

(2012) 05 GAU CK 0051

In the Gauhati High Court

Case No : Criminal Appeal No. 22 (J) of 2006

Jagannath Rajbongshi @ Kalu

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 02-05-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 304

Citation : (2012) 3 GLD 444 : (2012) 3 GLT 7

Hon'ble Judges : Iqbal Ahmed Ansari, J; Arun Chandra Upadhyay, J

Bench : Division Bench

Advocate : S. Choudhury, Amicus Curiae, for the Appellant; D. Das, Addl. PP Advocate, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—By judgment and order, dated 19.12.05, passed by the learned Sessions Judge, Kamrup, Guwahati, in Sessions Case No. 12 (K)/2003, the accused-appellant herein stands convicted u/s 302 IPC and sentenced to suffer imprisonment for life and pay fine of Rs. 3,000/- and, in default of payment of fine, undergo rigorous imprisonment for a period of 6(six) months. The prosecution's case may, in brief, be described thus: On 18.09.2002, at about 6:30 p.m., when Hem Prava Sarania @ Marami, a girl, aged about 14 years, was studying under the glow of lamp, on a moonlit night, at her house, sitting on a mattress, in her courtyard, along with her younger sister, Binita, the accused-appellant, Jagannath Rajbongshi @ Kalu, suddenly, appeared at the said courtyard and stabbed Marami on her back with a dagger. The act of stabbing of Marami, by the accused-appellant, was witnessed by her aunt, Binita Deka (PW1), and her mother, Subheswari Deka (PW2), who, too, were present in the courtyard at that time. The accused, after stabbing Marami, fell down on the ground and became senseless. Marami's father, Arun Deka (PW3), who was, at that point of time, in the house of his friend, Deka, was informed by his nephew, Toseswar Deka, that Marami had been stabbed by Kalu (i.e., the accused-

appellant) and, on coming to know about the same, PW3 rushed back to his house and, on arriving there, he came to know that his daughter, Marami, had been stabbed and while she was being taken to one local pharmacy for treatment, she succumbed to her injuries. The dead body of Marami was carried to Goreswar Police Station, where a written Ejahar was lodged by PW3, father of the said deceased. Treating the said Ejahar as First Information Report (in short, "FIR"), a case, u/s 302 IPC, was registered against the accused. During the course of investigation, inquest was held over the said dead body and inquest report (Exbt. 4) was accordingly prepared. The police also seized the dagger (Material Exhibit 1), which had been used as the weapon of offence. A plastic bottle of insecticide (Material Exhibit 2) was also found lying in the courtyard and the same was also seized by the police. On completion of investigation, police laid charge-sheet against the accused-appellant u/s 302 IPC.

2. To the charge, framed at the trial, u/s 302 IPC, the accused-appellant pleaded not guilty.

3. In support of their case, prosecution examined as many as 13 (thirteen) witnesses. The accused was, then, examined u/s 313 CrPC and, in his examination aforementioned, the accused denied that he had stabbed and killed Marami, but he admitted the fact that he was found sitting near Marami, when she was lying in her mother's lap in injured condition. No evidence was, however, adduced by the defence. Having reached the conclusion that the accused had been proved to be guilty of the charge framed against him, the learned trial Court convicted him accordingly and passed sentence against him as mentioned above. Aggrieved by his conviction and the sentence, passed against him, the accused has preferred this appeal.

4. We have heard Mr. S. Choudhury, learned amicus curiae, and Mr. K.A. Majumdar, learned Additional Public Prosecutor, Assam.

5. While considering the present appeal, let us, first, consider the evidence of PW1 and PW2, who have been examined as eyewitnesses to the occurrence of stabbing of Marami by the accused-appellant.

6. With regard to the above, we notice that, according to PW1, the accused hails from their village and she knew him. Describing the occurrence, PW1 has deposed that Marami was her niece and, on 18.09.2002, at about 6-30 p.m., while Marami was studying under the glow of a lamp, sitting on a mattress, in the courtyard of their house, her mother (PW2), she herself (PW1) and Marami's brother, Dibyajyoti, and Marami's sister, Binita Dea, were also present there. PW1 has also deposed that she (PW1) was going through Marami's question papers under the glow of the lamp and, all of a sudden, the accused appeared in the courtyard, called Marami and stabbed her at the back with a dagger. PW1 has further deposed that on being stabbed, Marami shouted, "Oh Aunt", and, on seeing Marami being stabbed, she (PW1) raised cries and that Marami's mother (PW2) and the rest of others, too, raised hue and cry and, thereafter, she (PW1)

went running to her younger brother's wife, Niyati, and, on her return, she found the accused lying unconscious in the courtyard and Marami's back bleeding profusely, the dagger having penetrated into the right-middle side of her back. Marami was, then, according to the evidence of PW1, carried, on a pull-cart, for treatment, but she died on the way and, thereafter, Marami's father (PW3) lodged an Ejahar with the police.

7. Though PW1 was put to cross-examination by the defence, nothing material could be elicited from her cross-examination to show that what she had deposed was untrue or false. In fact and surprisingly enough, the defence did not even suggest to PW1 that the accused had not stabbed Marami by a dagger and/or killed her.

8. Close on the heels of the evidence of PW1, Marami's mother (PW2) has deposed that Marami was a student of Class-IX, the accused was known to her and that the accused is, generally, called "Kalu" and that the occurrence had taken place, at about 6-30 p.m., in her courtyard, at the time, when she (PW2) was lying on a mattress, in her courtyard, with her younger son, Dibyajyoti, lying near her and her elder daughter, Marami, and younger daughter, Binita, reading books sitting on a mattress in the courtyard. It is in the evidence of PW2 that both Marami and her younger sister, Binita, were studying under the light of a lamp, the night being a moonlit night, and when she was just dozing off, she saw Kalu stabbing Marami on the back and Marami fell down on the ground, whereupon she (PW2) gave Marami water, but Marami was unable to speak, she having sustained injury on her back. It is also in the evidence of PW2 that hue and cry were raised in her house and Bhupen Deka (PW4), uncle of Marami, came running from his shop, pulled out the dagger from Marami's person and, then, some people took Marami for treatment, but she died on the way.

9. In her cross-examination, PW2 has admitted that she had not noticed whether Kalu had a dagger in his hand or not. However, the presence of the accused, in the courtyard, at the time, when Marami was stabbed, remained unrebutted by the defence.

10. From a close examination of the evidence of PW1 and PW2, it clearly surfaces that the accused, as described by PW1, came to their courtyard and stabbed Marami on her back with a dagger and the dagger, with which the accused had stabbed Marami, was taken out by her uncle (PW4), but, while being taken for treatment, Marami succumbed to her injuries. It has also clearly surfaced from the evidence of PW1 and PW2 that the night of the occurrence was a moonlit night and Marami and her sister, Binita, were studying under the light of a lamp. Clearly, therefore, there was sufficient light for PW1 to see and recognize Marami's assailant. Most importantly, the presence of the accused, at the place of occurrence, at the time, when Marami was stabbed, has remained without being even denied by the defence.

11. Bearing in mind what is indicated above, we turn to the evidence of PW4,

who was the first to arrive at the place of occurrence. His evidence is that on the day of occurrence, on 18.09.2002, at about 6-30 p.m., while he was at his grocery shop, which is situated at a distance of about 50 yards from his residence, he, suddenly, heard "hulla" raised from his residence, whereupon he rushed to his residence and, on arriving there, he saw Marami in a pool of blood with a dagger, which stood pierced into her back and had come out of her chest. It is in the evidence of PW4 that he pulled out the dagger from Marami's person, kept the same at the verandah, Marami was unable to speak and became senseless and, when Marami was being taken to Jain Pharmacy for treatment, she succumbed to her injuries.

12. What is also material to note is that, according to the evidence of PW4, his wife, Binita (PW1), reported to him that the accused had stabbed Marami, while Marami was studying at the courtyard. It is also in the evidence of PW4 that on his arrival, he saw the accused sitting at the courtyard and he saw the accused, suddenly, falling down. He also found an empty plastic bottle at a little distance, where the accused was sitting at the courtyard.

13. In his cross-examination, PW4 has deposed that on his arrival at his residence, he found deceased Marami, her mother and accused in the courtyard. The evidence, so given by PW4, remained wholly unchallenged by the defence admitting thereby the presence of the accused at the courtyard at the time, when Marami was lying injured as described above.

14. Though Binita (PW1), wife of PW4, has not deposed in her evidence that she had reported to her husband (PW4) that the accused had stabbed Marami, what is necessary to note is that soon after the occurrence, the name of the accused did surface as the assailant of Marami. Hence, although the question as to whether the accused was or was not the assailant, is a question to be determined, the fact remains that, in this regard, the evidence of PW1 and PW2, which we have already discussed above, is sufficiently clear, clinching and completely reliable.

15. We may pause here to point out that while dealing with a piece of evidence, which is, ordinarily, regarded as hearsay, the court must bear in mind that there is a difference, though subtle, between factum of an information and truthfulness/veracity of such information. In a given case, if the object is to merely establish that a statement was made, it may not be hearsay, but if the object is to prove that what was stated was true, then, it may become hearsay.

16. Thus, when "x" an eye witness of an occurrence of murder, comes to a police station and reports the occurrence to a police officer, the evidence given by the police officer, at the trial, that he was given such an information is not hearsay if the object is merely to prove that such a report was, indeed, received by the police officer; but if the object is to prove that what the police officer had been reported was true, then, the police officer's evidence as to what he was reported by "x" would be hearsay unless "x" appears as a witness at the trial and deposes

not only that he had so reported the occurrence to the police officer, but also that what he had reported was true as he had witnessed the occurrence himself. See *Biseswar Baori Vs. State of Assam*, 2002 (2) GLT 395.

17. In *Biseswar Baori* (supra), a Division Bench of the Court was confronted with a situation, where the female workers, according to PW1, (who was a witness in the said case), had heard, while working in a Tea Estate, shouting that Binti's husband had cut her. The question was as to whether the shouts of the female workers, heard by PW1, had any evidentiary value at all or the same must be kept wholly excluded from the court's purview of consideration as hearsay. Dealing with the situation, the Division Bench, in *Biseswar Baori* (supra), observed and held as under:

47. The evidence given by PW1 that female workers were shouting that Binti's husband had cut her may not be hearsay, if the court is to determine if PW1 had heard such utterances, but if the court is required to determine as to whether what PW1 had heard was true or not, then, the evidence given by PW 1 is hearsay and ought to have been held as hearsay inasmuch as he has no personal knowledge if the accused had really hacked Binti and for proving that his information is correct, PW1 depend on the evidence of the female workers, none of whom have come forward to say that they had witnessed the occurrence of assault on Binti at the hands of the appellant and/or that they had reported the occurrence to PW1."

18. We may pause, at this stage, and refer to *Subramamiam Vs. Public Prosecutor*: (1956) 1 WLR 965, wherein it has been held by the Privy Council that the state of mind of a man charged with possessing ammunition, contrary to certain regulations, could be proved by what had been told to him by certain terrorists into whose hands he had come. In *Regina Vs. Willis* (1960) 1 WLR 55, Lord Parker, CJ, referring to the case of *Subramamiam* (supra) and also to the advice given to the Board, pointed out that Mr. De Silva, giving the advice of the board, said:

In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible, when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible, when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made" quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

19. Referring to the above statement of law, the Court, in *Regina* (supra), speaking through Lord Parker, C.J., observed:

In the opinion of the court, that statement of the law is applicable to the present

case. It is true that the Board were considering the state of mind and conduct of the defendant at the time of the commission of the offence, provided the evidence as to his state of mind and conduct is relevant, it matters not whether it was in regard to the conduct at the time of the commission of the offence or, as here, at a subsequent time, to explain his answers to the police and the conduct when charged. Accordingly, that evidence, in the present case, was wrongly excluded."

20. What transpires, thus, as the position of law, is that the court must always bear in mind that there is a difference between the factum of information and truthfulness or veracity of such information. If, in a given case, the object of bringing on record as to what a witness has heard is merely to establish that a statement was made, then, to such an extent, such a statement may not be hearsay; but if the object of bringing on record the information is to prove that the information given was true, then, such an information may become hearsay unless the Informant is examined.

21. Considered in the light of the position of law, as discussed above, with regard to hearsay, it is clear that the fact, that PW4 had been given the name of the accused-appellant by his wife (PW1), is admissible as factum of information given to PW4; but, whether what had been reported by PW1 to PW4 was or was not true cannot be decided on the basis of what PW4 claims to have been told by his wife (PW1), for, on this aspect, the evidence of PW4 as to what PW1 had told him has to be regarded, and we do regard, as hearsay. To put it a little differently, so far the evidence, given by PW4 to the effect that his wife (PW1) had reported to him that the accused had stabbed Marami, is concerned, the same is admissible as a factum of information meaning thereby that what PW4 had heard from PW1, as deposed by PW4 in his evidence, is admissible as factum of information in the sense that PW4 was told by PW1 that the accused had stabbed Marami, but the same cannot, however, be used for holding that the accused-appellant had, as a matter of fact, stabbed Marami in the sense that the evidence of PW4, as to what his wife (PW1) had reported to him about the occurrence, has to be treated, and we do treat, in the absence of the evidence of his wife (PW 1), in this regard, as nothing but hearsay. Above all, what the evidence of PW4 reveals, in tune with the evidence of other witnesses, such as, the informant, is that the name of the accused-appellant did surface promptly after the occurrence as the assailant of Marami.

22. Turning to the evidence of PW3, father of the deceased, Marami, we note that, according to his evidence, he left his daughters, Marami and Binita, studying at the courtyard, he went out of the house to his friend Deka's house, where his nephew, Toseswar, came running and told him that Kalu (i.e., the accused) had stabbed Marami, whereupon he came home, the villagers took Marami for treatment, but she died on the way and her dead body was, then, carried to police station and he, too, went to the police station and lodged Ejahar there.

23. In his cross-examination, PW3 has admitted that the accused was entrusted with the charge of the grocery shop of Bhupen Deka (PW4), for three days, and that he (PW3) was not an eye-witness to the occurrence and that a substantial part of his evidence was what he had gathered from others. His evidence merely shows that the name of the accused had surfaced as the assailant of Marami soon after Marami (since deceased) was stabbed to death and that it was PW3, who had lodged the Ejahar with the police.

24. Turning to the evidence of PW5, we find that, according to his evidence, his house is adjacent to the house of PW4 (i.e., Marami's father) and, on the day and time of the occurrence, he was at the grocery shop belonging to PW4 and, while he was there, he heard hulla being raised from the house of PW4, whereupon PW4 rushed to his house and he (PW5), too, went to the house of PW4; but, while PW4 went to his house from the front side of the house, he (PW5) went to the said house from the backside and, on arriving at the house of PW4, he saw Marami and also the accused in the courtyard of the house and also saw a dagger, which stood pierced through the back of Marami, whereupon Bhupen Deka (PW4) pulled out the dagger from the person of Marami and the accused was, at that point of time, standing at the courtyard, but, suddenly, fell down on the ground. Injured Marami, according to PW5, was, then, taken to a pharmacy, namely, Jain Pharmacy, but she died on the way and, then, her dead body was taken to Goreswar Police Station.

25. In his cross-examination, PW5 has deposed that his mother had reported to him about a love affair between the deceased and the accused. However, as the mother of PW5 has not been examined and she has not given any evidence about her having reported to her son (PW5) about any love affair between the deceased, Marami, and the accused, Kalu, we cannot attribute much significance to the statements so made by PW5. This apart, even if there was a love affair between the deceased and the accused, this does not make the fact disappear that the accused, according to the unshaken evidence of PW1, was seen stabbing Marami. Even PW5, in his cross-examination, has stated that he had found the accused standing in the courtyard and Marami in injured condition and, at that point of time, Marami's mother (PW2), her sister, Binita, were also present there. The presence of PW2, at the place of occurrence, has not been specifically denied by the defence.

26. When we turn to the evidence of PW7, who is also a neighbour of the deceased, his evidence is that on the day of the occurrence, at about 6-30 p.m., he heard hulla raised from the house of PW3 and he went running there and, on arriving there, he found Marami bleeding at the lap of her mother and her (Marami's) brother and sister crying and that, at that point of time, PW4 and one Kamal were also present at the house of PW3. PW7 has also deposed that on arriving at the house of PW3, he saw accused lying in the courtyard at a distance of about 5/8 feet from the deceased. Though PW7 has deposed that he came to know from Bhupen Deka (PW4) that Marami had been stabbed by the accused,

Kalu, we keep this part of the evidence of PW7 excluded from the purview of our consideration as hearsay, because PW4 has not stated that he reported to PW7 about the stabbing of Marami by the accused. This apart, PW4 had, admittedly, not seen the incidence of stabbing of Marami by the accused.

27. As far as the evidence of PW6 is concerned, he is merely a witness to the seizure of the dagger by the police, the dagger having been found lying at the verandah of the house of the deceased. The seizure of the dagger and the fact that the dagger was found lying, at the verandah, have not been disputed by the defence. PW9 is also a witness to the seizure of the dagger by the police from the place of occurrence. Neither the evidence of PW 7 nor the evidence of PW 9 could be assailed by the defence by cross-examining them.

28. PW8 is the person in whose presence the inquest over the dead body of deceased, Marami, was held and the inquest report was prepared. The evidence of PW8 remains unscathed.

29. Coming to the evidence of PW11, who is the elder brother of the accused, we find that, according to his evidence, on the day of the occurrence, he had gone to the shop of PW4 to purchase chewing tobacco, but, before he could reach the shop, he heard a commotion and went to Marami's house to have a look, for, the commotion was raised from the house of Marami and, on reaching there, he saw Marami lying in the courtyard with a dagger stabbed into her back and she was crying loudly and, a little away from Marami, he saw his younger brother, Kalu (i.e., the accused) lying unconscious, whereupon he (PW 11) rushed to his home and told the members of his family about the incident. PW11 also deposed that, later on, he heard that Marami had been taken to hospital for treatment

30. So far as the Investigating Officer (PW12) is concerned, he has proved the FIR, which was lodged by PW3 on 18.09.2002 and also the seizure of the dagger. However, there was no cross-examination of PW12 by the defence.

31. When we come to the evidence of PW13, who, admittedly, conducted postmortem examination on the dead body of Marami on 19.09.2002, his evidence, we find, are to the effect that, on 19.09.2002, while he was working as Professor and Head of Forensic Medicine at GMCH, post-mortem examination was conducted by Dr. Arnab Pratim Baruah, under his guidance, over the dead body of Hemaprava Sarania @ Marami and the findings of the post-mortem were as under

Female dead body of average build/brown complexion covered by one blanket wearing one printed frock, one violet coloured under-wear, body looked pale, dried blood stains were present at places over the body and wearing clothes, two tears were present on the wearing frock which corresponds to the injuries on the body, body cold to touch, rigor mortis passed off all over the body.

INJURIES

1) One stab injury, chest cavity deep of size 6X3 chest cavity deep in middle and

widest part over the back of chest on left side, upper and outer blunt end located 9 cm. below acromion tip on left side, lower cutting end of the wound 12 cm left to the midline. The track of the wound passed through the posterior chest wall cutting rib Nos. 3, 4 and 5 along the posterior axillary line on the left side, upper lobe of the left lung, pleura, and then came out through the anterior chest wall cutting through the ribs Nos. 2, 3, 4 and 5 and 6 along with costal cartilage on left side through a wound of size 4 X 2 cm in the widest part over front of chest, upper blunt end 1 cm left to the midline lower cutting and on the midline, 16 cm below the superior sternal notch and another wound of size 1X0.5 cm over front of chest on left side 3 cm to the left of midline and 8 cm below the left clavicle (through and through, perforating stab wound).

2) One abrasion of size 8X0.2 cm. on front of right thigh.

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32. In the opinion of PW13, the death of the said deceased was caused due to haemorrhage and shock as a result of stab injury, which was ante mortem, and that the said stab wound was caused by sharp-cutting pointed weapon and that the said injury was homicidal in nature, the time of death being 12-24 hours.

33. The defence did not cross-examine PW13. Thus, the findings of PW13 and his opinion, as regards the cause of death of Marami, or the type of weapon, which could have caused the injury to her, have remained unchallenged. This apart, we do not notice anything inherently incorrect or improbable in the findings of PW13 or the opinion, which he has expressed.

34. We, therefore, find, as reflected from the evidence of PW13, that there was one stab injury, as described by PW13, on (he said dead body, which had penetrated into the chest and that the death was caused due to shock and haemorrhage resulting from the injury that Marami had sustained, her injury being ante mortem and homicidal in nature and that the said injury could have been caused by a sharp-cutting weapon, such as, dagger.

35. Thus, the medical evidence on record lends substantive support to the eye-witness' account of the occurrence. In fact, as we have already indicated above, the accused admitted, in his examination u/s 313 CrPC, that he was found sitting in the courtyard and that when he was sitting in the courtyard of Marami, Marami was lying injured in the lap of her mother (PW1).

36. From the facts, which we have so culled out, it becomes more than abundantly clear that it was the accused-appellant, who had stabbed Marami and caused, as described above, her death.

37. What follows from the discussion is that the deceased was sitting, at the relevant point of time, when she was stabbed on her back by a dagger with such a force that the dagger had pierced through her chest killing her within a short period of time. The part of the body, which was selected for the purpose of stabbing, the weapon used and the force with which the weapon was used, are

all proof of the fact that the accused-appellant intended to cause not less than death of Marami and he, indeed, succeeded in his intention to cause Marami's death.

38. From what have been discussed and pointed out above, we are of the firm view that the accused-appellant was rightly held to be guilty of the charge, framed against him, u/s 302 IPC. There is no circumstance, discernible from the evidence on record, which could bring the act of the accused-appellant within the ambit of Section 304 IPC. We, therefore, see no reason to interfere with the finding of guilt reached, against the accused, by the learned trial Court nor do we find any reason to interfere with the sentence passed against him.

39. We, therefore, hold this appeal to be wholly without merit and the same shall accordingly stand dismissed.

40. Send back the LCR. Let the learned amicus curiae be paid a sum of Rs. 3,500/- for the able assistance that he has provided to the Court in this appeal.