

(1998) 01 GAU CK 0026
In the Gauhati High Court
Case No : Criminal Appeal No. 17 of 1986

Dhirai @ Dhirendra Das and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 19-01-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293, 293(4), 294, 510
Evidence Act, 1872 — Section 32, 45, 60
Penal Code, 1860 (IPC) — Section 302, 323, 325, 34

Citation : (1998) 2 GLT 418

Hon'ble Judges : P.K. Sarkar, J; D.N. Chowdhury, J

Bench : Division Bench

Advocate : B.B. Deb, for the Appellant; S. Das, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

D.N. Chowdhury, J.—This appeal is directed against the judgment and order dated 31.3.1986 passed by the learned Sessions Judge, North Tripura, Kaitehahar in Sessions Trial No. 22 (N.T./K)82 convicting the accused Appellants u/s 302 read with 34 IPC and sentencing each of them to suffer imprisonment for life.

2. One Rakesh Chandra Das lodged First Information Report in the Kailashahar P.S. alleging that on 20.4.80 at about 7.30/8.00 p.m. when the informant was in his house he heard hue and cry towards the west and so he proceeded to see the things himself. On coming out he saw at a distance of 8-10 paces from the house of Suresh Das that the accused Suresh Das with his two sons, namely, Babul Das and Alok Das and 2-3 others whom the informant could identify but did not know their names being armed with lathis, Jhatas and Dagger assaulted the deceased Naresh Das. The informant saw by the moon-light that accused Suresh Das was armed with Lathi, Dhirendra Das was armed with Jhata and Babul and Alok Das were armed with Daggers and the others were armed with lathis and Jhatas. The

informant tried to persuade them not to assault on Naresh Das, At this Suresh Das instigated others to catch hold of the informant and to cause assault. Then the informant fled away out of fear. It was further reported by the informant that the assailants named in the FIR caused the death of Naresh Das. Police on the basis of the above information rushed to the spot and brought Naresh Das to Kaliashahar Hospital where he succumbed to the injuries on 21.4.1980 at 00.58 hours in the hospital. After the investigation police submitted charge sheet against the four accused persons alongwith one Kokil Mitra who died subsequently after framing of the charge by the learned Sessions Judge. The accused were charged for the offence u/s 302 read with 34 IPC for causing the death of Naresh Das along with the deceased Kokil Mitra in furtherance of their common intention. In the trial 16 witnesses were examined including the I/O. Incidentally the doctor who examined the injury of the deceased at the time of admission as well as the doctor who conducted the post mortem examination were not examined by the prosecution. The learned trial Court after the trial and on evaluation of evidence convicted the accused Appellants u/s 302 read with 34 IPC and sentenced each of them to suffer imprisonment for life as stated above. Hence the appeal.

3. Mr. B.B. Deb, the learned senior counsel appearing on behalf of the Appellants assailed the conviction and sentence on the accused persons as unsustainable. The learned senior counsel questioned the conviction firstly on the ground that no conviction of the accused could have been made u/s 302 IPC, for non examination of the person who conducted the autopsy. Mr. Deb, the learned Counsel submitted that in the absence of the witnesses, namely, Dr. Sudarshan Bhattachaijee who prepared the injury report and Dr. Sudhir Deb who conducted the post mortem report who were not produced in the Court for reasons best known to the prosecution, those reports could not have been take into account by the learned Sessions Judge for convicting the accused u/s 302 read with 34 IPC. Mr. Deb, the learned Counsel further submitted that in the absence of any reliable evidence against the accused persons of the existence of common intention the accused leading to the doing of a criminal act in furtherance of such intention the accused could not have been convicted u/s 302 of the IPC in aid of Section 34 of the IPC. Mr. Deb, lastly submitted that even otherwise on the basis of the material evidence on record there was absolutely no evidence against the accused Suresh Das and Alope Das, though at best some inference could be drawn for conviction of the accuse Dhirendra Das and Babul Das for convicting them u/s 323 IPC.

4. Mr. S. Das, leamed Public Ptosecutor on the other hand supported the conviction and sentence and submitted that there were no infirmity in the finding of the learned Sessions Judge in convicting and sentencing the accused on the basis of evidence of P.W. 16 Dr. Somendra Ch. Chakraborty who proved the injury report as well as the post mortem report, since Dr. Somendra Ch. Chakraborty was competent to depose from the official record as he was the S.D.M.O. at the relevant time. Mr. Das, the learned Public Prosecutor took us

through the evidence on record to persuade us for sustaining the conviction. The learned Public Prosecutor Mr. Das, submitted that in this case the accused were held constructively liable u/s 34 of the IPC. The Section has not created a distinct offence and is merely declaratory of a rule of joint criminal liability and this is only a rule of evidence, submitted the learned Prosecutor Mr. Das.

5. We have also taken into consideration the submission of the learned Public Prosecutor Mr. Das as to the admissibility of the evidence of the above two documents on the strength of Section 294 of the Code of Criminal Procedure Chapter-XXII of the Code in Part-A provides for evidence in inquiries and trials and Part-B provide for Commission for the examination of witnesses. Section 293 of the Code enables the Court to receive in evidence the report of certain Government scientific experts purporting to be a report under the hand of a Government scientific expert upon any matter or thing duly submitted to him for examination or analysis. The Court is conferred with the discretion to summon such expert as to the subject matter of the report. Sub-section (4) of the above provision envisaged that the Section applies only to six categories of Government scientific experts. The above provision does not include the medical witnesses including the doctor who conducted the post mortem examination. Section 293 of the Code corresponds to Section 510 of the old code with a view to accelerate criminal proceeding. Parliament in its wisdom inserted new provision in Section 294 of the Code to avoid formal proof of certain documents on admission. Section 294 however can not be meant to have introduced for doing away with the rule of evidence in criminal trial. In our Criminal Jurisprudence there are certain known principles of law, viz.:

- (a) the burden of proof of all essential ingredients of the offence against the accused rests on the prosecution.
- (b) The evidence must be of unimpeachable nature excluding every reasonable doubt of guilt of the accused,
- (c) In the matter of doubt the benefit must go to the accused because it is safer to acquit than to convict,
- (d) There must be clear and unimpeachable proof of the corpus delicti.
- (e) Any hypothesis of guilt should be consistent with all facts.

The essential ingredients of the offence is to be established by the prosecution and prosecution alone and for that purpose it is the burden on the prosecution to establish the case against the accused beyond all reasonable doubt. As alluded earlier the above two reports at best can be treated as opinions of experts. The Court is to arrive at its own opinion as to whether offence of murder was committed by the accused on the basis of evidence. The opinion of the expert is required to be proved orally since the post mortem report also contains the opinion of the doctor about the cause of the death. Such report can be used by the witnesses who conducted the post mortem enquiry in aid of his memory and

the said report is required to be proved and established in conformity with Section 32 of the Evidence Act when the person is dead, or who can not be found or who has become incapable of giving evidence or attendance of whom can not be procured without an amount of delay or expense. Section 32 is an exception to the rule of hearsay evidence. Hearsay evidence is excluded for the reason that in the interest of justice, fair play and equity, it is desirable to produce the person before the Court, whose statement or evidence is sought to be relied upon, for the purpose of examination and interrogated in Court to assess the accuracy and check and confirm his or her credibility. Criminal Justice system requires that no evidence can be relied upon against an accused person unless he is given an opportunity of cross examining the witnesses so long as the accused is not afforded with the opportunity of cross examining the witnesses the same can not be used as piece of material against the accused person. All oral evidence u/s 60 must be direct. A post mortem report as such can not be treated as proof by itself as a substantive piece of evidence. The requirement of proof of guilt of a criminal case under no circumstances can be allowed to be overreached-by taking aid of Section 294 of the Code of Criminal Procedure Section 294 in our view contemplates only reading in evidence on the admission of genuineness by the opposite party only those documents when formally proved speaks for itself like letters, written documents executed etc. Section 294 can not thus be read as a mechanism to replace the substantive evidence as to the commission of offence. A Division Bench of this Court in Bhandra Garh v. State of Assam reported in Bhandra Garh Vs. State of Assam, held that an expert evidence is relevant only u/s 45 of the Evidence Act. In the above case the Court held that the injury report Ext. 5 can not be admitted in evidence and relied on by the prosecution because the Doctor who examined the accused was not put in the witness box. The Madras High Court in Re Rangappa Goundan reported in (1936) ILR 59 Mad 349) relied on a decision in Queen Empress v. Jadab Das (1900) ILR 27 Cal 295) and held that a post-mortem report proves nothing. It is not even evidence, and can only be used by the witness who conducted the post mortem inquiry as an aid to memory.

6. In this case no endeavour was made by the prosecution to produce those witnesses before the Court. The learned Public Prosecutor even prayed before this Court for examination of Dr. Sudarshan Bhattacharjee and Dr. Sudhir Deb and this Court by its order dated 31.5.96 allowed their evidence to be recorded by the learned Sessions Court. But despite that opportunity the witnesses could not be produced by the prosecution. In the absence of testimony of the doctor in the Court the above two reports could not have been acted upon by the learned trial Court.

7. From the evidence of the witnesses "relied on by the prosecution more particularly the evidence of P.Ws. 2, 3, 4, 6, 7 and 24 it emerges that accused Dhirai @ Dhirendra Das, Babul @ Sukanta Das and Aloke @ Subhendu Das assaulted the deceased by lathi. From the nature of the evidence of the prosecution witnesses as well as the injuries inflicted by the accused it can not

be said that the accused persons caused the death or caused such bodily injury as was likely to cause death or with the knowledge that such act was likely to cause death of the deceased. We have scanned through the evidence and after going through the same it seems to us that the evidence which was adduced in Court falls short of proof of culpable homicide not to speak of murder. We accordingly set aside the conviction and sentence of the above accused Appellants u/s 302 IPC.

8. We have gone through the evidence on record and the totality of the evidence, both direct and circumstantial, however leads us to believe that the accused Dhirendra, Babul and Alope had the intention to cause grievous hurt to the deceased which resulted in the death. It can not however be ascertained as to who dealt the fatal blow. On evaluation of the evidence we are therefore of the view that the accused Dhirai @ Dhirendra Das, Babul @ Sukanta Das and Alope @ Subhendu Das is to be convicted u/s 325 IPC read with 34 of the said Code and which we hereby do and accordingly the above three accused Appellants are convicted u/s 325 IPC read with 34 of the said Penal Code. Considering the facts situation and the age of the accused we are of the view that the ends of Justice will be met if the above three accused Appellants, namely, Dhirai @ Dhirendra Das, Babul @ Sukanta Das and Alope @ Subhendu Das are sentenced for the period already undergone and which we accordingly do. The accused Appellants mentioned above, namely, Dhirai @ Dhirendra Das, Babul @ Sukanta Das and Alope @ Subhendu Das are accordingly sentenced for the period already undergone. There is no evidence of whatsoever manner against the accused Appellant Suresh Das and accordingly his conviction and sentence are set aside and we acquit him from all the charges.

9. In the result the appeal is allowed to the extent indicated above. The sureties are discharged from their bail bonds.