
(2009) 05 GAU CK 0019

In the Gauhati High Court

Case No : Criminal Appeal No's. 241, 245 and 259 of 2006

Kiran Sarma @ Kiran Chandra Sarma and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 27-05-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 161, 313
Penal Code, 1860 (IPC) — Section 109, 120B, 201, 210, 302

Citation : (2009) 4 GLT 287

Hon'ble Judges : Ranjan Gogoi, J;Arun Chandra Upadhyay, J

Bench : Division Bench

Advocate : J.M. Choudhury, B.M. Choudhury and N. Bharali, for the Appellant;
Z. Kamar, for the Respondent

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—All the three appeals are directed against the common judgment and order dated 27.10.2006 passed by the learned Sessions Judge, Darrang in Sessions Case No. 50 (DM)04. By the aforesaid judgment and order, the accused-Appellants have been convicted under Sections 302/34 IPC and they have been sentenced to undergo rigorous imprisonment for life and further to pay a fine of Rs. 10,000/- each, in default, to suffer rigorous imprisonment for one year more.

2. It would be appropriate to put on record that the Appellant in Criminal Appeal No. 241/2006 Kiran Sarma has died during the pendency of the appeal. Consequently, the aforesaid appeal i.e. Criminal Appeal No. 241/2006 will not require any consideration by the Court.

3. The short case of the prosecution is that on 28.2.2003 a FIR (Exhibit-1) was lodged before the Officer-in-Charge of Mangaldoi Police Station on behalf of the local people of Shaloipara village to the effect that a dead body has been found floating on the Bega river. On the basis of the aforesaid FIR dated 28.2.2003, Mangaldoi U.D. Case No. 5/ 2003 was registered. Subsequently, on the next day

i.e. on 1.3.2003, PW 3 Kamakhya Sarkar lodged another FIR (Exhibit-3) before the Officer-in-Charge of Mangaldoi Police Station alleging that his son Sushil Sarkar had gone out of the house at about 5.30 p.m. on 23.2.2003 and had not returned home. In the aforesaid FIR, it had been stated that on 28.2.2003 evening police had recovered a dead body from the Bega River which was identified by the first informant and his wife (PW 5) to be that of their son Sushil Sarkar. In the FIR filed by PW 3, it was further mentioned that for the last one year or so the deceased had been having a dispute with the accused-Appellant Kiran Sarma (since deceased) over certain family matters. It was also mentioned in the FIR filed that the aforesaid Kiran Sarma in collusion with accused-Appellant Bipul Sarma and few others had killed the first informant's son Sushil Sarkar.

4. On the basis of the aforesaid FIR dated 1.3.2003 (Exhibit-3), Mangaldoi P.S. Case No. 71 /03 was registered under Sections 302/ 201/109/34 IPC. Both the cases registered were duly investigated into, in the course of which, inquest was held on the dead body which was also sent for post mortem examination. The statements of a large number of persons were recorded in the course of the investigation. At the conclusion of the investigation, police submitted chargesheet against the accused-Appellants under Sections 302/210/34 IPC. Chargesheet u/s 120B IPC was also submitted against the accused Kiran Sarma.

5. The offence alleged being exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Darrang by the order dated 12.5.2004 committed the case for trial to the Court of Sessions. In the Trial Court charge under Sections 302/34 IPC and 201/34 IPC were framed against all the accused-Appellants. A separate charge u/s 120B was framed against accused Kiran Sarma. The accused-Appellants pleaded not guilty to the charges framed and claimed to be tried. In the course of trial, nineteen witnesses were examined on behalf of the prosecution. One defence witness was examined. The statements of the accused-Appellants u/s 313 Code of Criminal Procedure were also recorded. Thereafter, by the impugned judgment and order, the accused-Appellants have been convicted under Sections 302/34 IPC and sentenced, as aforesaid. Aggrieved, the appeals under consideration have been filed.

6. Out of the nineteen witnesses examined by the prosecution, the Court will be required to notice very briefly the evidence of PW 3, PW 5, PW 6, PW 8, PW 9, PW 10, PW 11, PW 13 and PW 1 apart from the evidence tendered by PW 4 Dr. Nani Gopal Saharia who had conducted the post mortem of the deceased.

7. PW 3, Kamakhya Sarkar, the first informant who had lodged the FIR dated 1.3.2003 (Exhibit-3) is the father of the deceased. In his deposition, PW 3 had stated that on 23.2.2003, in the evening, the deceased went out of the house to the market. When the deceased did not return till about 7.30 p.m., he went out in search of his son. According to PW 3, he went towards the house of accused Bipul Sarma and saw his son with accused Bipul Sarma, Kiran Sarma, Hiralal Dey and Tapeswar Murari in the public road near Uttar Mangaldoi High School.

According to PW 3, accused Jintu Kalita was also with them. PW has deposed that from a distance he could see that there was some commotion going on and further that he saw someone being pulled away towards the Bega River. According to PW 3, at that point of time being scared he returned home and told his wife (PW 5) about the incident. PW 3 has further deposed that in the next morning on suspicion he went towards the Bega River but did not notice anything there, PW 3 has also deposed about informing the incident to PW 10 Pinky Sarkar as well as to accused Jintu Kalita. In his deposition PW 3 had also stated that the day after the dead body had been recovered accused Bipul Sarma had come to their house and holding the feet of his wife (PW 5), he had stated that he had nothing to do with the killing of their son Sushil Sarkar. Furthermore, according to PW 3, accused Bipul Sarma informed his wife that it is accused Kiran Sarma who had committed the crime. PW 3 has also deposed that accused Bipul Sarma caught hold of his feet also and repeated the said statement. In addition, PW 3 has deposed that accused Bipul Sarma had stated that accused Kiran Sarma had committed the crime by paying Rs. 20,000/- and further that the deceased had an illicit relationship with the wife of the accused Kiran Sarma.

In his cross-examination, PW 3 admitted that he had not stated any of the aforesaid facts to the Investigating Officer of the case at the time when his statement was recorded by the Investigating Officer u/s 161 Code of Criminal Procedure. The examination of the Investigating Officer (PW 19) affirms the said fact.

8. PW 4 Dr. Nani Gopal Saharia was working as the Medical and Health Officer in the Mangaldoi Civil Hospital at the relevant point of time. He had performed the post mortem on the dead body of Sushil Sarkar. According to PW 4, at the time of post mortem no external or internal injury was noticed but the dead body was found to be swollen and decomposed.

9. PW 5 Smt. Mahamaya Sarkar is the wife of PW 3 and the mother of the deceased. According to PW 5, in the evening of 23.2.2003 the deceased had gone to a shop to fetch chocolates for his nephew. PW 5 has deposed that she too went towards the shop and had called the deceased from behind. At that time, accused Bipul Sarma was with him. According to PW 5, the deceased had gesticulated with his hand and had gone with accused Bipul Sarma towards the Tangla Road. PW 5 has corroborated PW 3 that her husband (PW 3) had gone out in search of Sushil Sarkar and he had come back home and reported to her that their son Sushil was with the accused persons.

PW 5 in her cross-examination denied that she had not made any of the aforesaid statements before the police at the time of investigation of the case. However, the said statement of PW 5 was contradicted by the evidence of PW 19, the Investigating Officer.

10. PW 6, Swapan Biswas had deposed that around 7/7.30 p.m. of the day of the occurrence deceased Sushil Sarkar accompanied by accused Bipul Sarma had

come to their house looking for one Bimal Dey. This witness had also denied that he had not made such a statement before the Investigating Officer which evidence was contradicted by the evidence of PW 19, the Investigating Officer.

11. PW 8, Sukumar Baroi, in his deposition had stated that around 5 p.m. of the day of disappearance he along with deceased had been watching T.V. According to PW 8, he along with the deceased had gone to the shop to buy some chocolates. Thereafter, according to PW 8, the deceased went away towards the north. PW 8 has further deposed that as the deceased was supposed to have his meal with him and had not returned he went out on a bicycle in the direction in which the deceased had gone. PW 8 had specifically deposed that he had gone towards the Army Camp and he had seen the deceased with accused Bipul Sarma. PW 8 has further deposed that he had called the deceased to his house to partake the meal to which the deceased had stated that he would come later.

PW 8, in his cross-examination, had admitted that none of the statements made by him in his deposition had been stated before the Investigating Officer at the time of recording of his statement u/s 161 Code of Criminal Procedure.

12. PW 9, Raju Mandal in his deposition had deposed that accused Bipul Sarma had fallen at the feet of PW 3 and PW 5 and had stated that he has nothing to do with the killing of deceased Sushil and that it is accused Kiran Sarma who had engineered the crime by paying a sum of Rs. 20,000/- to a group of youths who had killed Sushil.

In cross-examination, PW 9 denied that he had not made any such statement before the police, which fact, however, has been contradicted by examining the Investigating Officer (PW 19).

13. PW 10, Pinky Sarkar who is related to the deceased had deposed that six months before the incident the deceased had come to her house and had told her that accused Kiran Sarma had engineered a plot to kill him because he had an affair with the accused's wife. According to PW 10, at that time the deceased was weeping.

In her cross-examination, PW 10 denied that she had not made any such statement before the Investigating Officer which part of the evidence had been contradicted by examining the Investigating Officer (PW 19).

14. PW 11, Ms. Kaberi Sarkar is the sister of the deceased who had deposed with regard to the illicit relationship between the deceased and the wife of the accused Kiran Sarma.

15. PW 13, Smt. Bina Baroi is the wife of PW 8 who had corroborated her husband by stating that she could later come to know that accused Kiran Sarma had paid Rs. 20,000/- to get the deceased killed.

In her cross-examination, PW 13 denied that she had not made any such statement before the Investigating Officer which part of the evidence had been

contradicted by examining the Investigating Officer (PW 19).

16. PW 18, Smt. Sabitri Biswas is the wife of PW 6 who had corroborated the evidence of PW 6 regarding the deceased and accused Bipul Sarma coming to their house in search of one Bimal Dey.

PW 18 denied in her cross-examination that she had not made any such statement to the Investigating Officer which fact has been contradicted by examining the Investigating Officer (PW 19).

17. PW 19 Sri Jatin Ch. Bora is the Investigating Officer who had deposed that none of the witnesses of the prosecution had stated before him about any of the incident mentioned by the said witnesses in their depositions in Court.

18. The summary of the evidence of the prosecution witnesses recorded above would go to show that there is no eye witness to the incident. However, a reading of the evidence of the prosecution witnesses would seem to indicate that certain circumstances have been sought to be proved by the prosecution against the accused on the basis of the evidence of the witnesses examined. While PW 3, PW 5, PW 6, PW 8 and PW 18 have deposed that the deceased Sushil Sarkar was last seen in the company of the accused, PW 3, PW 5, PW 10, PW 11 and PW 13 have deposed that there was a extra marital affair between the wife of accused Kiran Sarma and the deceased. PW 3, PW 5, PW 6, PW 9 and PW 13 have deposed that after the incident accused Bipul Sarma had come to the house of PW 3 and PW 5 and touching their feet the said accused had denied any involvement with the crime and had further stated that it is accused Kiran Sarma who had engineered the death of Sushil Sarkar by paying Rs. 20,000/- to certain persons. PW 10 and PW 11 have deposed that deceased Sushil Sarkar had earlier informed them about the plan of accused Kiran Sarma to have him killed on account of the extra marital affair that he had developed with the wife of the said accused.

19. The question that confronts the Court in the present appeals is whether the aforesaid circumstances have been proved by the prosecution evidence and, if so, whether the same can form a reasonable chain of events which can unerringly point to the involvement of the accused in the crime alleged against them.

20. The first circumstance sought to be proved by the prosecution against the accused-Appellants i.e. that the deceased was last seen in the company of the accused persons, if proved, would definitely be a highly incriminating circumstance. Though the said circumstance, by itself, may not establish the guilt of the accused persons, the same, if proved, along with other circumstances, if any, will have to be considered by the Court to decide as to whether the cumulative effect of the proved circumstances brings home the guilt of the accused. In the present case, though PW 3, PW 5, PW 6 and PW 18 have stated about seeing the deceased in the company of either accused Bipul Sarma or all the accused persons, what must be noticed is that all the said witnesses have been proved to have not made any such statement before the Investigating

Officer at the time of recording of their statements u/s 161 Code of Criminal Procedure. Though not strictly a contradiction so as to require proof of the same by following the procedure laid down by Section 145 Code of Criminal Procedure, the absence of any such statement of the accused persons before the Investigating Officer and the maiden narration of such evidence in the Court has to be construed by the Court to be omissions in the evidence of the aforesaid prosecution witnesses. Omission in the evidence of prosecution witnesses on vital issues has to be taken into consideration by the Court in determining the credibility of the witnesses. That apart, out of the prosecution witnesses examined on the said point i.e. last seen together, it appears that the testimony of PW 3 is of crucial importance as it is he who had seen the deceased in the company of all the accused persons. A consideration of the evidence of PW 3 discloses that there is a fair amount of unnaturalness in the evidence tendered by the said witness, inasmuch as, PW 3 had stated that he had seen the deceased in the company of the accused persons and he had also noticed someone being dragged towards the Bega River; yet, PW 3 did not inform the police of the said incident which had occurred on 23.2.2003, neither had PW 3 made any such statement before the Investigating Officer. PW 3, in fact, had lodged the FIR (Exhibit-3) only after recovery of the dead body from the Bega River. If the evidence of PW 3 has a ring of uncertainty, naturally, corroboration of such evidence sought to be established by the evidence of PW 5 will also have to be treated by the Court with circumspect. The other witnesses examined on the point have deposed seeing the deceased with accused Bipul Sarma and not other accused persons. However, the prosecution story is that the deceased was in the company of all the accused persons. Naturally, the version offered by the prosecution witnesses cannot be understood to have established that the deceased was seen in the company of all the accused persons. The Court, therefore, considers it unsafe to rely on the evidence of PW 3, PW 5, PW 6, PW 8 and PW 18 to come to the conclusion that the first circumstance sought to be proved by the prosecution has been proved and established beyond all reasonable doubt.

21. The other three circumstances sought to be established by the prosecution i.e. extra marital affair between the deceased and the wife of accused Kiran Sarma; accused Bipul Sarma touching the feet of PW 3 and PW 5 and stating that he was not responsible for the crime which was committed by accused Kiran Sarma; and the statement of the deceased to PW 10 and PW 11 about accused Kiran Sarma conspiring to kill him, even if accepted to be proved and established by the prosecution, cannot lead the Court to arrive at the conclusion that the accused-Appellants should be held responsible for the crime alleged against them. The extra marital affair and the statement of the deceased about his knowledge that accused Kiran Sarma was conspiring to kill him though relevant circumstances by themselves or in conjunction with each other, cannot lead to the only conclusion that it is the accused persons who had committed the offence of murder of the deceased Sushil Sarkar. The statement of accused Bipul Sarma

made before PW 3 and P W 5 about the involvement of accused Kiran Sarma has hardly any evidentiary value to bring home the charge levelled against the accused-Appellants.

22. In view of the foregoing discussions, we deem it appropriate to arrive at the conclusion that in the present cases, the prosecution has failed to prove the charge under Sections 302/34 IPC levelled against the accused-Appellants. The evidence adduced by the prosecution falls short of the requirement of proving the charge beyond all reasonable doubt. We are, therefore, of the view that the impugned judgment and order dated 27.10.2006 passed by the learned Sessions Judge, Darrang in Sessions Case No. 50 (DM)04 convicting and sentencing the accused-Appellants under Sections 302/34 IPC should be interfered with. Accordingly, the said judgment and order including the conviction and sentence recorded against the accused-Appellants are set aside. The accused-Appellants are acquitted of the charge under Sections 302/34 IPC.

23. Consequently, Criminal Appeal Nos. 245/2006 and 259/2006 are allowed as indicated above. The accused-Appellants are stated to be in custody. They shall be released forthwith.