
(2022) 03 GAU CK 0046
In the Gauhati High Court
Case No : Criminal Appeal No. 168 Of 2019

Jakhunda Narzary

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 24-03-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 201, 302, 364
Code Of Criminal Procedure, 1973 — Section 161, 164, 313
Evidence Act, 1872 — Section 27

Citation : (2022) 03 GAU CK 0046

Hon'ble Judges : Suman Shyam, J; Malasri Nandi, J

Bench : Division Bench

Advocate : S Chauhan

Final Decision : Allowed

Judgement

Suman Shyam, J

1. Heard Mr. B. Narzary, learned senior counsel assisted by Mr. S. Chouhan and Mr. P. Mazumdar, learned counsel appearing for the appellant. Also heard Ms. S. Jahan, learned Addl. Public Prosecutor, Assam representing the State. None has appeared for the informant/respondent No.2.

2. By the judgment dated 14.11.2018 passed by the learned Additional Sessions Judge, Udalguri in connection with Sessions Case No.01(U)/2015 the sole appellant was convicted under Sections 302/201 of the Indian Penal Code (IPC) for committing the murder of Ramchandra Gorh and for concealing his dead body. For the offence committed under Section 302 of the IPC, the appellant, viz., Jakhunda Narzary was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/-with default stipulation, whereas, for the offence committed under Section 201 of the IPC, he was awarded the sentence of rigorous imprisonment for three years and to pay fine of Rs.5000/- with default stipulation. All the sentences to run concurrently. The four other co-accused persons viz., Gaikher Narzary, Sanjib Mochahary, Raja Narzary and Uday Narzary

were acquitted in respect of the charges framed against them under Sections 302/201/364/34 IPC due to lack of evidence.

3. The prosecution case, briefly stated, is that on 16.04.2005 the deceased Ramchandra Gorh was forcefully taken away, by around 12 persons belonging to the Bodo community, to a nearby L.P. School. Thereafter, he was assaulted on his head which ultimately led to his death. Subsequently, the body of Ramchandra Gorh was buried in a nearby area. On 18.04.2005 the daughter of the deceased viz., Smti Basanti Gorh had lodged an ejahar with the In-Charge of Bhairabkunda Police Outpost. On receipt of the ejahar, G.D. Entry No.271 dated 18.04.2005 was made in the Bhairabkunda Outpost and thereafter, the same was forwarded to the Officer-in-Charge of Udalguri Police Station for registering a proper case. Based on the aforesaid ejahar, Udalguri P.S. Case No.44/2005 was registered against five accused persons under Sections 364/302/201 of the IPC and the case was taken up for investigation. On completion of investigation the I.O. had submitted charge-sheet against five accused persons viz., Jakhunda Narzary, Gaikher Narzary, Sanjib Mochahary, Raja Narzary and Uday Narzary.

4. On committal of the case to the Court of Sessions, the learned Sessions Judge had framed charges under Sections 302/201/34 IPC against all the five accused persons. However, since the accused persons had pleaded not guilty and claimed to be tried, the matter went up for trial.

5. The prosecution case is based on circumstantial evidence. In order to bring home the charge, the prosecution side had examined as many as 18 witnesses including the doctor who had conducted the post-mortem examination on the dead body (PW-15) and the I.O. who had conducted the investigation (PWs-16). After recording the evidence of the prosecution witnesses the statements of all the five accused persons including the appellant herein, were recorded under Section 313 of the Cr.P.C. whereby, they had denied the incriminating circumstances put to them. The defence side, however, did not lead any evidence.

6. On conclusion of trial, the learned Additional Sessions Judge, Udalguri had found the appellant Jakhunda Narzary guilty of offence committed under Sections 302/201 of the IPC and sentenced him as aforesaid. However, as mentioned hereinbefore, the other four accused persons were acquitted. Aggrieved by the judgment dated 14.11.2018, the instant appeal has been preferred.

7. Mr. Narzary, learned senior counsel appearing for the appellant has argued that the conviction of the appellant is de hors any evidence available on record. According to the learned senior counsel, the prosecution has failed to prove the charge brought against the appellant by adducing circumstantial evidence. It is also the submission of Mr. Narzary that an Assistant Sub-Inspector of Police, who had conducted the investigation in this case, was not competent under the Police Manual to conduct investigation in a murder case and that too, without proper supervision of the superior authorities. As such, the entire investigation would stand vitiated on such count alone. While addressing elaborate argument on the

probative value of the prosecution witnesses, the learned senior counsel for the appellant has vociferously argued that the conviction of the appellant is wholly based on suspicion without there being any evidence. It is also the submission of Mr. Narzary that since the co-accused persons have been acquitted by the learned Sessions Judge, it was not permissible for the learned court below to convict the appellant/accused on the same set of evidence and in respect of the same charge. On such ground the learned senior counsel has prayed for setting aside the conviction of the appellant and to acquit him of the charges. In support of his above argument, Mr. Narzary has placed reliance on the following decisions :-

- 1) (2020)4 SCC 33 [Parvat Singh and others vs. State of Madhya Pradesh].
- 2) (2000) 3 SCC 50 [Kallikatt Kunhu vs. State of Kerala].
- 3) AIR 1966 SC 119 [Aghnoo Nagesia vs. State of Bihar].
- 4) AIR 1971 Kerala 193 [State of Kerala vs. V. P. Enadeen].
- 5) 2001 (1) GLT 479 [State of Assam vs. Sahabuddin and Ors.].
- 6) 2005 (4) GLT 86 [Kipa Sero vs. State of Arunachal Pradesh].
- 7) 2006 (1) GLT 267 [Pandav Koya vs. State of Assam].
- 8) 2006 (4) GLT 33 [Joyram Ingty vs. State of Assam].
- 9) 2007 (4 GLT 905 [Talar Sorum vs. State of Arunachal Pradesh].
- 10) 2010 (5) GLT 450 [Deoraj Goala & Anr. Vs. State of Assam].

8. Responding to the above, Ms. S. Jahan, learned Additional Public Prosecutor, Assam has submitted that the prosecution has examined as many as 18 witnesses who had some knowledge about the circumstances under which the incident took place. According to the learned Addl. P.P., the deceased was accused of practising black magic upon the daughter of the appellant which had enraged the appellant. Being so enraged, the appellant, together with the other villagers, took the victim to a nearby L P School and then fatally assaulted him. The learned Addl. P.P. has, however, submitted in her usual fairness that the evidence available on record is not enough to point out as to which of the accused persons had actually assaulted the victim. The learned Addl. P.P. has also fairly submitted that there is no evidence to indicate that the recovery of the dead body was made on being led by the accused persons since no material could be produced within the meaning of Section 27 of the Evidence Act. Ms. Jahan has, however, pointed out that in the statement of the accused recorded by the I.O. under Section 161 Cr.P.C. it has been mentioned that the accused person has admitted that he would be able to show the place where the dead body was buried.

9. We have considered the submissions advanced by learned counsel for both the sides and have also carefully gone through the evidence available on record.

Since Mr. Narzary has argued that there is no evidence to sustain the charge brought against his client, we deem it appropriate to briefly discuss the evidence led by the prosecution.

10. Sri Bhimsaru Kisan was examined as the PW-1. The PW-1 is a resident of the same village and he has deposed that the occurrence took place about 10 years ago when accused Jakhunda Narzary had assaulted deceased Ramchandra Gorh with a lathi on the allegation that the latter was practising black magic. This witness has stated that he had witnessed the assault and it took place at around 7.00 a.m. (in the morning). However, the PW-1 did not say so before the I.O. Rather, it appears from the statement made during his cross-examination that he had stated before the I.O. that he suspected that the people of the village had killed Ramchandra and kept him buried. Therefore, although the PW-1 has claimed to be an eye-witness to the incident, we find that there are ostensible improvements in his testimony thereby rendering the evidence of this witness as untrustworthy.

11. Mrs. Champa Narzary was the next witness examined by the prosecution side. PW-2 has merely stated that the occurrence took place about 9/10 years ago but she did not witness the occurrence. The cross-examination of this witness was declined.

12. Sri Jiheskel Basumatary was examined as the third prosecution witness. The PW-3 was the Gaonburah of the village. In his examination-in-chief the PW-3 has stated that he did not witness the incident but came to know from the villagers that deceased Ramchandra was lying dead. Then he had informed the administration. In course of investigation the police had seized a hoe and a cricket stump. Ext-1 was the seizure list and Ext-1(1) was his signature. At this stage, on the prayer of the prosecution side, this witness was declared as a hostile witness. During his cross-examination by the prosecution, he was confronted with his previous statement made before the I.O. to the following effect :-

"In the afternoon of 18/4/2005, Monday, when I reached home, I came to know that some people of No.2 Majuli village took out co-villager Ramchandra Gorh to their village and assaulted him by alleging that he made a girl unconscious by putting her under a spell of black magic; that he could not be traced at that time; that in the meantime I heard that police had arrived; that in the evening Sri Jakunda Narzary of Majuli village came to me and informed me that he had killed Ramchandra because Ramchandra had made his daughter unconscious by putting her under a spell of black magic; that he would then surrender before police; that I asked him to come the following morning and that when Jakhunda came, I produced him in Bhairabkunda police out post."

The witness had denied of having said so before the I.O.

13. During his cross-examination by the defence side, PW-3 has stated that he had heard that at the time of the occurrence accused Jakhunda was not at home.

He has also denied that the accused had ever told him that he himself had killed Ramchandra. When he had reached the place, the dead body had already been dug out. Since he had reached late, so he did not know if the dead body was recovered after being shown by somebody else. This witness has also denied having informed the police that the dead body has been recovered on being shown by Jakhunda.

14. PW-4, Sri Kankata Kisan has deposed that the accused persons had called him and asked him to take Ramchandra along with him who was in an injured state. When he replied that he could not do so, the accused persons had threatened them and so he along with his companions took along Ramchandra. After a while, the accused persons again took Ramchandra to the L P School. PW-4 has stated that he saw Jakhunda i.e. the accused assaulting Ramchandra and he fell down. When the accused persons threatened them, they took Ramchandra to the village. However, during his cross-examination, this witness has categorically denied of having seen the deceased being assaulted.

15. PW-5, Smti Basanti Gour is the daughter of the deceased and the informant in this case. PW-5 has deposed that before killing her father the accused persons had taken him away from the house of Suku. On hearing commotion coming from the house of Suku, she went there. At that time, the villagers told her that the accused persons had killed her father. After her father was killed she had lodged an ejahar and put her thumb impression therein. During her cross-examination, PW-5 has maintained that she had stated before the police that she heard from the villagers that some people of No.2 Majuli village had dragged her father away, killed him and then buried his dead body. She has also deposed that she did not know as to who had taken away her father and who had killed him. Therefore, it is clear from the testimony of this witness that she did not see anything but had merely heard about the occurrence from the villagers.

16. PW-6, Sri Bikram Kisan is another neighbor of the deceased and he has deposed that some persons took the deceased away and assaulted him. However, since it was night time, he could not see anything i.e. he could not recognize them. On the following morning, Kankata and Bakri i.e. PW-4 and PW-9 had carried Ramchandra in their shoulders suspending him to a pole but the villagers did not keep the dead body and returned the same. In his cross-examination, PW-6 has stated that he could not say the names of the persons who had taken Ramchandra away since it had happened at night.

17. The wife of the accused/appellant Smti. Omela Narzary was examined as PW-7. This witness has merely deposed about the presence of Ramchandra in their house before the occurrence. According to PW-7, it was the time of Bihu festival and Ramchandra came to their house to consume liquor and asked her daughter Sanjima to give him liquor. But when Sanjima refused to give him liquor, out of anger, Ramchandra lit a match stick and threw it on Sanjima. At that, Sanjima got afraid and fell down on the ground. Hearing the commotion, few persons came over and pushed away Ramchandra. This witness could,

however, not state as to what had happened thereafter. Eventually, she was declared as a hostile witness.

18. Ms. Sanjima Narzary i.e. the daughter of the appellant, was examined as PW-8. She has corroborated the facts stated by her mother PW-7 by stating that deceased Ramchandra had asked her to give him alcohol but when she did not provide with the same, he had rebuked her. Then he lit a match stick and threw it on her. Then she raised hullah and called her neighbours. Her mother came and took her away. She did not know what happened thereafter.

19. PW-9, Sri Bakri Kisan is another villager who has deposed that on being instructed by the accused Jakhunda they took Ramchandra to his house. However, PW-9 did not corroborate the testimony of PW-6, who had stated that PWs-4 and 9 had carried Ramchandra on their shoulders by suspending him on a pole. Cross-examination of this witness was declined.

20. Sri Sarai Basumatary, another co-villager, was examined as PW-10 and he has merely deposed that at around 9.00 p.m. on the date of the incident he had seen some persons near his house. On the following morning he had heard that a person was killed. According to PW-10, the deceased knew black magic. In his cross-examination, he had denied any knowledge about who had killed the deceased.

21. PW-11, Sri Tripurendra Pator was the Executive Magistrate on duty at Udalguri on 19.04.2005 and had conducted inquest over the dead body of deceased Ramchandra Gaur. PW-11 has proved the inquest report Ext-3 by identifying his signature. According to PW-11, the deceased was found concealed under a hole of about 3 ft width, 5 ft in length and 15 ft in depth. The hole was dug near the bank of one small canal locally known as Mora Pani. One prominent injury mark on the left side of the forehead and several injury marks on the forehead including private organs were also found. The PW-11 has also confirmed the presence of three inquest witnesses viz., Chumba Basumatary (PW-13), Biru Kisan (PW-12) and Jaheseal Basumatary (PW-3).

22. PWs-12 and 13 are the inquest witnesses. They have identified their signature in the Ext-3 inquest report. Cross-examination of these witnesses were declined.

23. Sri Lakhya Jyoti Das, who was posted as S.I. of Police at the Udalguri Police Outpost on 13.09.2012, was examined as PW-14. This witness has deposed that he was entrusted with the task of carrying out investigation in connection with Udalguri P.S. Case No.44/2005. When he took over charge in the aforesaid police case, he found that the investigation was almost completed. So, he had filed charge-sheet Ext-4 against five accused persons. Cross-examination of this witness was declined.

24. PW-15, Dr. Brajen Bhattacharjee was on duty as the SDM & HO at the Mangaldai Civil Hospital on 20.04.2005 when the dead body of the deceased was

brought there for conducting post-mortem examination. This witness has proved the post-mortem report Ext-4. According to the post-mortem report, one lacerated injury in the left temporal region of size 2 x ½ inch was found in the dead body. The doctor has opined that the cause of death was due to shock and haemorrhage as a result of head injury sustained.

25. PW-16, Sri Khagen Deka was the In-charge of Bhairabkunda Outpost coming under Udalguri Police Station on 18.04.2005 when the information regarding the incident was first received. PW-16 has deposed that upon receipt of the ejahar lodged by the daughter of the deceased i.e. Smti. Basanti Gorh he had made G.D. Entry No.271 dated 18.04.2005 and took charge of the investigation himself. The I.O. had deposed as regards the steps taken by him during investigation of the case which included recording of statement of the witness, preparing sketch map and collecting post-mortem report. The PW-16 has stated that on 19.04.2005 the accused Jakhunda Narzary had surrendered at the Outpost whereafter, he was arrested. According to PW-16, accused Jakhunda Narzary had confessed of having committed the offence. As shown by the accused the dead body was recovered in presence of Executive Magistrate and the Gaonburah. The PW-16 has further deposed that Ext-8 is the statement of accused Jakhunda Narzary and he had made a prayer to get the statement of the accused recorded under Section 164 Cr.P.C. but the accused had refused to do so. He had also got the inquest on the dead body through a Magistrate. He found two gunny bags at the place of occurrence and seized those bags. The PW-16 has also made an attempt to bring on record the contradictions in the statements earlier made by the PW-3 and PW-7 i.e. the two hostile witnesses. During his cross-examination, PW-16 has admitted that Suku Kisan did not state before him the names of the accused persons who had taken Ramchandra from his house.

26. PW-17, Sri Nabin Chandra Das and PW-18, Sri Girish Das were posted in the Bhairabkunda Outpost during the time when the investigation in connection with Udalguri P.S. Case NBo.44/2005 was still going on but both of them got transferred before the conclusion of the investigation. Cross-examination of both these witnesses was declined by the defence side.

27. From the bulk of evidence led by the prosecution side what transpires is that the incident took place on 16.04.2005 but there is substantial doubt as to the actual time of the occurrence. While the PW-1 has stated that the incident took place at 7.00 a.m. in the morning, other witnesses such as PW-6 has deposed that it was night time and therefore, he could not recognize the persons who took the deceased away. It is also the specific case of the prosecution that the deceased was taken away by the accused persons from the house of Suku Kisan. However, strangely enough, Suku Kisan has not been examined as a witness although his statement was recorded by the PW-16 (I.O.) during the course of investigation. There is no explanation as to why an important witness such as Suku Kisan was not examined as a prosecution witness.

28. In so far as the PW-1 is concerned, although he has claimed to have seen the

assault being made to the deceased, yet, it transpires from his statement recorded under Section 161 Cr.P.C. that he had not stated so before the I.O. The other witness viz., PW-4 who has also claimed to have seen the accused assault the victim had denied having seen the assault during his cross-examination. As such, neither PW-1 nor the PW-4 can be treated as eye-witnesses to the occurrence. None of the other witnesses had seen the accused either being taken away or being assaulted on the head by the appellant. In other words, the prosecution has failed to prove that it was the appellant who had assaulted the deceased causing death to him.

29. In so far as the plea of discovery of the dead body on being led by the accused is concerned, here also, we find that the said plea has also not been established by the prosecution in accordance with law. Save and except a solitary statement in Ext-8 i.e. the statement of the accused recorded under Section 161 Cr.P.C. wherein he has stated that he will be able to show the place where Ramchandra's dead body had been buried, there is nothing to show that the dead body was actually recovered on being led by the accused. The PW-11, who had conducted inquest over the dead body did not indicate about any such discovery. Although the PW-3 had initially deposed that the dead body was exhumed on being shown by the accused, yet, during his cross-examination, he has stated that he had reached the place after the dead body had already been dug out. So, he did not know if the body was recovered on being shown by somebody. On the teeth of such evidence led by the prosecution and in the absence of any documentary evidence to show that the dead body was recovered on being led by the accused, we are unable to accept the prosecution story that the accused had pointed out the place where the dead body was buried.

30. Having observed as above, we have also noticed that there were five accused persons who were charged under Sections 302/201/34 IPC and the evidence against all of the five persons were one and the same. Notwithstanding the same, four of the accused persons had been acquitted by the learned trial Court while the appellant herein has been convicted for murder on the basis of the same evidence.

31. The post-mortem report no doubt established that it is a case of homicidal death. However, the post-mortem report Ext-5 also mentions about a single lacerated injury in the head. There is nothing to indicate as to which of the accused persons had dealt the blow on the temporal region of the deceased.

32. In the case of Ram Laxman vs. State of Rajasthan reported in (2016) 12 SCC 389 the Apex Court has held that the evidence available on record cannot be split to grant benefit to some co-accused while maintaining the conviction of another who stand on the same footing and deserves parity in treatment. In the present case, as noted herein above, the evidence against all the accused persons were one and the same and the appellant stood in the same footing with the other accused persons with the only exception that the allegation against the deceased is of practising black magic on the daughter of the appellant. If that be so, by

applying the law laid down in Ram Laxman (supra) we are of the view that the learned trial court was not correct in splitting the evidence and acquitting the four accused persons while convicting the appellant herein. We are, therefore, of the view that since the co-accused persons have been acquitted based on the same set of evidence, benefit of doubt must also go to the appellant in this case.

33. We have already mentioned that the claim of the PWs-1 and 4 of having seen the assault has been held to be unreliable and hence liable to be discarded by this Court. There is no other evidence to show that it was the accused/appellant who had assaulted the victim on his head with a stick. Although the PW-16 has seized a hoe and a cricket stump during investigation, yet, no effort has been made by the I.O. to connect the accused person with those seized weapons so as to establish that it is none other than the accused who had inflicted the blow on the victim with the stump. Therefore, the impugned judgment, in our view, is not sustainable in law.

34. Mr. Narzary, learned senior counsel, has questioned the competence of the I.O. to investigate a matter of this nature without the supervision of a senior officer. However, in view of the conclusion arrived at by this Court leading to interference with the impugned judgment, it would not be necessary for us to go into the said aspect of the matter in the present proceeding and the issue is being kept open for being decided by the court in an appropriate proceeding.

35. For the foregoing reasons, we are of the unhesitant opinion that the prosecution has failed to establish the charge brought against the accused persons beyond reasonable doubt by leading cogent circumstantial evidence. On the contrary, having acquitted the four accused persons of the same charges based on the same set of evidence, we are of the opinion that the learned Additional Sessions Judge had committed manifest illegality in convicting the appellant for the charge under Section 302/201 of the IPC without ascribing any specific role to him based on cogent evidence available on record.

36. In the result, this appeal succeeds and is hereby allowed. The impugned judgment and order of conviction stands set aside.

We are informed that the appellant is presently in jail. As such, we direct that the appellant, Jakhunda Narzary be forthwith released from the jail if his custodial detention is not required in connection with any other case.

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