
(2005) 07 GAU CK 0044
In the Gauhati High Court
Case No : Criminal Appeal No. 37 of 1997

Jogen Ch. Roy and Another	Vs	APPELLANT
State of Assam		RESPONDENT

Date of Decision : 19-07-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 374
Evidence Act, 1872 — Section 101, 103, 104, 105, 114
Penal Code, 1860 (IPC) — Section 300, 302, 304, 34

Citation : (2006) 3 GLT 229

Hon'ble Judges : A. Hazarika, J

Bench : Single Bench

Advocate : S. Medhi, R. Bora and Siladitya, for the Appellant; B.S. Sinha, for the Respondent

Judgement

A. Hazarika, J.—Where tolerance and passing fails to act for a fraction of second than the animal instinct prevails over human being. The throwing of weeds and garbage in the agricultural field of another person leads to altercation resulting in fight and in the process the society lose human life though not premeditated and by the time sanity prevails, one Kamaleswar Roy died in the way. The case in hand belongs to such category of case.

2. The instant appeal u/s 374 of the Code of Criminal Procedure has been preferred by Jogen Chandra Roy and Dimbeswar Roy being convicted u/s 304 Part-II I.P.C. in sessions Case No. 26 of 1994 and sentencing them to undergo Rigorous imprisonment for 5 years with a fine of Rs. 1,000/- each in default further R.I. for 2 two months.

3. The case set out by the prosecution is that the land of the victim and the accused persons are contiguous. Both are agriculturist and they went to field in the morning of 10.08.1992. It was alleged that the accused persons had thrown weeds and garbage in the land of the victim and as a result, altercation took place in between the son of the victim and the accused persons. The victim

intervened and suggested that the dispute may be resolved later in a village but the accused did not pay any heed to it, rather assaulted him with hulabari and loru both agriculture equipment made of bamboo) and as a result the victim Kamaleswar Roy died on the spot. Thereafter the E was lodged by the nephew of the deceased Chakrapani Roy within two hours of the occurrence and the name of the accused Umesh Ch. Roy, Jogen and Dimbeswar were mentioned in the FIR.

4. The police investigated into the case and held inquest over dead body. The investigation Officer prepared the sketch map of the place of occurrence and witnesses were examined. The I. O. had also seized one hulabari from the place of occurrence and one loru from the house of the accused persons vide Exts 4 and 5. The dead body was sent for postmortem and after collecting the report of the postmortem examination (vide Ext. 2) charge-sheet was submitted against all three accused on 25.10.1992 u/s 302/34 of the Indian Penal Code.

5. The case being exclusively triable by the Court of Sessions the same was committed to the Court of Sessions. On receipt of the case record and on appearance of the accused the learned Sessions Court framed charge u/s 302 read with Section 34 IPC and the charge was read over to the accused to which they pleaded not guilty and stand for trial.

6. The case when was proceeded and pending before the learned Sessions Judge, the accused Umesh Chandra Roy died the case was abated against Umesh and his name was struck off on 13.11.1995.

7. During the trial prosecution has examined as many 10 (ten) witnesses in order to prove the case of the prosecution. The relevant position of the evidence of all the witnesses is quoted herein below.

P.W.1 Chakrapani Roy was the informant and the deceased was his uncle. He has not seen the occurrence and therefore his evidence is hearsay and therefore no reliance can be placed in order to prove the guilt accused.

P.W.2 Dr. Golab Hussain who held the postmortem examination has found the following injuries on the dead body:

One lacerated wound ?" x ?" in size on the right ear middle part. There was bleeding from the right ear mouth and nostrils. On dissection the doctor found one lacerated wound around ?" x ?" in size in the right temporal region with fracture of the right temporal bone and maxillary bone.

In the opinion of the doctor the death was due to shock and haemorrhage as a result of injury sustained. The PW.2 on examination stated that the injury sustained might have been caused by any heavy blunt weapon either wooden or iron. He has deposed that the fracture of temporal bone and maxillary bone can cause death in ordinary course as there will be severe haemorrhage in the brain.

However in cross-examination he has stated that the bamboo lathis produced in the court are not likely to cause fracture of temporal bone and maxillary bone.

PW.2 Niva Rani was one of the eyewitness who has seen the occurrence. She has deposed that the accused Jogen was throwing waste and garbage in the field of the agricultural land of the deceased Kamaleswar to which Dilip, the son of the deceased protested. But Jogen did not pay any heed to such protest and he continued throwing waste. Dilip Roy also, in relation threw back the garbage in the land of the accused. Thereafter, an altercation took place. While the altercation was going on, the deceased Kamaleswar and accused Umesh and Dimbeswar also arrived at the place of occurrence and joined in the altercation. She has further deposed that suddenly Umesh pick up loru (bamboo stick) and Dimbeswar and Jogen picked up hulabari and started beating Kamaleswar and Jogen grappled Kamlaeswar and fell him on the ground and thereafter all the three accused persons continued to beat the deceased. She has further deposed that at the relevant time, her sister Iva Rani Choudhury was also working in the field and she had also seen the beating and as a result of assault Kamaleswar died on the spot.

In cross-examination she has deposed that she can not say who gave the first assault. She has seen assaulting the deceased on his back. She can not say on which part the deceased was assaulted when he fell down.

PW.4 Prafulla Medhi has deposed that Umesh gave a blow on Kamaleswar from behind with his hulabari. During scuffle Kamaleswar fell down. Thereafter all the three accused started beating Kamaleswar with their hulabari.

In cross-examination he has deposed that he saw one injury behind the ear and blood was oozing from his nostrils.

PW.5 Rajanikanta Roy has deposed that suddenly Dimbeswar raised hulabari which was resisted by Kamaleswar. Both of them tried to take possession of the hulabari. In the scuffle Kamaleswar fell down. In the meanwhile accused Umesh also arrived and all the accused started beating Kamaleswar with hulabari and Loru.

PW.6 Dinanath Roy has seposed he heard halla and saw that the deceased Kamaleswar was being assaulted by accused by Umesh, Dimbeswar and Jogen. Dimbeswar and Jogen were carrying hulabari. He has further deposed that before their arrival at the place of occurrence deceased had breathed his last and accused persons had also left the place.

PW.7 Jatin Roy has deposed that he saw the accused Umesh, Dimbeswar and Jogen had assaulted Kamaleswar with hulabari and laru and before their arrival Kamaleswar died.

PW.8 Dilip Roy is the son of deceased. He has deposed that the quarrel took place among the accused and him in the beginning. He says that when he went to the field with tea for his father, he noticed that the accused Jogen and Dimbeswar were throwing garbage in their field and he protested against the illegal acts which resulted into altercation and hearing the quarrel his father

arrived there. This witness has admitted that the accused were alleging that the garbage were earlier thrown by them. As soon as his father tried to return to the place of ploughing by saying that the dispute be settled in presence of some people, Dimbeswar and Umesh assaulted his father with hulabari and loru. When his father fell down Jogen also assaulted him with a short Hulabari. Thereafter Jogen sat on the chest of his father and other accused persons assaulted further. Hearing his halla witnesses Chakrapani, Rajani, Jatin and Chandra arrived there. He has further deposed that Niva Rani and Iva Rani were working nearby only at a distance of around 15/20 cubits and they also came near his father. His father died on the spot and later he was taken on a ladder. This witness further deposed that he was assaulted by accused. Umesh with a loru. As regards the injury of his father he has said blood came out from the head of his father.

In cross-examination PW6 admitted that the accused persons charged him that the garbage was earlier thrown by them. He further says that other witnesses were working at a distance of around 200 cubits and halla can be heard from such a distance. His father came in the midst of the altercation. The witnesses came to the place of occurrence after the marpit was over. He has denied that the marpit took place him and accused and he has also denied the defense suggestion that accused Jogen and Dimbeswar have been named falsely.

P.W.9 Iva Rani has deposed that at the relevant time she was collecting paddy seedling along with her sister. The accused were working nearby and after sometime P.W.8, son of the deceased arrived there and said PW.8 was charged by the accused as to why, he was throwing garbage in their field to which he denied the allegation. In the meantime the deceased Kamaleswar came near them and suggested that the dispute may be settled amicably in a village meeting. The accused did not agree to this suggestion. This witness has further deposed that the accused shouted to assault Kamaleswar and within a moment all the three accused started to beat Kamaleswar with Hulabari and loru. Kamaleswar fell down in the field and even thereafter he was assaulted. She has seen the occurrence only from a distance 60 cubits and she raised the halla. After few minutes 6/7 persons arrived at the place of occurrence but Kamaleswar died instantaneously.

In cross-examination she says that the accused persons came to the place of occurrence first. Amongst them accused Jogen arrived earlier. She has admitted that she did not see any agricultural equipment in his hand.

PW. 10 Shri Reba Kanta Das, the investigating Officer, visited the house of the deceased and held the inquest over the dead body and thereafter visited the place of occurrence and prepared the sketch map, examined the witnesses and sized one hulabari vide Ext-4 and one loru (vide Ext-5) and has sent the dead body for postmortem examination.

The investigating Officer has stated that he has recorded in his diary that the hulabari was laying in the western corner of the field belonging to the accused.

He recorded the statements of Chakrapani Roy, Niva Rani, Iva Rani Prafulla Medhi, Rajani Kanta Roy, Chandra Kanta Roy, Dilip Roy and Jogen Roy.

Witness Chakrapani Roy, PW.1 has stated before him that he heard about the occurrence while Dilip Roy PW.8 was running to his house and told him that his father was killed. He has stated that the witness Niva Rani PW.3 had stated before him that as soon as the accused Umesh and Dimbeswar assaulted Kamaleswar on his head he fell down. This witness admitted that the witness Dilip Roy PW.8 had stated before him that first of all accused Umesh Began assault his father followed by other accused persons. While criticizing the Judgment Shri Section Medhi, Sr. Council assisted by Shri Siladitya, has led me to the entire evidence on record, more particularly the evidence of P.W.2 Dr. Golab Hussain and P.W.3, 8 and 9. This witness PW.3, 8 and 9 are the only eye witnesses of assault on the person of the deceased. According to Mr. Medhi, the medical evidence would show that there is only one injury on the deceased i.e. One lacerated wound "?"x"?" in size on the right ear on the middle part. On dissection, the doctor found "?"x"?" in size in the right temporal region with fracture of the right temporal bone and maxillary bone. The doctor has specially stated the injury might have been caused by any heavy blunt weapon either wooden or iron. In cross-examination he has doubted that the bamboo lathis can cause the fracture of temporal and maxillary bone.

Therefore, the medical evidence vis-a-vis the ocular evidence would show that there are contradictions amongst all the eye witnesses as to the nature of assault and the weapon used. Admittedly, in the agricultural field of our society hulabari and loru are being used for carrying the seedlings and for driving out the cattle. These articles are being made by bamboos. The eye witnesses have categorically stated that these hulabari and loru have been used in the assault. Now close scrutiny of all the eye witness would show that following contradictions viz.

PW.3 Niva Rani admittedly knew both the parties. She was collecting paddy seedlings in their field. Jogen was collecting paddy seedlings in their field. Jogen was throwing weeds and garbage in the land of deceased to which the son of the deceased protested. Accused Jogen did not pay any heed to his protest and altercation took place. At that time Kamaleswar, the deceased, accused Umesh and Dimbeswar arrived at the place of occurrence and joined in the altercation. Suddenly accused Umesh picked up a loru and accused Dimbeswar and Jogen picked up hulabari and started beating Kamaleswar. Thereafter Jogen grappled Kamaleswar and fell him on the ground and all the accused persons continued to beat the deceased.

PW.8 Dilip Roy came to the field with tea for his father and he saw Jogen and Dimbeswar were throwing garbage in the agricultural field of the deceased. When he had protested them, there was altercation and hearing the quarrel his father Kamaleswar arrived at the place of occurrence. When his father tried to return by saying that the dispute will be settled in presence of some people, accused Dimbeswar and Umesh assaulted his father with hulabari and loru. When his

father fell down accused Jogen assaulted him with a short hulabari. Thereafter Jogen sat on the chest of his father and other accused persons assaulted further.

RW.9 Iva Rani was collecting paddy seeding along with her sister. The accused were working nearby and after some time Dilip Roy, son of the deceased arrived there and started altercation relating to throwing of garbage. In the meantime the deceased came nearby and suggested that the dispute will be settled amicably in a village meeting. The accused did not agree to the said suggestions and immediately thereafter Umesh shouted assault Kamaleswar and within a moment all the three accused persons started to beat Kamaleswar with hulabari and loru. Kamaleswar fell down in the field and thereafter also he assaulted which caused the death of Kamaleswar on the spot.

A close scrutiny of all the evidence of three witnesses would show that there are material variations of presence of the accused and the deceased and PW.8 Dilip Roy who deposed the Umesh had given first assault and on the single assault Kamaleswar died and therefore the Appellants can not be convicted u/s 302/34 IPC surfer that Mr. Medhi. The injury and medical evidence would support his contentions and Mr. Medhi therefore prayed for acquittal of the accused.

In support of his submissions the following decisions have been cited by Mr. S. Medhi viz.

- (a) Sharad Birdhichand Sarda Vs. State of Maharashtra,
- (b) Himachal Pradesh Administration Vs. Om Prakash,
- (c) Rishi Kesh Singh and Others Vs. The State,
- (d) 1998 Cri. L.J. 466 Lakhiwindar Singh v. State of Punja.
- (e) Ayya alias Ayub Vs. State of U.P. and Another,
- (f) Mangulu Kanhar and Another Vs. State of Orissa,

The case referred in Sharad Birdhichand Sarda Vs. State of Maharashtra, deals with circumstantial evidence and conviction on the basis of, the condition must be fulfilled before a case against accused based on circumstantial evidence can be said to be established. The Hon"ble Supreme Court had laid down five (5) conditions before an accused can be convicted on circumstantial evidence. The Hon"ble Supreme Court while dealing with the case has referred in two paragraphs regarding benefit of doubt. The Supreme Court has held that it is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt (Paras 165 & 175).

The case reported in Himachal Pradesh Administration Vs. Om Prakash, deals with the benefit of doubt and the same analogy can be drawn as stated hereinabove.

The case reported in Rishi Kesh Singh and Others Vs. The State, deals with

Sections 101, 103, 104, 105 and 114 of the Evidence Act. The said case deals with the burden and presumption under and role of the criminal court. The court has dealt with the case that in a case in which an answer to the prima facie prosecution case, any general exception in the Penal Code is pleaded by an accused and evidence is adduced to support such a plea but such evidence fails to satisfy the court affirmatively that the accused has fully established his plea, he will still be entitled to acquittal, provided that after weighing the evidence as a whole prudently, (including the evidence given in support of the plea of the said general exception), the court reaches the conclusion that as a consequence of the doubt arising about the existence of the exception, the prosecution has failed to discharge its onus of proving the guilt of accused beyond reasonable doubt, the accused is entitled to get the benefit.

The case reported in 1998 Cri L.J. 466 the court had dealt with Section 300 IPC and Section 3 of the Evidence Act. In the case, the court has come to the conclusion that there was doubt of alleged assault, presence of eye witnesses at the place of occurrence, their testimony inconsistent with medical evidence, alleged recovery of weapon, sending of dead body for postmortem etc. was not inspiring any confidence any connect the accused with alleged offence and hence conviction was set aside.

The case reported in Mangulu Kanhar and Another Vs. State of Orissa, the court has dealt Section 3 of the Evidence Act : While dealing with the case, the Court has dealt with evidence of witnesses, their credibility and the doubt arising with regard to any material fact, the accused always, entitled to benefit of such doubt. The court has further held that it is well settled that credibility of a witness should not be accepted merely because it is corroborated by the evidence of other witnesses, but such credibility, should be tested in the touchstone of the brand probabilities of the case. If doubt arises with regard to any materials fact in a criminal case, the accused is always entitled to the benefit of such doubt.

I have considered the arguments advanced by Mr. S. Medhi learned Counsel appearing on behalf of the Appellant and Mr. B.S. Sinha the Public Prosecutor, also have gone through the cases referred to above. Admittedly PW.3, 8 and 9 are only eyewitness in the case in hand. There are contradictions amongst three eye witnesses and the medical evidence. If the ocular evidences are to be accepted than there can not be any assault, because Jogen, Kamaleswar and fell him on the ground and after felling the ground there can not be any assault. If the evidence of PW.9 is to be accepted, then only probability is that, Umesh shouted to assault Kamaleswar and all the three accused assaulted and her ocular evidence is negated by the medical evidence and therefore her evidence is also can not be accepted in regard to injuries. If the evidence of P.W.3 is accepted, then Umesh and Dimbeswar assaulted his father with hulabari and Iaru and when his father fell down Jogen assaulted with a short hulabari, whereas the medical evidence is otherwise.

Therefore, this Court after scrutiny of the entire evidence of record and the

decisions referred to above, held that the assault was premeditated and the alleged criminal act not done in furtherance of common intention and therefore Section 34 I.P.C. is attracted. Common intention u/s 34 I.P.C. is not itself an offence, but it creates joint and constructive liability for the crime committed in furtherance of such common intention, when the action was not premeditated Section 34 has no application in the instant case. The cause of injury and the medical evidence would show that there is only one injury which was caused by a single assault and therefore, the assault can be safely connected with Umesh who was aggressive at the relevant time and thus the two accused Appellants are entitled to get the benefit of doubt, which this Court is hereby doing by acquitting the accused persons from the charge.

The accused, if they are in custody, they should be released forthwith.