
(1981) 04 GAU CK 0011
In the Gauhati High Court

Haren Kalita

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 24-04-1981

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (1981) CriLJ 1110

Hon'ble Judges : D. Pathak, Acting C.J.; T.C. Das, J

Bench : Division Bench

Judgement

D. Pathak, Ag. C.J.

1. This appeal from Jail is directed against the judgment and order dated 8-11-79 passed by the learned Sessions Judge, Kamrup, Gauhati in Sess, Case No. 115 (K-G) of 1977, whereby the appellant was convicted u/s 302, I.P.C. and sentenced to rigorous imprisonment for life.

2. A brief narration of the fact leading to the present appeal is that deceased Thaneswar who was originally a man of Urput village shifted to Rongpur village before the date of occurrence. At Rongpur village he purchased a plot of land near the house of his niece, Niroda Kalita (P. W. 8), his sister's daughter married to P. W. 7, Amrit Kalita. As the construction of his house was not complete he stayed with P. W. 7, Amrit Kalita temporarily. On the date of occurrence on 11-12-75 he went out for some purpose and it was at about 9 P. M. somebody attacked him with a dagger near his house under construction. On receipt of the injury he gave a scream and on hearing cry of distress of the deceased, his niece P. W. 8, Niroda Kalita, who happened to come out at that moment to throw out the kitchen rubbish, raised alarm and also called her husband to come out. At her call her husband P. W. 7 came out but before that P. W. 8 herself went ahead and saw appellant Haren Kalita coming hurriedly from the place from where the cry of her maternal uncle was heard. It is in the allegation of the prosecution case that seeing her the appellant turned towards the west to the paddy field. Then P. Ws. 7 and 8 went near the injured and at that time the deceased

expressed that "he was finished by accused Haren Kalita". From the evidence it is found that these are the last words uttered by the deceased. Thereafter he succumbed to the injuries at the spot before any aid could be given to him. When he died in the aforesaid manner, his dead body was taken to the house of P. W. 7. Amrit Kalita and thereafter on the advice of the people who gathered there, information was given to the she Gaonbura (P. W. 3) to come to the place of occurrence and on his arrival he was apprised of the occurrence and was requested to lodge the information to the police. However, that night nothing was done and on the next morning a first information was lodged, by P. W. 3 (Dipuram Gaonburah) being accompanied by some others, at the Palasbari Police Station. On receipt of the first information the police started investigation, tried in vain to apprehend the appellant. However the appellant surrendered before the Court at Gauhati. After completion of the investigation a charge-sheet was submitted u/s 302, I.P.C. against the appellant. During trial he was charged u/s 302, I.P.C. which was explained to the appellant to which he denied to have any complicity in the offence.

3. During the course of trial 9 (nine) witnesses were examined including a doctor and two police officers. From the side of the defence no evidence was adduced. On consideration of the evidence on record the learned trial court convicted the appellant u/s 302, I.P.C. and sentenced him as aforesaid.

4. In recording a finding by the learned trial court for basing the conviction, four circumstances were taken into consideration: (1) First is that on hearing the cry of distress from the deceased. P. W. 8, Niroda Kalita, rushed to the spot and while doing so she saw accused Haren running away from the place of occurrence. (2) The second is that in presence of both P. W. 7, Amrit Kalita and P. W. 8. Smt. Niroda Kalita, the deceased made a dying declaration that he was finished by accused Haren. (3) The third is that a muffler was found lying near the injured person and that it is alleged that the muffler belonged to the accused and (4) the fourth that came for consideration before the trial court is that after the occurrence the accused led the police for recovery of a dagger which he used against the deceased and the same was found from inside the haystack. The last two points which came up for consideration before the trial Court have been outright rejected by the trial Court itself because of the inherent improbability and undependability of the existence of these two circumstances. Hence the trial Court mainly based the conviction only on two circumstances, namely. No. (1) and No. (2) as indicated above.

It is true that there is no ocular evidence to testify as to who inflicted the injuries on the deceased. The entire case is based on circumstantial evidence. The law as to the circumstantial evidence for the purpose of basing the conviction is no longer res integra. If the conviction is to be based on circumstantial evidence, the circumstance must be such that it is the appellant and none else could have committed the offence. It must be categorically shown from the evidence that the circumstances lead to the irresistible conclusion that it was the appellant and

none else who was responsible for causing the death of the deceased. In Govinda Reddy and Krishna and Another Vs. State of Mysore, while considering the test for evaluation of circumstantial evidence, the Court relied on the observation made in Hanumant Vs. The State of Madhya Pradesh, which reads (at page 138 of Cri LJ):?

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

5. There is no dispute as to the death of the deceased Thaneswar. The postmortem examination on the dead body of the deceased was held by P. W. I. Dr. N. Sonowal and he found as many as 13 injuries.

(1) One stab wound 4 cm x 2 1/2 cm x 10 cm on the middle of the left inguinal region.

(2) One stab wound 4 cm x 2 1/2 cm x 8 cm at 4 cm. above the said point of left inguinal ligament.

(3) One stab wound 4 cm x 2 1/2 cm x 8 cm just above the left anterior superior iliac spine.

(4) one stab wound 4 cm x 2 1/2 cm x 3 cm at 8 cm above cubital fossa.

(5) One incised wound 1 1/2 cm long on the dorsal surface of the left wrist joint,

(6) One stab wound 4 cm x 2 1/2 cm x 6 cm, 4 cm below the left posterior axillary fold.

(7) One stab wound 4 cm x 2 cm x 3 cm on the middle of the lateral surface of the left arm.

(8) One stab wound 2 1/2 cm x 2 cm x 3 at 5 1/2 cm below the left posterior auxiliary fold.

(9) One stab wound 3 cm x 1 1/2 cm at 10 cm from the nap of the neck at the midline of the back.

(10) One stab wound 3 cm x 1 cm on the middle of the left scapula.

(11) One stab wound 3 cm x 2 cm x 3 at the middle of the left shoulder.

(12) One stab wound 3 cm x 7 cm x 2 cm on the middle of the back over the

midline.

(13) One stab wound 3 cm x 2 cm x 3 cm on the middle of the lateral surface of the right forearm.

In the opinion of the doctor all the wounds were elliptical in the shape with angles and the margins on plain cut and invested and staining with blood. He has further opined that the weapon used was a sharp pointed one and the person died as a result of shock and haemorrhage as a result of stab injuries received by him at the chest and abdomen.

6. Now the only question is as to whether the prosecution has been able to prove without any reasonable doubt that it was the appellant who caused the death of the deceased. In this regard we may first of all turn to the first information report, The first information report was lodged by P.W. 3. Dipuram Gaonbura, the next morning of the occurrence. It is found in the First Information Report that on being informed by Dharmeswar Kalita and Sabin Chandra Das, he had lodged the first information report. It is found in the first information report that the informant was told by the aforesaid two persons that it was Haren who caused the death of the deceased Thanesar, We have very carefully scanned the evidence of P.W. 3. It is rather Queer and surprising that he has not spoken a word as to whether he had come to know about the involvement of the appellant in causing the death of the deceased from any other source than Dharmeswar Kalita and Sabin Chandra Das, aforesaid. These two persons from whom he is reported to have heard as mentioned in the First Information Report, are not examined by the prosecution. No explanation has been afforded by the prosecution for their non-examination. Therefore the presumption would be that if they would have been examined, perhaps they would not have supported the prosecution case. From the evidence of the investigating officer P.W. 9, Laksheswar Chetia, it is found that P.W. 3. came to the police station being accompanied by Dandiram. They were examined by him but this Dandiram was also not produced before the Court in support of the prosecution case. No explanation as to his non-examination from the side of the prosecution has come forward and this also leads to an adverse presumption against the prosecution. Be that as it may after going through the evidence of P.W. 3, we do not find any statement to the effect that he was told by either P. W. 7 or P. W. 8 at the time when he went to the place of occurrence about the offence committed by the appellant. Therefore, his evidence is not any way helpful to the prosecution case, Rather, we are constrained to hold that his evidence does not inspire any confidence as to his credence and it is also seen from the impugned judgment that even the learned trial court has observed that he has concealed something and has not given out the whole facts. In view of the aforesaid state of facts it must be held that his evidence is rather weak and no implicit reliance can be placed on it.

P. W. 7 has stated that at the time of occurrence when he heard shout of his wife that her maternal uncle was killed, he went out. It is in his evidence that P.W. 8

his wife Smt. Niroda Kalita was going ahead of him and the witness followed her in a run. They found the deceased Thaneswar lying in front of his house under construction. He was found lying down holding his stomach with his hands. It is in his evidence that his wife P. W. 8 asked deceased Thaneswar what had happened, to which deceased had said that "Haren had finished me". The other portion of the evidence for our purpose may not be material because it only testifies the fact of carrying the dead body to his house and also the fact that the deceased was staying temporarily in his house after shifting from his original village to his village.

7. Now regarding the dying declaration which has been stated to have been heard by this witness, we find some inherent improbability which we shall discuss a little later after consideration of the evidence of P.W. 8.

P. W. 8. Smt. Niroda Kalita has stated in her evidence that while she was going out at the time of occurrence to throw out kitchen rubbish after serving dinner to her mother-in-law and P. W. 7, she heard Thaneswar saying "Bhagin Marilo of (Nephew I am dying)". Hearing this scream, she raised a shout calling P.W. 7 and ran straight to the gate and then she saw a man coming from the direction of Thaneswar's house. It is stated by her that the person who was in a run, after seeing her ran westwards. She has stated that she could recognise the man by the moon-light as Haren. Seeing this she called out her husband from the road. At the same time she kept on going towards her maternal uncle. It is in her evidence that P. W. 7 came after her. The witness after going a little distance found the injured Thaneswar near his house under construction. When she enquired as to what had happened. Thaneswar told her that "Haren had finished me off" and after this he could not speak any more.

8. From the evidence of P. W. 8 the only fact that emerges is that she saw the appellant running away. P. W. 8 does not say that she saw the appellant being armed with any weapon or having any incriminating mark on him. P. W. 7 does not say that he also saw the appellant running away, although according to his evidence he followed his wife in a run. To implicate a person merely because he is seen running away from the side of the place of occurrence without anything more would be a very dangerous proposition. There might be hundred and one reasons for his running from that side. It is the duty of the prosecution to exclude any other hypothesis.

From the evidence of these two witnesses namely, P.Ws. 7 and 8 it is found that the deceased could only utter this single sentence namely. "Haren has finished me". If we consider the evidence noticed above of these two witnesses, we find that there is a serious discrepancy between the evidence of these two witnesses. First. P. W. 8 has stated that while she came to the sate, she saw the appellant running towards . westwards and after seeing this she gave a shout to her husband P. W, 7. It is also found in her evidence that P.W. 7 came out after hearing the shout from her.

On the other hand. P.W. 7 has stated that his wife shouted that her maternal uncle was screaming and that the witness should come there. After hearing the shout of his wife he followed her in a run. It is in his evidence that P. W. 8 ran to the road and P.W. 7 followed her in a run. If these two pieces of evidence are believed then, it would have been quite possible for P. W. 7 also to have seen the accused while he was in a run. But P. W. 7 does not say that he saw the accused-appellant.

9. The inherent improbability about the dying declaration is that the injury on the person of the deceased was so serious that in the opinion of the doctor he could survive only for 15/20 minutes. From the sketch map it is seen that the distance of the place of occurrence where the deceased was living from the residence of P. Ws. 7 and 8 is about 100 yards. Therefore, it was rather difficult for a woman like P. W. 8 to have rushed to the place of occurrence and to have heard the dying declaration, because from the evidence of these two witnesses it is clearly established that after uttering only a short sentence, which we have noticed above, the deceased collapsed. It is found from the evidence that it was a moonlit Sukla Astami night and that the moonlight could have lasted up to 8 or 9 P. M. only. From the prosecution evidence, namely that of P. W. 8. it is found that the occurrence took place at about 9-30 P. M. It is also found from the evidence of P. W. 8 herself that it was a foggy night. Mr. Y. K. Phukan, the learned Counsel appearing on behalf of the appellant submits that it was not possible for P. W. 8 to have recognised the appellant as it was a foggy night and further that if the occurrence took place at 9-30 P. M, to which the prosecution evidence is categorical, there would not have been any moon light and the recognition of the appellant would have been inherently improbable. In this regard the learned Counsel has also brought to our notice the evidence of P.Ws. 7 and 8 who have stated that they could see the injuries and blood on the person of the deceased only after the mother of P. W. 7 brought an open lamp (Chaki) near the deceased. It is submitted that this evidence demonstrates that without the light of lamp visibility was poor.

It is found further from the evidence of P. W. 8 that soon after the occurrence when hue and cry was raised in her residence, many people came there. She has stated in her evidence that she told these people on their entry that she saw the appellant just after the occurrence. But in her evidence we do not find, even after the proper scanning that she told any of the people assembled there that the deceased had made any dying declaration. It is true that in her statement she has stated that she told the people assembled there that it was Haren. who killed the deceased. We have already adverted in the earlier part of our judgment that none of the villagers has been examined to whom she might have disclosed the name of Haren to be the author of the crime and no explanation has been afforded as to their non-examination. Therefore, the evidence of P. Ws. 7 and 8 in regard to the dying declaration does not inspire any confidence. We also noticed another serious discrepancy in the evidence of P. Ws. 7 and 8. P. W. 7 has stated that just before the occurrence he was sleeping in his bed and was

roused by his wife for dinner. Whereas, P. W. 8 has stated that P. W. 7 was near the fireplace in the courtyard. This shows the inconsistency in their evidence impairing the intrinsic value of their deposition.

10. We have also noticed the evidence of P.W. 5 Rajen Das. He has stated that he went after the occurrence to the residence of P.Ws. 7 and 8. He has said that at first he did not ask any one about the occurrence. His further evidence is that when P. Ws. 7 and 8 came, villagers asked them about the occurrence, to which Niroda (P. W. 8) said that she had seen Haren (accused) running away from the place of occurrence. His further evidence is that P. W. 8 did not say anything more. Even to this witness P. W. 8 did not say that any dying declaration was made by the deceased Thanesar. Therefore, the credence to be given to the evidence of P. Ws. 7 and 8 regarding the dying declaration becomes very weak.

11. After going through the records of the case we find that there is another person in the name of Haren who happens to be the brother-in-law of the present accused Haren. who lives in the village Majkuchi at a distance of about 2/3 miles from the village of P. Ws. 7 and 8. It is found from the evidence of P. W. 7 that on the date of occurrence he went to the house of aforesaid Haren and returned from his place alone with Alit Kalita, the younger brother of the present appellant at about 8 or 9 P. M. The learned Counsel for the appellant submits that even assuming that the deceased was in a fit condition to make the above-mentioned dying declaration where only the name of Haren was mentioned and when we find that there is another Haren who lives at a distance of 2/3 miles being related with the present appellant. it is difficult to connect conclusively the present appellant to have been given out in the dying declaration by the deceased.

12. Mr. A. Ahmed, the learned Public Prosecutor, Assam has very strenuously argued and submitted that the dying declaration deposed to by P, Ws. 7 and 8 and more particularly the evidence of P. W. 8 to the effect that immediately after the occurrence appellant Haren was seen running from the side of the place of occurrence eking towards west, should give sufficient strength to the prosecution case for the conviction of the appellant. In our opinion, in view of the discussion of the evidence and for the reasons stated above, the submission made by the learned Public Prosecutor, does not seem to have much force. After going through the evidence we find that there are serious and inherent improbabilities in the prosecution case.

It is true as submitted by the learned Public Prosecutor, even emoting from Shakespear's poem that the last word of a dying man has a sanctity to which due weight must be given and the same cannot be just brushed aside. It is true that a dying man would not commit a sin by implicating a wrong man. But it has been judicially evolved as to how and what test should be employed for placing reliance on a dying declaration. Dying declaration is to be approached with caution because it is coming from a dying man and it is a statement which is not subject to any cross-examination and the same is not made before the accused.

The Court must, in order to test the reliability of a dying declaration, keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night, whether the capacity of the declarant to remember the facts stated had not been impaired at the time he was making the statement by circumstances beyond his control either due to the nature of the injuries or for any other cause and whether the statement has been made at the earliest opportunity and was not, the result of tutoring by interested parties.

In the instant case we have noticed from the evidence of P. Ws. 7 and 8 that the deceased could not utter anything more than "Haren has finished me." This shows the serious nature of injuries with which he was inflicted. Therefore the injured condition of the deceased coupled with the circumstance of the foggy night militates against his making any dying declaration as his power of observation was seriously impaired. As we have said in this case even assuming that the deceased was in a fit condition to make the dying declaration, it is difficult to conclusively connect the appellant to be the person who was the author for infliction of the injury on the deceased.

In the earlier part of our judgment we have already alluded that none of the villagers who came to the residence of P. Ws. 7 and 8 after the occurrence, has been examined. Even in regard to P. W. 3 Dipuram Gaonburah, who gave the evidence in the Court, the trial Court itself was skeptical about his evidence. The trial Court has observed that the witness must have concealed many of the things.

13. In conclusion we find that the learned trial Court overlooked the inherent improbabilities and infirmities of the prosecution case as discussed above. We are of firm opinion on consideration of the evidence on record that the conviction and sentence passed against the appellant are not sustainable in law. Accordingly they are set aside. The appeal is allowed. The appellant who is in jail shall be set at liberty forthwith, unless he is wanted in connection with any other case.