
(2012) 01 GAU CK 0066
In the Gauhati High Court

In Jail Suresh Rajbongshi

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 24-01-2012

Acts Referred:

Citation : (2012) 01 GAU CK 0066

Hon'ble Judges : A.K.Goel, C.J. and C.R.Sarma, J

Bench : Division Bench

Advocate : By Advocate : Mr PK Talukdar, Amicus Curiae., By Advocates: Mr D Das, Addl. Public Prosecutor, Assam., Advocates appearing for Parties

Judgement

C.R. Sarma, J.—These two appeals are directed against the judgment and order, dated 7.6.2005, passed by the learned Sessions Judge, Dhemaji, in Sessions Case No.73(DH)/2004.

2. By the impugned judgment and order, the learned Sessions Judge, convicted the appellants aforesaid, under Sections 302/201 read with Section 34 of the Indian Penal Code (for short, "IPC"), and sentenced each of them to suffer rigorous imprisonment for life and pay fine of Rs.5000/ each, in default, suffer rigorous imprisonment for another period of one year each, for their conviction under section 302 IPC, and suffer rigorous imprisonment for three years each, and pay fine of Rs.1000/ each, in default, suffer rigorous imprisonment for three months each, for their conviction under section 201 IPC.

3. We have heard Mr PK Talukdar, learned Amicus Curiae, appearing for the appellant and Mr D.Das, learned Addl. Public Prosecutor, appearing for the State respondent.

4. Both the appeals having been arisen out of the same judgment and order, were heard together and for the sake of convenience, we propose to dispose of the said appeals by this common judgment and order.

5. The prosecution case, in brief, is that, on 29.5.99, when Sri Himangshu Biswas

(hereinafter referred to as "deceased"), was enjoying "BipadNashini Puja" at Chagalikata LP School under Silapathar police station, in the District of Dhemaji, three persons, namely, Sri Bhabananda Das [appellant in CrI Appeal(J) No.66/05], Sri Suresh Rajbonshi [appellant in CrI Appeal(J) No.65/05] and Sri Sarat Sekharu called him away and killed by inflicting injuries on his person. After causing the death, the dead body was buried in the field of one Sri Meghlal near Joba Nadi (river). Subsequently, on suspicion, the appellants were apprehended by the Village Defend Party (VDP) before whom they had confessed to have killed the deceased. The appellant, Sri Suresh Rajbonshi led the villagers to the place of occurrence where the dead body was buried and accordingly, the dead body was discovered.

6. Sri Anil Biswas, father of the deceased (PW 1), on 9.6.99 ,lodged an FIR with the police and on receipt of the same, police registered a case under Sections 302/201/34 IPC.

7. During the course of investigation, the Investigating Officer visited the place of occurrence, sent the dead body for postmortem examination, arrested the appellants, examined the witnesses and recorded the statements of the appellants. The Investigating Officer seized a dagger and a hoe, on being produced by appellant, Sri Suresh Rajbonshi and another dagger, on being produced by appellant Sri Bhabananda Das. As the other accused person ,namely, Sri Sarat Sekharu was absconding, the Investigating Officer could not arrest him and therefore, the chargesheet was submitted against the present appellants under Sections 302/201 IPC read with section 34 IPC.

8. The case being committed, the learned Sessions Judge framed charges under Sections 302/201 read with Section 34 I.P.C. against the appellant s, to which they pleaded not guilty. The prosecution examined 9(nine) witnesses, including the Investigating Officer (PW 9).

9. At the close of the evidence for the prosecution, the appellants were examined under section 313 Cr.P.C. They have denied the allegations, brought against them and declined to adduce defence evidence. Their plea was that they were innocent and that, they were not involved with the death of the deceased.

10. The learned Sessions Judge considering the evidence on record, more particularly, the extra judicial confession alleged to be made by appellant, Sri Suresh Rajbonshi, leading to the recovery of the dead body, the seizure of the dagger and the hoe and the statements of the appellants recorded under section 161 Cr.P.C. by police, convicted the appellants under section 302/201 IPC read with section 34 IPC and sentenced them as indicated above.

11. Aggrieved, by the said conviction and sentence, the convicted persons, as appellants, have come up with these appeals from jail.

12. Mr PK Talukdar, learned Amicus Curiae, appearing for the appellants aforesaid, has submitted that there is no substantial evidence against the

appellants and that, the learned Trial Judge committed error by relying on the statements of the accused persons (Exts. 5 and 6) recorded by the Investigating Officer. It is also submitted that, there being no evidence to show that the seized knife and hoe were the incriminating weapons, the learned trial Judge committed grave error by holding that the said weapons were used in committing the offence. It is also submitted that, on being tortured and assaulted by the villagers, appellant Sri Suresh Rajbongshi, though led the villagers to the place where the dead body of the deceased was kept buried, there is no evidence to show that the appellants had killed the deceased. In view of the above submission, the learned Amicus Curiae has contended that the prosecution has failed to prove the case against the appellants, beyond all reasonable doubt and as such, the appellants are entitled to be acquitted.

13. Mr D Das, learned Addl. Public Prosecutor, referring to the evidence on record, has submitted that, the appellant, Sri Suresh Rajbonshi made extra judicial confession before the villagers and on the basis of such extra judicial confession, the dead body of the deceased, which was buried by the appellants after committing the crime was recovered from the place of occurrence. The learned Addl. Public Prosecutor has submitted that, the said extra judicial confession, made by the appellant and the recovery of the dead body on the basis of the said disclosure coupled with the seizure of the incriminating weapons, clearly established that the appellants had committed the murder of the deceased and thereafter concealed the dead body to cause disappearance of evidence to screen themselves from the punishment. In view of the above, the learned Addl. Public Prosecutor, supporting the impugned conviction and sentence, has submitted that the learned Sessions Judge rightly convicted the appellants and as such, the conviction and sentence need no interference.

14. In order to appreciate the counter arguments, advanced by the learned counsel for the parties and to examine the correctness of the impugned conviction, we feel it appropriate to briefly scrutinize the evidence on record as follows :

15. Sri Anil Biswas, who lodged the FIR (Ext.1), is the father of the deceased. He, deposing as PW 1, stated that, he was told by one Sri Nimai that, his son(deceased) was called from the puja by the accused persons. According to this witness, his son had gone to attend "Bipal Nasini puja" in the evening of 29.5.99 and thereafter, he was missing. He further stated that, the appellant Sri Suresh Rajbongshi confessed before the public that, he, along with Sri Bhabananda Das (appellant) and Sri Sarat had killed the deceased and buried the dead body. From the evidence of this witness, it is found that, no extra judicial confession was made before him and he came to know from Nimai that the appellants had called his son from the puja. The said Nimai has not been examined by the prosecution. Withholding of such a vital witness, raises doubt about the veracity of evidence of PW 1. Therefore, there is no direct evidence to show that, the appellants had called the deceased from the Puja.

16. Now, the question is whether, the appellant Sri Suresh Rajbonshi had made any extra judicial confession admitting his guilt.

17. Sri Paresch Das, who deposed as PW 2, stated that, on being asked, Sri Suresh Rajbonshi disclosed that Sri Sarat Sekharu had killed Sri Himangshu and that, the dead body was buried in Sri Meghlal Rajbonshi's paddy field, situated by the side of river "Joba," in his presence. This witness further stated that, they went to the paddy field along with Sri Suresh Rajbongshi and the dead body of the deceased was recovered. He further stated that, the appellant Sri Suresh Rajbongshi had produced a dagger and a hoe which were seized by police vide Exts.2 and 3. According to this witness, the appellant, Sri Suresh Rajbongshi had dug the place, where the dead body was found. In this cross examination, this witness further stated that, he reached the place after production of knife and hoe by the appellant Sri Suresh Rajbongshi. From the above, it appears that this witness was not present at the time of production of the said knife and hoe, in as much as, he had appeared there after the seizure made by police. Regarding extra judicial confession, it is found that, the appellant, Sri Suresh Rajbonshi had told him that Sri Sarat Sekharu had killed the deceased and buried the dead body in his presence.

18. Sri Sujit Dutta, who was the VDP Advisor, deposed as PW 3. He stated that, on being asked, the appellant Sri Suresh Rajbongshi confessed that, the dead body of the deceased was buried on the bank of river "Joba." He also stated that, the said appellant had shown the dead body of the deceased on the bank of river "Joba". This witness further stated that, he did not accompany the appellant Sri Suresh Rajbonshi to the recovery of the dead body and that he neither asked the appellant Sri Suresh Rajbonshi nor, the latter had told him as to who had killed the deceased. Therefore, from the evidence of this witness, there is nothing on record ,to show that, the appellants had killed the deceased. From the evidence of this witness, it can be gathered that appellants Sri Suresh Rajbonshi went there and showed the dead body, which was kept buried near a tree on the bank of river Joba. This witness has not stated anything as to who had killed the deceased or buried the dead body. What can be found from his evidence is that, appellant Sri Suresh Rajbonshi had the knowledge that the dead body of the deceased was buried on the bank of river "Joba." That apart, PW 3 was not a party to the recovery of the dead body. Of course, PW 2 stated that, Sri Suresh Rajbongshi, while leading for discovery of the dead body had told that Sri Sarat Shakharu had killed the deceased.

19. Sri Pradip Das, who deposed as PW 4 was a VDP Nayak. He stated that, on being threatened and assaulted by VDP party, the appellant, Sri Suresh Rajbonshi had led them to the bank of river "Joba" and that on being pointed out by the said appellant, the dead body of the deceased was recovered. He, however, stated that, appellant Sri Bhabananda had produced a dagger, which was seized by police vide Ext. No.4 and that. appellant Sri Suresh had produced a dagger and a hoe, which were seized by the police vide Exts 2 and 3

respectively. In his cross examination, this witness stated that, he did not see the dead body and that, his signatures on the seizure list were taken in the house of one Anil Master. From the above evidence, it is found that this witness was not present at the time of recovery of the dead body and the seizure by the police. This witness nowhere stated that, the appellants confessed that, they had killed the deceased and buried the dead body. Rather, from the evidence of this witness, it is clearly found that the appellant, Sri Suresh Rajbonshi was threatened and assaulted by VDP members and, on being so assaulted, he had led the public to the bank of river Joba, where the dead body of the deceased was found buried. This witness, in his cross examination, stated that, he did not see the dead body. Therefore, his evidence that, the dead body was discovered, on being led by the appellant, is not a substantive evidence.

20. Sri Lakhan Biswas deposing as PW 5 stated that, the dead body of the deceased was recovered from the bank of river, on being shown by appellant, Sri Suresh Rajbonshi. In his cross examination, this witness stated that, he had not gone along with the VDP personnel in search of the dead body of the deceased. The prosecution version is that, the VDP party, recovered the dead body, on being led by accused Sri Suresh Rajbonshi. As this witness did not accompany the VDP party on the fateful night, his evidence that the dead body was discovered, on being led by Sri Suresh Rajbonshi, is not believable.

21. Sri Nitai Rajbonshi, who deposed as PW 6 stated that, the appellant Sri Suresh Rajbonshi led the VDP party to the discovery of the dead body, which was kept buried on the bank of river "Joba." In his cross examination, this witness stated that, he did not accompany the VDP party to the bank of river "Joba". However, he stated that he was present, when the police had disinterred the dead body on the following day. But from the evidence of this witness, it is found that, the VDP party had already discovered the dead body prior to the arrival of the police. Therefore, there remained nothing to be discovered on the next morning. Admittedly, police arrived in the place where the dead body was kept buried, on the following day. From the above, it is found that this witness was not present at the time of the disclosure made by appellant, Sri Suresh Rajbonshi. From the evidence of this witness, nothing substantive is found against the appellants.

22. Sri Kalachand Sarkar, who deposed as PW 7 stated that, he was not present at the time of discovery of the dead body of the deceased. He further stated that, he did not ask appellant Sri Suresh Rajbonshi regarding the incident. In his cross examination, this witness stated that police and the VDP showed him the hoe, which was seized by police and that, police had seized a dagger from Bhabananda's house. This witness further stated that, he was not present at the time of seizure of knife vide Ext. No.2 from Sri Suresh Rajbonshi.

23. Sri Sudhir Dey, who deposed as PW 8 stated that, he got the information that, the dead body of the deceased was buried on the bank of river "Joba." According to this witness, the V.D.P. took with them, Sri Suresh Rajbonshi to the

place, where the dead body of the deceased was kept buried. PW 7 and PW 8 did not state anything regarding extra judicial confession, made by the appellants.

24. PW 9, was the Investigating Police Officer. He stated that the dead body of the deceased was found in the land of Meghlal Rajbonshi, where it was kept buried, on the bank of river Joba and that VDP members and the informant had shown him the dead body. According to the Investigating Officer, the dead body was exhumed in presence of the witnesses and after preparation of inquest report, the dead body was sent to Dhemaaji Civil Hospital for postmortem examination. The Investigating Officer, exhibiting the statement of the appellants as Exts 5 and 6, stated that, he recorded the statements of the appellants. He further stated that one dagger and one hoe were seized vide Exts 2 and 3 respectively, on being produced by appellant Sri Suresh Rajbonshi. He also stated that appellant Sri Bhabananda Das had produced one dagger, which was seized vide Ext. No.4. This witness admitted, in his cross examination that, the seized articles were not sent to Forensic Science Laboratory for its examination. In view of absence of any report from the Forensic Science Laboratory, there is nothing substantive to show that the said daggers were used as incriminating weapons.

25. From the above discussed evidence, we find no substantive evidence to believe that the appellants had made any confessional statement . As noticed from the evidence of the prosecution witnesses, accused Sri Suresh Rajbonshi, on being assaulted and threatened by the villagers, had disclosed that accused Sri Suresh Sekharu had killed Himangshu and that, the dead body was buried in Meghlal Rajbonshi's paddy field by the side of river Joba in his presence. Admittedly, the dead body was recovered from the said place, on being led by said appellant. But, there is nothing to find that, the appellant had confessed that, he had either killed the deceased or buried the dead body. What he stated is that, the deceased was killed by Sri Suresh Sekharu and the dead body was buried in his presence. This statement made by the appellant, being exculpatory statement, cannot be treated as a substantive evidence. At best the same could be a statement, made against Sri Sarat Shekharu. Therefore, the said exculpatory statement cannot be binding on its maker. That apart, in his statement, made under section 313 Cr.P.C., the appellant aforesaid, denied to have made any such confessional statement. Therefore, the same cannot be used as a substantive evidence to base the conviction against the appellants. Except, the said statement, made by Sri Sarat Sekharu and the discovery of the dead body, on being shown by Sri Suresh Rajbonshi, there is no other direct or substantial evidence leading to the hypothecation that, none except the appellants had caused the death of the deceased and that, they had buried the dead body. There is not an iota of evidence against appellant, Sri Bhabananda Das. Even if, we accept the statement, alleged to be made by Sri Suresh Rajbonshi before the VDP members, more particularly, PW 2, it would be found that Sri Sarat Sekharu had killed the deceased and the dead body was buried in his presence. Mere presence of appellant Sri Suresh Rajbonshi at the time of

killing the deceased by Sri Sarat Sekharu and burial of the dead body, cannot conclusively lead to hold that appellant Sri Suresh Rajbonshi had played any role in causing the death of the deceased as well as burying his dead body.

26. The learned Sessions Judge has based the conviction relying on the following circumstances :

(1) That the deceased was missing from "Biupad Nasini Puja" with effect from the night of 29.5.99 ;

(2) That neither the accused persons nor the members of their family accompanied the villagers in search of the deceased ;

(3) That after the incident, accused Sri Suresh Rajbonshi made statement before the villagers that Sri Sarat Sekharu had killed the deceased and that the dead body was buried near the river;

(4) That the dead body was recovered, on being led by Sri Suresh Rajbongshi ;

(5) That both Sri Suresh Rajbonshi and Sri Bhabananda, in their statements i.e. Exts 5 and 6, made before the Investigating Officer, admitted their guilt ;

(6) That the daggers and the hoe were seized from the accused persons.

27. In the absence of inculpatory statement, the said exculpatory statement, alleged to be made by Sri Suresh Rajbonshi, cannot be treated as substantive evidence to hold that the present appellants had caused the death of the deceased, or that they in furtherance of their common intention had buried the dead body of the deceased after causing the death of the deceased. There is no evidence to show that the said appellants and Sri Sarat Shekharu had any meeting of mind or plan to cause the death of the deceased. In fact, no substantive could be adduced to establish that the death of the deceased was caused by the appellants, in furtherance of their common intention. In view of the said exculpatory statement, made by Sri Suresh Rajbongshi coupled with the recovery of the dead body at the instance of Sri Suresh Rajbongshi, it can be held that Sri Suresh Rajbongshi had the information/knowledge regarding burial of the dead body in the said place of occurrence. Therefore, under Section 106 of the Evidence Act, it was the duty/burden of Sri Suresh Rajbongshi to explain the circumstances leading to the death of the deceased and burial of the dead body. In the said exculpatory statement, Sri Suresh Rajbongshi had clearly stated that Sri Sarat Shekharu had killed the deceased and then buried the body. There is nothing to disbelieve the said version of Sri Suresh Rajbongshi. Hence, it appears that the appellant Sri Suresh Rajbongshi discharged his burden. That apart, missing of the deceased from the puja, failure of the accused persons or members of their family to accompany the villagers in the process of search of the missing person or recovery of dead body cannot be substance circumstantial evidence against the appellants. The said circumstances may raise suspicion. But suspicion howsoever high, cannot substantiate legal and substantive evidence.

28. It is settled law that, in order to base the conviction on the basis of the circumstantial evidence, the events of circumstances must form a complete chain leading to the irresistible conclusion inconsistent with the innocence of the accused persons. It is also settled law that, the prosecution is required to prove its case beyond all reasonable doubt and in the event of existence of two views i.e. one is going in favour of the accused person and another is in faovur of the prosecution, the view which goes in favour of the accused person is to be accepted.

29. In the present case, except the exculpatory statement aforesaid, made by accused Sri Suresh Rajbonshi, before the VDP members leading to the discovery of the dead body, there is no incriminating evidence against the appellants. We have already noticed that the said statements made by the appellant Sri Suresh Rajbonshi is not an extra judicial confession in the eye of law. His presence at the time of causing the death of the deceased by another person and burial of the dead body cannot be sufficient to hold that, appellant Sri Surersh Rajbonshi was guilty of the offence under sections 302/201 read with Section 34 IPC. Mere presence, at the time of commission of offence by another person, cannot be ground to find fault with person, so present.

30. The learned Sessions Judge has heavily relied on the statements i.e. Exts/5 and 6, made by the accused persons before the Investigating Officer. In the said statements, the appellants had admitted that they, along with sri Sarat Sekharu had killed the deceased and buried the dead body. The said statement recorded by the Investigating Officer is hit by section 25 of the Evidence Act. Section 25 of the Evidence Act provides that no confession made to a police officer, shall be proved against a person accused of any offence. However, as provided by Section 27 of the Evidence Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Therefore, the part of the statement, made before the police by a person, leading to the discovery of fact, is admissible. In the present case, the said statements were recorded by police after discovery of the dead body by the villagers and VDP members, on being led by appellant Sri Suresh Rajbonshi. The Investigating Officer also (PW 9) in his evidence, stated that VDP members and the complainant had shown him the dead body. The Investigating Officer no where stated that that the dead body was discovered, on being led by accused person. Therefore, there remained noting to be discovered at the time of arrival of the police. In view of the above, we find nothing to hold that, the accused persons had made any statement, before the Police officer, leading to discovery of any fact.

31. In fact, the said statements ie Exts 5 and 6 have been recorded by the police officer as confessional statements of the accused persons. Hence, the same cannot be used against the accused persons i.e. the appellants as evidence

against them. The learned Trial Judge also held that in view of the threat and assault caused to appellant Sri Suresh Rajbonshi, the extra judicial confession ,made by the said appellant before PWs 2,3 and 4 as well as villagers, might not have been voluntarily made. Therefore, in the absence of voluntariness, the statement, extracted by use of force, cannot be used against its maker.

32. In the light of the above discussion, considering the entire aspects of the matter, we are inclined to hold that the appellant Sri Suresh Rajbonshi did not make any extra judicial confession and the statements made by them, before the Investigating Officer, cannot be used against them. Therefore, we have no hesitation in holding that the prosecution failed to prove the charges, against the appellants, beyond all reasonable doubt. In our considered opinion, for want of substantive evidence, the impugned conviction and sentence cannot be maintained.

33. In view of what has been discussed above, we find sufficient merit in these appeals requiring interference with the impugned conviction and sentence. Accordingly, the appellants are acquitted and the conviction and sentence aforesaid, are set aside. The appellants be released and set at liberty forthwith, if not required in connection with any other case. Return the LCRs.

34. We record our appreciation for the services, rendered by Mr PK Talukdar, as Amicus curiae and direct that an amount of Rs.3500/ be paid to him, as remuneration, by the Assam State Legal Services Authority.