
(2008) 05 GAU CK 0042
In the Gauhati High Court

Gokul Roy and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 30-05-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 148, 149, 302, 304, 326

Citation : (2008) 3 GLT 260

Hon'ble Judges : Mutum B.K. Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Mutum B.K. Singh, J.—Challenge in this appeal is to the judgment dated 30.6.2007 passed by the learned Additional Sessions Judge, West Tripura, Khowai in S.T.(WT/K) No. 31 of 2007, convicting the appellants u/s 304(1) read with Section 149 of Indian Penal Code and sentencing them to suffer rigorous imprisonment for 10 years and to pay a fine of Rs. 10,000/- each, in default thereof, to suffer rigorous imprisonment for another two years.

2. That, facts culminating to this appeal, are that on 5.9.2006, one Gopal Chandra Deb (PW No. 13) lodged a report with the Officer-in-charge, Khowai Police Station informing that on 4.9.2006 at about 9.30 p.m. a quarrel took place in between his younger brother Subhas Deb and the appellant Nos. 1, 2 and 3 in front of the meat shop of the appellant No. 2, Sankar Roy, in which his brother was assaulted by the appellants with hard wooden files. Subhas Deb sustained grievous bleeding injuries and died on the spot. Acting on the said report, police registered a case u/s 302 read with Section 34, IPC against the appellant Nos. 1, 2 and 3 but after investigation submitted charge-sheet under Sections 148 149 302, IPC against all the appellants. The learned trial Court framed charges u/s 302 read with Section 149, IPC against all the appellants to which they pleaded not guilty and claimed to be tried.

3. That, during the course of trial, the prosecution examined as many as 17

witnesses and exhibited 10 documents and 3 M.Os. No witness was examined from the side of the appellants but produced some documents, which were admitted and marked as Exbt. A, B and C (series). The learned trial Court after full dressed hearing convicted and sentenced the appellants as stated above. Hence, this appeal.

4. Heard Mr. M. Kar Bhowmik, learned senior counsel, assisted by Mr. S. Kar Bhowmik, learned Counsel for the appellants and Mr. A. Ghosh, learned Additional Public Prosecutor for the respondent.

5. That, the appellants' case is that the prosecution intentionally omitted and/or suppressed the material facts relating to the injuries sustained by the appellant Nos. 1, 2 and 3 in the same incident and also failed to give any explanation for long delay in recording the statement of the alleged sole eyewitness, who is also the son of the deceased. The learned trial Court has completely overlooked these facts while passing the impugned judgment. The order of conviction and sentence is, accordingly, unsustainable in the eyes of law. According to the appellants, on the fateful day, the deceased came in front of the shop of the appellant No. 2 and suddenly attacked on him with a knife, when the appellant Nos. 1 and 3 rushed to rescue the appellant No. 2, they were also attacked by the deceased with his knife. The appellants tried to defend themselves with the help of "wooden file" which was available in the shop by then. As a result of such attack of the deceased, the appellant Nos. 1, 2 and 3 sustained bodily injuries and taken to hospital from the place of occurrence by somebody for treatment. While the appellant Nos. 1, 2 and 3 were in hospital under treatment, the wife of the appellant No. 2 lodged a report with the Khowai Police Station against the deceased and others, which was registered as Khowai P.S. Case No. 40 of 2006 u/s 326, IPC. The I.O., after investigation, submitted charge-sheet against the PW No. 12, son of the deceased and the same is pending before the concerned Juvenile Court. The appellant Nos. 4 and 5 have been falsely implicated in the instant case. On the contrary, the Additional Public Prosecutor strongly refuted the argument advanced by the appellants' learned Counsel that the appellant Nos. 1, 2 and 3 sustained injuries on their bodies in the same incident. The learned Additional Public Prosecutor, supporting the impugned judgment further submits that the evidences of PW Nos. 6, 10, 12 and 17 clearly prove that the appellants committed offences punishable u/s 304(1) read with Section 149, IPC and there is no infirmity, irregularity or otherwise in the impugned judgment.

6. That, no hand sketch map of the place of occurrence was prepared during the course of investigation. However, the inquest report, marked Exbt.-4, first information report, marked Exbt.-10 and evidences of PW Nos. 1, 2, 6, 12, 15 and 17 reveal that the incident occurred in the Chebri market in front of the meat shop of the appellant No. 2. It is in the evidence that there are 50/60 shops in the said market and 9/10 shops are located near the place of occurrence, which lies at a distance of 600 cubits from the house of the deceased. It is also in the evidence that the day of incident was the market day

and a festival was also held by the side of the said market where many persons were assembled.

7. That, PW No. 6, Smt. Rita Deb, the wife of the deceased, deposes that on 4.9.2006 at about 10 p.m. her husband returned from the market and informed her that the accused persons abused him in slang language. She also heard abusing her husband in slang language by somebody. Immediately, the deceased went back to the place where he was being abused. Apprehending that her husband would be killed, they tried to resist him but without success and thus, her son, PW No. 12, followed the deceased. After sometime, she heard the voice/ alarm of her son. Thereafter, she was informed by the police about the incident and found her husband in death condition in the police vehicle near the shop of Gakul Roy, appellant No. 1. In the cross-examination, she admitted that on the night of incident PW No. 12 did not return home. He went to the house of his maternal uncle at Paharmura. After the shradha ceremony of the deceased, P W No. 12 again went to his aunt's house at Hapania. Police informed her that the deceased inflicted injuries to the accused persons by knife.

8. That, PW No. 10, the daughter of the deceased, deposes that on 4.9.2006 at about 10.00 p.m. the deceased was threatened to be killed and also abused him in slang language while the deceased was returning with fish from the market. The accused persons even came in front of their house and invited the deceased to come out if he had courage. The deceased, on being provoked, went out from the house and proceeded towards the market. Her younger brother followed the deceased and after some time, she heard an alarm of her brother. Thereafter, some police personnel came to their house and took them to the market stating that her father was killed by the accused persons and the dead body of her father was found in the police vehicle. In the cross-examination, she admitted that on the next day of the incident, her brother was in the house and told her that her father inflicted injury to the accused persons by knife.

9. That, PW No. 12, the son of the deceased, deposes that on 4.9.2006 at about 10.00 a.m. his father returned to the house with fish and informed that the accused persons every day threatened him to be killed. By that time, the accused persons were at a distance of about 100 cubits from their house and abused his father in slang language and also asked him to come out if he had courage. His mother, sister and himself tried to resist the deceased but he went out from the house and he was following him. When his father reached in front of the shop of appellant Nos. 1, 2 and 3, his father was struck on his back side of the head by the appellant No. 3 with a wooden file. When he raised alarm, appellant Nos. 4 and 5 caught him and as such he could not resist them. Immediately, the appellant Nos. 1, 2 and 3 started to assault his father with wooden file and seat continuously on the head of the deceased. The appellant No. 3 had assaulted on the upper part of his left eye with one wooden file. Thereafter, he fled away to save his life. From the place of occurrence, he went to his maternal uncle's house at Paharmura, where he got information of the death

of his father. Thereafter, he returned to his house and performed shradha ceremony on the 5th day. After shradha ceremony, he went to his aunt's house at Agartala. In cross-examination, he denied that his father and himself inflicted injuries to the accused persons by knife. However, he stated that after some days he heard about the treatment of the accused persons at GB. Hospital. He admitted that from the next day of incident he was in his house till the completion of shradha ceremony and he stated to his mother and sister as to how his father died. He also admitted that before the shradha ceremony of his father, police came to his house and asked about the incident.

10. That, the above evidences establish that on the fateful day the deceased returned to his house from the market with fish and immediately went to the place of occurrence after informing to his family members that he was abused and threatened to be killed by the appellants. It is also established that PW No. 12 followed the deceased and witnessed the incident. PW Nos. 6 and 10 are not the eye-witnesses to the occurrence. PW No. 12 is the only alleged eye-witness to the incident. According to his version, the deceased was assaulted first by the appellant No. 3 and thereafter, the appellant Nos. 1 and 2 also assaulted the deceased on his head. The appellant Nos. 4 and 5 caught him while trying to resist the appellant Nos. 1, 2 and 3. Nowhere he stated that the appellant Nos. 4 and 5 assaulted the deceased. Rather he stated that the appellant No. 3 had also assaulted him on the upper portion of his left eye with a wooden file. He did not mention anything about the injuries sustained by the appellant Nos. 1, 2 and 3 though he admitted that on the next day of the incident he informed to his mother and sister as to how his father died. Whereas PW No. 10, in her cross-examination, stated that her brother informed her that her father inflicted injuries to the accused persons by knife.

11. That, in view of the above evidences on record and upon hearing the rival submission for the parties, it is to be examined whether the appellant Nos. 1, 2 and 3 sustained bodily injuries in the same incident and, if so, whether the prosecution failed to explain about such injuries, in the light of the evidences on record.

12. That, PW Nos. 1 and 2 were declared as hostile witnesses by the prosecution. PW No. 3, a shop-keeper at the Chebri market, deposes that at the time of incident he was sleeping in his shop and on hearing the alarm, he opened the door and saw that the appellant Nos. 1, 2 and 3 were taking by an Auto Rickshaw and at about 11.00 p.m. he was called by the police to the place where the dead body of Subhas was lying. On the next day, he went to GB. Hospital. He had seen blood transfusion to Gokul Roy, appellant No. 1 and also seen appellant Nos. 2 and 3 in the hospital. PW No. 4, the brother-in-law of the deceased, simply deposes that after the incident he was in the market for about 2 hours and heard that appellants were taken to hospital. It is in the evidence of PW No. 17, the Investigating Officer, that on 4.9.2006 at about 22.40 hours, on getting information about the incident through wireless set, rushed to the spot and found

the dead body of the deceased in the market. He investigated the matter by calling the adjacent shop owners for identification of the deceased, prepared inquest report, arranged for photographs of the dead body, taken the dead body to hospital and also seized one knife, one wooden file, one wooden seat and some blood stained earth by preparing seizure list. He has also recorded the statement of eight witnesses on the spot and went to hospital, where he learnt that 3 named accused persons, namely, Prabir Roy, Shankar Roy, Gokul Roy (appellant Nos. 1, 2 and 3) were shifted to GB. Hospital from Khowai Hospital. On 14.9.2006, Prabir Roy, appellant No. 3, was produced to the police station from GB. Hospital under guard and arrested him. On 16.9.2006, appellant Nos. 1 and 2 were discharged from the hospital and arrested them. In the cross-examination, he admitted that neither the family members of the deceased informed him nor he asked to PW No. 12 about the injuries sustained by the appellants. He had stated that he did not collect the injury reports of the accused persons from the GB. Hospital but collected their Discharge Certificates. He further admitted that he did not furnish the discharge certificates in connection with the present case. On 5.9.2006 at 03.50 hours he came to know from his secret information about the injuries of the accused persons but he did not enquire in details. From the Discharge Certificates of the accused persons, it appears that they sustained multiple stab injuries.

13. That, during the course of trial, the post-mortem report of the deceased and the injury reports of the appellant Nos. 1, 2 and 3, on production by the appellants, were exhibited under Exbt.-C Series, which are as follows:

1. Injuries sustained by the deceased:

- (a) Lacerated wound over the occiput, bone depth, 4 ? 4 ? 1 cms. in size;
- (b) Lacerated wound over the vault, 7 ? 1 ? 1 cm. in size, longitudinally;
- (c) Lacerated wound over the vault, 3 ? 1 ? 1 cm. in size anterior to Sl. No. (b) obliquely. Bleeding from both nostril and both ear;
- (d) Abrasion over left leg measuring 2 cm. ? 1 cm., 10 cm. below base of patella and 2 cm. medial to midline;
- (e) Haematoma on occipital region of brain.

2. Injuries sustained by the appellant No. 1:

_____	Size of	On what	Slight,	By what	kind	each	injury	part	of	the	sever	or	of	weapon	in	inches	body	danger	inflicted	inflicted	_____
_____																					?" ? ?" ? 1" Rt.
_____	Anterior	Danger	Sharp	incise	chest	wall	weapon	wound	_____												
_____																					Stitched 1
_____	Lt.	Danger	Sharp	wound	Supraclavicle	weapon	_____														
_____																					Stitched Lt. Slight

Sharp 1 ? wound Infrascapular weapon _____

_____ 3. Injuries sustained by the appellant No. 2 : _____

_____ Size of On what part Slight, By what each of the body sever kind of injury inflicted or danger weapon inflicted in inches inflicted _____

_____ Stitched Ant. Chest Slight Sharp wound wall (sub object 3/4" clavicle region) _____

_____ Stitched Rt. Fore Slight Shaip 3" head object _____

_____ 4. Injuries sustained by the appellant No. 3:

_____ Size of On what part Slight, By what each of the body sever or kind of injury inflicted danger weapon in inches inflicted _____

_____ 1?," Lt. anterior Slight Sharp stitched arm object wound _____

_____ Stitched Lt. leg Slight Sharp wound object 1/2" anterior _____

_____ Stitched Lt. Infra Slight Sharp wound Arilla object _____

_____ Multiple Posterior Slight Sharp stabs chest wall object injuries _____

_____ Stitched Rt. Lumber Slight Sharp wound object 2" _____

_____ 1/2" Valt res. Slight Sharp stitched object _____

According to PW No. 11, the Doctor, who conducted post-mortem examination of the deceased, the cause of death was due to cardio-respiratory failure following haemorrhage and head injuries caused by homicidal grievous injuries. The type of weapon which might have caused the said injuries has not been mentioned either in the post-mortem report or in the statement of PW No. 11. The prosecution did not examine the concerned doctor, who gave medical treatment to the appellant Nos. 1, 2 and 3.

14. That, the above evidences on record clearly establish or reveal that the appellant Nos. 1, 2 and 3 were also sustained serious injuries on vital parts of their bodies in the same incident and the injuries sustained by them were caused by sharp weapon and sharp object. The cause of death of the deceased was because of haemorrhage and head injuries and he sustained lacerated wounds. It appears that the prosecution actively concealed about the injuries sustained by the appellant Nos. 1, 2, and 3. The Investigating Officer (PW No. 17), admitted in his statement that he arrested the appellant Nos. 1, 2 and 3 after they were discharged from the hospital but did not enquire about their injuries. He had

admitted that the appellant Nos. 1, 2 and 3 were in the hospital under medical treatment but he withheld the discharge certificates of the appellant Nos. 1, 2 and 3 while submitting the charge-sheet of the case. On the other hand, the deceased did not sustain any sharp cut injury on his body. Whereas, the I.O. seized one knife along with wooden file and seat from the place of occurrence. The Investigating Officer did not try to investigate about the knife seized by him from the place of occurrence on the same day. PW No. 12, the alleged eye-witness did not mention anything about the knife seized from the place of occurrence.

15. That, from the above evidences it can be inferred that the prosecution, right from the stage of investigation, has actively suppressed and concealed the reality of the incident. Keeping in view of the above facts and evidences on record, it appears that the version of the appellants that the deceased first attacked the appellant Nos. 1, 2 and 3 with a knife, thereby inflicted multiple stab injuries on their bodies and they only tried to defend themselves with the help of the wooden file, is more probable than the prosecution case that the deceased was brutally assaulted by the accused persons.

16. That, it is also in the evidence that there was an enmity between the deceased and the appellant Nos. 1, 2 and 3, as they gave evidence against the deceased in a criminal case. Evidences further reveal that many villagers filed complaint to the SDM, Khowai against the deceased and his son for their involvement in many criminal activities. The impugned judgment discloses that two versions were before the Court regarding the incident but the learned trial Court brushed aside the version of the appellants on the ground that the accused persons did not take any plea of private defence. It is settled principle that when two versions are available before the Court on the basis of evidences on record, the version which is favourable to the accused persons should not be brushed aside unless it has been properly and satisfactorily explained to do so. In *Balwan Singh etc. Vs. State of Haryana*, the Hon'ble Apex Court held that while the prosecution has to prove its case beyond all reasonable doubt, the defence has only to produce evidence or show material on record which probablise its defence. In the said case, the Hon'ble Apex Court held the testimony of the prosecution witnesses unreliable on account of failure of the prosecution to explain the vital injuries sustained by the accused persons who were promptly examined by Doctor. In *Lakshmi Singh and Others Vs. State of Bihar*, the Hon'ble Apex Court held that in a criminal trial it is not necessary for the defence to prove its case with the same rigor as the prosecution is required to prove its case, if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the Court to reject the prosecution version. Where the truth and falsehood are inextricably mixed, the entire prosecution case must be rejected. The Hon'ble Apex Court held that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witness is un-ture; and (2) that the injuries probablise the plea taken by the appellants. In *State of Rajasthan Vs. Madho and*

another, , the Hon''ble Apex Court held that if the prosecution witnesses shy away from the reality and do not explain the injuries caused to the respondents herein it casts a doubt on the genesis of the prosecution case since the evidence shows that these injuries were sustained in the course of the same incident. It gives the impression that the witnesses are suppressing some part of the incident, (para 2).

17. That, the Hon''ble Apex Court, reiterating the ratio laid down in *Laxmi Singh (supra)*, held in *Babu Ram and Others Vs. State of Punjab*, as follows:

18. It is well-settled law that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

1. that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
2. that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
3. that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case. (See *Lakshmi Singh v. State of Bihar* SCC p. 401, para 12).

19. Further, it is important to point out that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

18. That, in the case in hand, evidences clearly depict that the prosecution has completely concealed the origin of the occurrence and also failed to explain the injuries sustained by the appellant Nos. 1, 2 and 3. Thus, the statement of the PW No. 12 appears to be unreliable. His statement appears to be untrue for the reasons that according to him, appellant No. 3, while he was holding by the appellant Nos. 4 and 5, assaulted him with the wooden file on the upper side of his left eye but he never stated that he sustained any sort of injury on his body. In view of the above facts, the appellants' version appears to be more probable.

19. Besides, the prosecution has also failed to explain the delay caused in recording the statement of PW No. 12 though he was available at his residence from the next day of the incident till the shradha ceremony of the deceased. In a catena of decisions of the Hon''ble Apex Court, it has been held that the delay in recording the material witness is a serious defect on the part of prosecution and much reliance cannot be placed on the evidence of such witness. In the instant case, PW No. 12, the son of the deceased, the only alleged eye-witness of the occurrence, was examined by the Investigating Officer after 45 days of the

incident without explanation of the delay and thus, his statement is not much reliable. It maybe also noted that there is no evidence against the appellant Nos. 4 and 5 for their involvement in assaulting the deceased and they are also not the named accused persons. The prosecution must to fail on this count alone.

20. That, taking into consideration the above facts and evidences on record and having regard to the ratio laid down by the Hon''ble Apex Court in the above decisions, I am of the considered view that the appellants are entitled to the benefit of doubt.

21. That, resultantly, the impugned judgment and order of conviction and sentence dated 30.06.2007, passed by the learned Additional Sessions Judge, West Tripura, Khowai in S.T. (WT/K) No. 31 of 2007, is set aside. The appellants are set at liberty on the benefit of doubt and the bail bonds and surety bonds stand discharged. Appeal allowed.

22. Send down the lower Court records.