

(2021) 12 GAU CK 0003
In the Gauhati High Court
Case No : Criminal Appeal No. 28 Of 2019

Konbhaity Das @ Lakhan

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 02-12-2021

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 323, 325
Code Of Criminal Procedure, 1973 — Section 161, 313

Citation : (2021) 12 GAU CK 0003

Hon'ble Judges : Suman Shyam, J;Arun Dev Choudhury, J

Bench : Division Bench

Advocate : A. Upadhyay, B. Bhuyan

Judgement

Suman Shyam, J

1. Heard Mr. A. Upadhyay, learned counsel appearing for the sole appellant. We have also heard Ms. B. Bhuyan, learned APP, Assam, appearing for the State. None has appeared for the informant/respondent no. 2.

2. The judgement and order dated 09/10/2018 passed by the Court of learned Additional Sessions Judge (FTC), Lakhimpur at North Lakhimpur, by means of which the appellant herein, was convicted under section 302 of the IPC and sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs. 3000/- with default stipulation, has been assailed by filing the present appeal.

3. The prosecution case is to the effect that on 02/01/2012, at around 7-30 p.m., the FIR named accused persons had assaulted deceased Pradip Das inside Gharmara Satra, resulting in his death. Sri Latu Das, who had accompanied the deceased had reported the matter to the family members of the victim. On 03/01/2012, Sri Tulan Das i.e. the elder brother of the deceased had lodged an ejahar with the Officer-in-Charge of North Lakhimpur Police Station informing him that the three accused persons named in the ejahar and another unknown person had assaulted his younger brother Pradip Das when he went to Garmara

Satra to collect money from the shops at around 7-30 p.m. on 02/01/2012 after supply of food products to the retailers from "Ahar factory". In the FIR dated 03/01/2012, it was also mentioned that Sri Latu Das had accompanied the deceased, who was also assaulted with a piece of big split timber inside the Satra premises by putting gag on their mouth. Latu Das had managed to flee but the accused persons had assaulted his brother. The witness could recognize the accused persons. Therefore, a request was made to the Police to take action in the matter.

4. Based on the FIR dated 03/01/2012, North Lakhimpur Police Station case No. 02/2012 was registered under Section 302/325/34 of the Indian Penal Code (IPC). Upon completion of investigation, the I.O. had laid charge sheet under Section 302/323/34 IPC against the appellant and accused Prasanna Das (since deceased). Based on the charge sheet submitted by the IO, the learned trial Court had framed charges under Section 323/302/34 IPC against the accused persons. However, since the accused persons had pleaded not guilty, they were made to face trial. It appears that one of the accused, viz. Sri Dhunu Das was found to be a juvenile in conflict with law and the co-accused Prasanna Das had expired on 30/05/2017 during the pendency of trial and as such, the proceeding had abated against him.

5. In order to prove the charge brought against the accused Konbhaity Das, the prosecution had examined as many as 9 (nine) witnesses including the doctor Dambarudhar Mili (PW-2) who had conducted the post-mortem examination on the dead body, Sri Nabajit Das (PW-9), the IO who had conducted the investigation in connection with North Lakhimpur PS case No. 02/2012 as well as Ms. Basanti Hazarika (PW-8), who took over from the earlier IO, completed the investigation and submitted charge sheet (Ext-5). After recording of evidence of the prosecution witnesses, statement of the appellant/accused was recorded under Section 313 Cr.P.C., wherein he had claimed innocence. The defence side, however, did not lead any evidence.

6. PW-4 Sri Latu Das was the person who had accompanied the deceased Pradip Das on the day of the incident inside the Gharmara Satra where the occurrence took place and therefore, is a key witness in this case. According to the PW-4, the appellant, in association with his two nephews, viz. Prasanna Das (since deceased) and Dhunu Das (juvenile), had assaulted the deceased with a stick leading to his death. Taking note of the evidence adduced by the PW-4, the learned trial Court has held that the prosecution has succeeded in establishing the charge brought against the appellant under Section 302 of the IPC beyond reasonable doubt and accordingly, convicted the appellant and sentenced him as aforesaid.

7. Referring to the evidence available on record, Mr. Upadhyay submits that the testimony of PW-4 is full of contradiction and, therefore, the same ought not to have been relied upon by the learned trial Court for convicting the appellant. The learned counsel for the appellant has further submitted that save and except the

testimony of PW-4, there is no other evidence to even remotely implicate the appellant with the occurrence. Under the circumstances, submits Mr. Upadhyay, the conviction of the appellant by the impugned judgement dated 09/10/2018 is unsustainable in the eye of law and, therefore, calls for interference by this Court.

8. Ms. B. Bhuyan, learned APP, Assam, on the other hand, has argued that the PW-4 had not only seen the incident but has also identified the accused persons including the present appellant. She submits that even though there are some minor contradictions in the testimony of PW-4, yet, the same would not in any manner vitiate the judgement passed by the learned trial Court since the PW-4 had claimed to have seen the occurrence himself.

9. We have bestowed our anxious considerations on the rival submissions and have also examined the evidence available on record. From a careful evaluation of the evidence, we find the the followings.

10. The informant Sri Tulan Das, who is the elder brother of the deceased, was examined as PW-1. This witness had confirmed that he had lodged the FIR (Ext-1) and Ext.1

(1) is his signature. He has deposed that late Pradip Das was his younger brother. According to the PW-1, the incident took place on 02/01/2012 at around 7-30 p.m. At that time, he was going back home from the town. When he reached his house, there was nobody at home. Then his elder sister Ritamoni Das informed him over phone that the accused "duo" had killed his brother Pradip. On receipt of that information, he went to the place of occurrence, which is near Gharmara Satra and saw that his brother was being taken to the hospital in a vehicle. He immediately went to the hospital and found that his brother Pradip Das had already died. On the following day, he had lodged the ejahar at about 10-30 a.m. PW-1 has also stated that at the time of the incident, Latu Das (PW-4) was there along with the deceased Pradip and on being asked, Latu had told him that two persons had called him and Pradip Das to the house of Pushpa Das. However, he (Latu Das) did not inform him as to what had happened thereafter. Another witness Sri Lowa Das, who was also present at the place of occurrence at the time of the incident, also witnessed the incident and told him (PW-1) that he had seen the accused duo leaving the dead body of his bother after killing him. PW-1 had also confirmed that he is an inquest witness and in course of investigation, Police had seized one piece of fire wood and a piece of cloth, which was put in the mouth of Pradip.

11. During his cross examination, PW-1 has stated that he did not know as to who had killed his younger brother and that Latu Das had told him that on the night of the occurrence, they sat in the house of Pushpa Das near Gharmara Satra and that two persons had taken Pradip Das to another room. He had seen the dead body when it was being lifted in the Ambulance and also saw it in the hospital.

12. PW-2 Dr. Dambarudhar Mili was the Medical and Health Officer-I on duty in

the North Lakhimpur Civil Hospital on 03/01/2012 when the dead body of deceased Pradip Das was brought there for conducting post-mortem examination. PW-2 has stated that he had conducted the post-mortem examination and prepared the post-mortem report (Ext-3). PW-2 has deposed before the Court as regards the injuries seen in the dead body of the victim in the following manner :-

"On external examination, I found (1) Bleeding from the nose clotted blood and (2) laceration of scalp (a) inn occipital vertex size : 1/2 inch x 2 ½ inches x 1/3 inch. (b) in frontal region size : 1/4 inch x 1/2 inch z 1 inch. On dissection I found hematoma on occipital region.

In my opinion, the deceased died due to head injury as a result of (head injury) by blunt trauma."

During his cross-examination, PW-2 has opined that a strong/robust and healthy young and energetic person may not die due to such type of head injury.

13. PW-3 Sri Pulin Das did not see the occurrence but had arrived when Pradip Das was being taken to the hospital in an 108 ambulance. This witness has deposed that he could learn from the public that accused Konbhaity (i.e. the appellant herein) has killed Pradip Das.

14. As mentioned above, Sri Latu Das (PW-4) is the key witness in this case, whose testimony has been heavily relied upon by the learned trial Court so as to convict the appellant. PW-4 has deposed before the Court that the deceased Pradip Das was known to him and the incident took place in between 7-30 p.m. to 8 p.m. in the year 2012. At that time, while he was waiting near the Namgarh at Ahatguri, Pradip Das had met him and asked him to accompany him (victim) for collection of money for the biscuits he had sold. At first, PW-4 had refused to accompany Pradip Das by saying that it would rain but later on, as he again requested him, PW-4 had accompanied Pradip Das. Then he saw accused (appellant) Konbhaity Das armed with a 'lathi' standing in front of Gharmara Satra. Konbhaity Das had dealt a 'lathi' blow near the neck of Pradip Das saying "you show off yourself to be a big bully. Show it of now." When the appellant was assaulting Pradip Das, he had caught hold of the 'lathi' and asked them not to assault Pradip Das. While he was in a scuffle with the appellant by holding the lathi, three more persons had arrived there and started beating the deceased and himself. Two out of those three persons were Sri Prasanna Das and Sri Dhunu Das. PW-4 has stated that he could not recognize the other person. On being assaulted, he ran away from the scene believing that Pradip Das had also left. While he was running, Dhunu Das and Prasanna Das were chasing him and were beating him all along with a 'lathi'. Seeing an opportunity to hide himself, the PW-4 had hid himself in a bamboo grove and after about an hour, he came to know that Pradip Das had passed away.

15. During his cross-examination, PW-4 has denied the suggestion put to him that he did not know the accused duo since before and that it was not a fact that

he had witnessed Pradip Das being assaulted. This witness has also denied that Pradip Das and he had urinated near the Gharmara Satra. He has also denied that he had falsely deposed by saying that he had seen appellant Konbhaity Das armed with a 'lathi' standing in front of Gharmara Satra.

16. PW-4 was confronted with his previous statement made before the I.O. and he has denied that he did not state before the Police that he had seen the accused Konbhaity Das giving a 'lathi' blow near the neck of Pradip Das saying "you show off yourself to be big gully. Show it off now." PW-4 had also denied that he did not state before the Police that out of the two persons who had arrived and were beating him and the deceased, Dhunu Das and Prasanna Das were there. He had also denied the suggestion that he did not state before the Police that he ran away from the scene thinking that Pradip had gone home; that why he had been running away; Dhunu Das and Prasanna Das had chased him and were beating him all along with a lathi; that he had hidden himself in a bamboo grove; that about an hour thereafter, he came to know that Pradip had passed away. This witness has also denied the suggestion that he could not recognize the persons who had killed Pradip.

17. PW-5 Sri Bakul Das is a seizure witness and he has stated that he had put his signature in Ext-4, by means of which, the Police had seized a piece of timber and a lathi from the place of occurrence. PW-6 Sri Biren Das had deposed that he did not see the occurrence but later on he had seen Pradip Das lying in front of Gharmara Satra with lot of people gathered around. He went there and saw Pradip as was dead. He had also seen a 'lathi' and a cudgel lying there. PW-7 Smt. Biju Das also did not witness the incident but she had heard from others that the occurrence had taken place at night about 2/3 years back.

18. PW-8 Mrs. Basanti Hazarika was working as Sub-Inspector of Police in the North Lakhimpur Police Station on 10/03/2013 when the Case Diary was entrusted to her after the transfer of the previous I.O., viz. Sri Nabajit Nath (PW-9). PW-8 has stated that after receipt of the Case Diary, she had completed the investigation and thereafter, submitted charge sheet against the accused persons.

19. Sri Nabajit Nath, who was the I.O. in this case was examined by the prosecution as PW-9. This witness has deposed that the Officer-in-Charge of North Lakhimpur Police Station had entrusted him with the task of carrying out investigation in the connected Police Case. Accordingly, he had visited the place of occurrence, drew sketch map, seized a 'cane lathi' and a piece of 'fire-wood' from the place of occurrence vide seizure list Ext-4, got the inquest done on the dead body, had sent the dead body for post-mortem examination and later collected the post-mortem report. PW-9 has also stated that during the investigation he had arrested the accused persons and had forwarded them to the Court. However, he was transferred before completion of the investigation.

20. In his cross-examination, PW-9 has stated that the occurrence took place at

around 8-30 p.m. on 02/01/2012 and when he went to the place of occurrence on receipt of information from the Officer-in-Charge of the Police Station, the dead body was lying there. He had sent the dead body to the North-Lakhimpur Civil Hospital in a 108 Ambulance. According to the PW-9, the location of the place of occurrence was inside the campus of Gharmara Satra.

21. During his cross-examination, the PW-9 also proved the contradiction in the evidence of PW-4 by stating that "Latu Das did not state before him that he had seen accused Konbhaity Das armed with a lathi standing in front of Gharmara Satra; that he had seen the accused beating Pradip Das near his neck with a lathi saying "you show off yourself to be a big bully. Show off it now"; that while Pradip Das was being assaulted, he had caught hold of Konbhaity's lathi and asked him as to why had he assaulted Pradip; that as he has been scuffling with Konbhaity by holding the lathi, 3 more persons had arrived there and had started beating the deceased along with him.

22. From a reading of the evidence available on record, it would be evident that PW-4 had claimed himself to be an eye-witness and the learned trial Court had also treated him as one. The learned Court below had placed heavy reliance on the testimony of PW-4 to convict the appellant.

23. Taking note of the submission of the appellant's counsel as regards material contradictions in the testimony of PW-4, we have examined the Case Diary, in order to find out the nature of statements made by this witness before the Police under Section 161 Cr.P.C. and find that the statement of PW-4 was recorded by the IO on 03/01/2012. PW-9 has confirmed during his cross-examination that the statement of this witness was recorded at 11 'O' clock at the place of occurrence on the 3rd day of the month. From the statement of the PW-4 recorded u/s. 161 Cr.P.C. we find that he had stated before the Police that on 02/01/2012 at around 6.00/7.00 p.m. he along with Pradip Das was going towards Gharmara Satra. Pradip Das was supplying biscuits to the shops on the way and collected money from the shops. Before reaching the "Satra", both of them were urinating near the road. At that time, a middle aged person was coming through the road and following him, another person was coming by pushing a bicycle. When they reached near them, deceased Pradip Das had wished them "good night". At that time, the middle aged person had responded by saying "What do you mean good night" and then gave a fist blow to Pradip. Then both of them entered into a scuffle and went inside the Gharmara Satra. The person who was pushing a bicycle then left the place. By the side of the road both of them were engaged in a scuffle. He tried unsuccessfully to stop them. Pradip is stronger than me. Although I tried to stop him physically, he pushed me away. At that time, two younger persons with 'lathi' (stick) in their hand came inside Garmara Satra and without asking any question, one of them started striking me with the stick. Out of fear for life, I ran away by leaving Pradip at that place. Although the boy had chased me, I succeeded in running away. I believe the boy was the nephew of the middle aged person because the boy

while entering the Satra was asking as to who had hit his uncle. I ran away and after reaching home, informed the family members of Pradip. Later on, he came to know that Pradip has died. He believe that the middle aged person and the boy with the stick in his hand had together struck Pradip leading to his death. He came to know about the name of the assailants only that morning. The name of the middle aged person is Konbhaity Das and amongst the two boys, one is nephew of Konbhaity Das, viz. Prasanna Das and the other one is friend of Prasanna Das viz. Dhunu Das. All of them were residents of Gharmara.

24. From a careful examination of the statement of PW-4 recorded under Section 161 Cr.P.C., his deposition before the Court as well as the testimony of PW-1, it is evident that this witness had given three different versions of the incident and each version substantially contradicts the other. It is also apparent that there are material contradictions in the testimony of PW-4 which have been duly proved by the I.O. Moreover, although PW-4 had stated that he was also beaten by the stick a number of times, yet, there is no evidence to show that he had received any injury. The other witnesses have also not mentioned about any injury being suffered by the PW-4. We, therefore, finds sufficient force in the submission of Mr. Upadhyay that the testimony of PW-4 is full of material contradictions, omissions and improvements, which render his evidence untrustworthy.

25. Besides the above, it is also evident from the statement of PW-4 made before the IO that he did not previously know the accused persons but had come to know about their names only on the next day of the incident i.e. on 03/01/2012. We also find that during his deposition before the Court, PW-4 had not identified the accused persons present in the dock. In other words, there is no evidence to show as to wherefrom the PW-4 had learnt about the names of accused persons and in what manner, they had been identified by the PW-4 during trial. We are, therefore, of the view that the prosecution had failed to establish an important link in the chain of circumstances, viz. the identity of the accused persons and to that extent the involvement of the appellant in assaulting the victim Pradip Das on the date of the incident.

26. It is no doubt firmly established that the incident took place in the evening hours of 02/01/2012, in the precincts of Gharmara Satra where the deceased was attacked with stick and firewood, as a result of which, he had received grievous injuries in the vital part of the body. It is also established from the medical evidence, more particularly, the testimony of PW-2 that the deceased had died a homicidal death.

27. However, there is no evidence to show that the appellant is a resident of Gharmara Satra nor is there any evidence to prove that he was present at the place of occurrence on the day of the incident. Due to the inherent contradiction in the version of the PW-4, we have serious doubt as to whether he had at all seen the occurrence and if so, whether he could identify the real assailants. As such, it would be very unsafe to solely rely on the testimony of PW-4 to convict the appellant.

28. The learned trial Court had placed heavy reliance on the testimony of PW-4 and observed that this witness had deposed in a consistent manner and proved that it was the appellant Konbhaity Das who had given the first blow with a stick in the neck of the deceased Pradip Das. However, such finding of the learned trial Court is not supported by the testimony of PW-2. That apart, as noted herein before, due to material contradiction in the testimony of PW-4, his evidence without due corroboration from independent witnesses was not liable to be relied upon for conviction of the appellant. Since there is no other evidence to implicate the appellant with the occurrence, we are of the unhesitant opinion that the prosecution has failed to establish the charge brought against the appellant under Section 302 of the IPC beyond reasonable doubt.

29. For the reasons stated herein above, the impugned judgement dated 09/10/2018 passed by the learned Additional Sessions Judge (FTC), Lakhimpur, North-Lakhimpur, in connection with Sessions Case No. 207(NL)/2013 is hereby set aside. The appellant Konbhaity Das is acquitted of the charge brought u/s. 302 IPC due to lack of evidence against him.

30. Since the appellant is already out on bail, his bail bond shall stand discharged with immediate effect.

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