001, i.e., on the seventh day of the occurrence and his statement was also recorded under section 164, Cr.PC on 21.11.2001.

12. Now, from a close reading of the above description of the occurrence given by P.W. 13, it is clear that Amal was assaulted by as many as four persons with iron rods and lathis and, similarly, Uttam was assaulted by another set of four accused persons with iron rods and lathis. This apart, P.W. 13 asserts that he had clearly seen the faces of the assailants, when they were assaulting Amal and Uttam, because their faces were visible under the moonlight and also under the decorative lights of Puja pendal.

13. Bearing in mind the above assertion of P.W.13, when we turn to the evidence of P. W. 14 (doctor), we notice that according to this witness's evidence, he had held postmortem examination, on 28.10.2001, on the dead bodies of Amal and Uttam and then the ante mortem injuries. found on the dead body of Amal, being as under:

"Lacerated injury 8" x 4 x penial cramil, present over left parital temporal region of scalp, with multiple fracture both partial and temporal region of scalp, with multiple fracture both parital and temporal bone with part of the brain matter stored out."

14. From a bare reading of the evidence of P.W.14, what clearly emerges is that Amal had sustained only one injury, this injury being on his left parietal temporal region, which had caused multiple fracture. Had Amal been assaulted in the manner as has been deposed to and described by P.W.13, there would have been multiple injuries on his dead body. Thus, the medical evidence on record completely belies the description of the occurrence, which P.W.13 has given as regards the assault on Amal. If the medical evidence on record cannot " be discarded and if P.W.13 is, upon closer scrutiny of the evidence on record, as a whole, is not found to be trustworthy, the fact that the medical evidence on record does not reconcile with the ocular evidence of P.W.13 can leave one with no option, but to hold that P.W.13 had either not seen the occurrence or has given a completely false and concocted version of the occurrence.

15. Similarly, while P.W.13 claims that Uttam had been assaulted by as many as four persons with iron rods and lathis and killed on the spot, the medical evidence on record discloses that Uttam had sustained as many as three incised

wounds and multiple abrasions. Though P.W.13 claims that there was sufficient light at the place of occurrence and the weapons used were iron rods and lathis, the fact remains that the incised wounds, found at Uttam's body, clearly reflect that Uttam was assaulted, besides blunt weapons, with heavy sharpcutting weapons, like Ram dao, as P.W.14 (doctor) has opined. Viewed thus, it is clear than even u while describing the occurrence of assault on Uttam, the evidence of P.W.13 does not reconcile with the medical evidence on record.

16. Though the medical evidence cannot always be used as a touchstone for testing the veracity of the ocular evidence and though, in a given case, when there is a conflict between the ocular evidence and the medical evidence, the court may ignore the medical evidence if it finds the ocular evidence trustworthy, safe and reliable, what needs to be pointed out is that when there is a conflict between the medical evidence and the eyewitness's account of the occurrence, the medical evidence cannot be rejected unless it is either proved that the medical evidence on record is incorrect and untrue or it is proved that, the eyewitness's account of the occurrence is true. In the case at hand, there is nothing to indicate that the medical evidence on record suffers from falsity or incorrectness. It is, therefore, necessary to ascertain if P.W.13 can be treated such a reliable witness that the medical evidence on record, which reflects to the contrary, can be ignored.

17. Our quest for an answer to the above question makes us closely scrutinize the evidence of P.W.13 to ascertain as to how consistent and reliable P.W.3 has been. While considering this aspect of the prosecution's case, what attracts our eyes, most permanently, is that according to the evidence, given in his examination in chief, by P.W.13, having escaped from the hands of the accused, he spent the night in a rubber garden and when it was dawn, he went to Kami Baishnab's house at Chanmari, got Ranjan Chowdhury called there and left Kanu Baishnab's house, on Ranjan's motorcycle, for Bamutia and remained, at Bamutia, at the house of Bindu Banik and after 4/5 days, he came back to his house and, on reaching home, having learnt that the police wanted to record his statement, he went to the police station and his statement was recorded there. Surprisingly enough, however, when the occurrence was fresher in his mind and his statement was recorded under section 164 by P.W.15, P.W.13 had stated that he had returned home on the following day and when he had so returned home, he came to know that Uttam and Amal had been murdered by the accused. It is evident from the said previous statement of P.W.13 that two consequences flow from the statement so made by P.W.13, namely (i) that he had not known, until the time he had reached his house, on the following day of the occurrence, that Uttam and Amal had already been killed and (ii) that he has reached his home not after 4/5 days of the occurrence, as has been deposed to by him at the trial, but on the very next day of the occurrence. Thus, his previous statement (Exhibit 16), recorded under section 164, Cr.PC, clearly reveals that contrary to what P.W.13 has, now, asserted, at the trial, to the effect that he had seen both Uttam and Amal having been put to death, he had not really seen Amal and Uttam

having been killed.

18. What further follows from the above discussion is that the evidence of P.W.13, given in the court, that he had come back to his house after 4/5 days of the occurrence and/or that he had remained, at Bamutia, is completely false. In fact, in no uncertain words, P.W.13 admits, in his crossexamination, that on the following day of the occurrence, he had come back to his house. This admission makes it very clear that P. W. 13 is not a witness, who can be easily and readily relied upon, far less be treated wholly believable. In the back drop of the fact that P.W.13, in his statement, recorded under section 164, Cr.PC, had clearly stated that it was only on his coming back home that he had come to learn that Amal and Uttam had been murdered, it becomes transparent that until the time he had reached home, P.W.13, according to his own previous statement, did not even know that Amal and Uttam had been killed. When this piece of evidence is juxtaposed against the medical evidence on record, it logically follows that either P.W. 13 has deliberately given a coloured and concocted version of the occurrence and that is why, his description of the evidence is belied by the medical evidence on record or that he had not witnessed the occurrence at all. Viewed, thus, it becomes crystal clear that the quality of evidence given by P.W. 13 is not of the kind that can override the medical evidence on record, which, if we may reiterate, belies the description of occurrence given by P.W.13.

19. Coupled with what we have indicated above, it is no less important to note that according to P.W.13, he went, on the very night of the occurrence, to the house of a relative of Amal, but he was not allowed to stay there and, on the following day, in the morning, he went to Kami's house and got Ranjan called there and then, along with Ranjan, he went to Bamutia and remained there at the house of Bindu Banik for 4/5 days. What is, however, curious to note is that none of the said three persons, namely, Kanu, Ranjan, the relative of Uttam and Bindu Banik to whose house's, P.W.13 claims to have gone and the persons, with whom P.W.13 claims to have stayed, have been examined to corroborate the said assertions of P.W, 13. No explanation has been offered by the prosecution for nonexamination of any of these witnesses nor is there any explanation discernible, in this regard, from the materials on record. When this aspect of the case is considered, in the light of the fact that the previous statement of P.W.13 shows that he had come back home on the very next day of the occurrence, there remains no escape from the conclusion that the person to whose house P.W.13 claims to have gone on the very night of the occurrence and also Kanu, Ranjan and Bindhu Biswas have been withheld by the prosecution, for, had they been produced, they would not have supported the evidence so given by P.W 13. Viewed from this angle, one has no option, but to hold that P.W.13. is not a witness, who can be held reliable, far less described as wholly reliable.

20. Even if we become over indulgent to the prosecution and do not discard the evidence of P.W.13 as the evidence of a wholly unreliable witness, this witness would fall, at best, in the category of those witnesses, who are neither wholly

reliable nor wholly unreliable. Such witness needs corroboration of his evidence, direct or circumstantial, in order to enable the court to rely upon such a witness's evidence. When we look for corroboration, we find that the prosecution have not examined even those witnesses, who had either witnessed the occurrence or are claimed to have been reported about the occurrence by P.W.13, In fact, when we put the evidence of P.W.13 to a microscopic scrutiny, we notice that according to evidence of P.W.1, the was a nightguard at the FCI Godown, he had seen, at about 8:30 p.m., Uttam and Amal sitting in front of a shop near the shop of Sishu Ranjan and, after some time, when he heard hue and cry and came to the place from where the cries were being raised, he found Uttam and Amal lying with bleeding injuries on the ground and within a few minutes, police arrived there and, with the help of the police, the injured were taken to hospital. Closely supporting the evidence of P.W.I is the evidence of the Investigating Officer (P.W.17), who has deposed that he received information, at his TOP, on 27.10.2001, at 9.20 p.m., that two injured persons, Uttam and Amal, were lying on the road at Bankumari and his presence were required there, whereupon he made an entry, in this regard, in the general diary and reached the spot at 9:50 p.m., where he received the FIR from Bidur Lodh (P.W.8), brother of deceased Amal.

21. What becomes transparent from the evidence P.W.1 and P.W.17 is that the occurrence took place some time around 8:30 p.m. and in less than an hour's time, the police had already arrived at the place of occurrence. Bearing in mind the evidence so given by an independent witness, such as P.W.I and the Investigating Officer (P.W.17), when we consider the evidence of P.W.13, we notice that according to him, the accused continued to search for him till about 10:00 p.m. and he remained hiding at a distance of about 20 yards from the place, where Uttam had been killed. This, in turn, means that even when the police had already arrived at 9:50 p.m., all the accused were still at large and were looking for P.W.13. This assertion of P.W.13 is not only unrealistic and unnatural, but also unbelievable, for, the same runs wholly contrary to the evidence of disinterested witnesses, such as, P.W.I and P.W.17.

22. Turning to the evidence of P.W. 2, we notice that according to his evidence, on 27.10.2001, at about 8:40 p.m., he heard hue and cry from the direction of Bankumari Chowmuhani and, on arriving there, he found deadbodies of Amal and Uttam lying on the road. P.W. 2 claims that on his way to Bankumari, he met Mantu Miah and Bikash Debnath, who informed him that there was a quarrel, at Bankumari Chowmuhani, between Uttam, Amal and Dipu. on the one hand and Sagir Miah, Latu Miah, Parinial, Raimohan, Sankar Sarkar, AjitSarkar and Ranjan Majumder, on the other. P.W.I has, however, clarified that Mantu and Bikash had not told him as to how they had come to know about the quarrel. It is also in the evidence of P.W.2 that he took, with the help of others, the bodies of Amal and Uttam to G.B. Hospital, where they were declared dead. Apart from the fact that P.W. 2 had not made any statement to the police" that he had come to know from Manu Miah and Bikash about the quarrel, which he has spoken about, in his

evidence, the evidence of P.W.2 is completely hearsay inasmuch as Bikash Debnath, who has been examined as P.W. 6, has, nowhere, deposed that he had informed P.W.2 about a quarrel having taken place between the said two groups of persons.

23. We may also point out that as far as P.W.4, P.W.5, PW.9 and P.W. 10 are concerned, they have been declared hostile. Though the evidence of a hostile witness cannot be thrown away lock, stock and barrel, the fact remains that nothing has been elicited by the prosecution from these witnesses to show that the accusedappellants were the ones, who had assaulted and/or killed Amal and Uttam. The evidence of these four witnesses is, therefore, of no material consequence.

24. So far as P.W. 3, widow of deceased Uttam, is concerned, her evidence does not also help the prosecution in proving the guilt of the accusedappellants inasmuch as P.W.3 was also not a witness to the occurrence.

25. Turning to the evidence of P.W.6, we find that according to him, he had been told by P.W.13 that the accused had killed Uttam and Amal. However, as P.W.13 has, nowhere, deposed that he ever reported the occurrence P.W.6, the assertions of P.W.6 are nothing, but hearsay. To the same effect is the evidence of P.W.7, who too claims to have been reported about the occurrence by P.W.13, but P.W.13 does not state that he had reported the occurrence to P.W.7. The evidence of P.W.7 too, thus, does not help the prosecution's case.

26. We, now, turn to the evidence of P.W.8, elder brother of deceased Amal. According to this evidence, on the day of the occurrence, on 27.10.2001, on hearing hue and cries, when he came and reached Bankumari Chowmuhani, he found Amal and Uttam lying dead and Ranjan, who was present there, told him that the accused had assaulted Uttam and Amal in front of the factory of Raimohan. Since Ranjan has not been examined as a witness, the evidence given by PW.8 as to what he had reported to P.W.8 is nothing, but hearsay.

27. What crystallizes from the above discussion is that the evidence of PW13 has to be wholly discarded as his evidence does not inspire the confidence at all In these circumstances, when the prosecution's case rests entirely on the evidence of PW13, this court has no option, but to hold and we do hold, that the prosecution has miserably failed to bring home the charge framed against the accusedappellants and that the accusedappellants deserve to be accorded, at least, benefit of doubt.

28. In the result and for the reasons discussed above, this appeal succeeds. The conviction of the accusedappellants and the sentence passed against them are hereby set aside. The accusedappellants are hereby held not guilty and are acquitted of the charge framed against them under section 302 read with section 34, IPC under benefit of doubt.

29. The bail bonds of the accusedappellants shall stand cancelled and their

sureties are discharged.

30. Send back the LCRs.