
(2012) 09 GAU CK 0042
In the Gauhati High Court
Case No : Criminal Appeal No. 98 (J) of 2007

Kul Bahadur Koirala Chetry

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 428
Penal Code, 1860 (IPC) — Section 201, 300, 302, 304, 84

Citation : (2012) 5 GLT 868

Hon'ble Judges : Swapan Chandra Das, J; Iqbal Ahmed Ansari, J

Bench : Division Bench

Advocate : B. Sharma, Amicus Curiae, for the Appellant; D. Das, Addl. P.P., for the Respondent

Judgement

I.A. Ansari, J.—This is an appeal against the judgment and order, dated 28.05.2007, passed, in Sessions Case No. 107(NL)/2006, by the learned Additional Sessions Judge (FTC), North Lakhimpur, convicting the accused-appellant under Sections 302 and 201 IPC and sentencing him to suffer, for his conviction u/s 302 IPC, imprisonment for life and pay fine of Rs. 1,000/- and, in default of payment of fine, suffer rigorous imprisonment for a period of one year and also to undergo, for his conviction u/s 201 IPC, rigorous imprisonment for three years and pay fine of Rs. 1,000/- and, in default of payment of fine, suffer rigorous imprisonment for a further period of one year, both the sentences having been directed to run concurrently. The case of the prosecution, as unfolded at the trial, may, in brief, be described as under:

(i) Bishnu Bahadur Chetri (since deceased) was the elder brother of accused Kul Bahadur Koirala Chetry. On 23.10.2005, at about 7.30 am, a quarrel took place between, the two brothers. Following the quarrel, Bishnu slapped the accused. Enraged by the slap, given by his elder brother, the accused pushed his brother to the ground, picked up an axe and gave blow with the same on his brother, Bishnu Chetri. When Bishnu was lying injured on the ground, the accused gave

further blows on Bishnu. Having received grievous injuries, Bishnu Chetri died. The accused, then, dragged the dead body to a drain located nearby and, with the help of a spade, buried the said dead body in order to screen himself from being caught as an offender. The quarrel between the two brothers aforementioned, the act of slapping of the accused by his elder brother and retaliated blows by the axe, given by the accused on his elder brother, were all witnessed by P.W. 3 and P.W. 4, who are female persons, and whose houses are situated in front of the house of the accused.

(ii) After having killed his brother, as indicated above, the accused went to the houses of P.W. 3 and P.W. 4 making enquiry from them if they had seen his elder brother, Bishnu. Scared and frightened, both the ladies, namely, P.W. 3 and P.W. 4, expressed their ignorance about the whereabouts of Bishnu, because no male member was, at that point of time, present in their respective houses. When P.W. 6, father of P.W. 3, returned home, P.W. 3 informed him about what the accused had done. Similarly, P.W. 4 also informed her husband (P.W. 5), when the latter returned home. P.W. 5 and P.W. 6, in turn, informed their co-villagers and, on hearing what had happened, the co-villagers of the accused came to the house of the accused, apprehended him and, on enquiry made by them, he confessed to have killed his brother, Bishnu. The police was, then, informed by Tanka Kumar Chetry by way of a written Ejahar at Dolahat outpost. Having made G.D. Entry No. 364, dated 23.10.2005, in this regard, the in-Charge, Dolahat outpost, sent the said Ejahar to Laluk Police Station. Treating the said Ejahar as First Information Report (in short, FIR), Laluk Police Station Case No. 123/2005, under Sections 302 /201 IPC, was registered against the accused.

(iii) During investigation, police visited the place of occurrence, held inquest over the said dead body, got post mortem examination performed over the said dead body and, on completion of investigation, submitted charge-sheet, under Sections 302 /201 IPC, against the accused.

2. During trial, when charges, under Sections 302 and 201 IPC, were framed against the accused, he pleaded not guilty thereto.

3. In support of their case, prosecution examined altogether 8 (eight) witnesses. The accused was, then, examined u/s 313 Cr. P.C. and, in his examination aforementioned, he denied to have committed the offences, which were alleged to have been committed by him, the case of defence being that of denial. No evidence was adduced by the defence.

4. However, having found the accused guilty of the offence, which he stood charged with, the learned trial Court convicted him accordingly and passed sentences against him as mentioned above. Aggrieved by his conviction and the sentences, which have been passed against them, the accused has preferred this appeal.

5. We have heard Ms. B. Sharma, learned Amicus Curiae, and Mr. D. Das, learned Additional Public Prosecutor, Assam.

6. Before we enter into the discussion of the various incriminating pieces of the evidence, which formed the basis of conviction of the accused-appellant, we deem it appropriate to take into account the medical evidence on record. The doctor (P.W. 4), who, admittedly, performed, on 24.10.2005, post mortem examination on the dead body of Bishnu Chetry, found, according to the evidence given by the doctor, as follows:

- a. Transverse cut wound on neck, above hyoid bone structure involved larynx, esophagus, neck muscles with neuro vascular structure of both sides.
- b. Both eye ball dislocated.
- c. Lacerated wound involved whole right forehead and nose.
- d. cut wound on scalp right occipital area 2.5 x 1.00 cm x upto skull.
- e. Lacerated wound on ulnar border of left palm size 3 cm x 1 cm x upto bone.
- f. Scalp injury which is cut wound on right occipital area on sagittal direction, size 2.5 x 1 cm x up to bone.
- g. comminuted fracture on right frontal bone and whole nasal bone.
- h. Brain membrane ruptured on right frontal area.
- i. Brain injury lacerated injury on right frontal bone.

7. All the injuries, according to the doctor, were ante mortem in nature and the death was caused due to shock and hemorrhage, which resulted from the injuries sustained, the injuries being homicidal in nature, Ext. 5, according to the evidence of the doctor, is the post mortem report and Ext. 5(1) is his signature.

8. The findings of the doctor and his opinion with regard to the nature of injuries sustained by the deceased and the cause of death were not in dispute at the trial. We, too, do not notice anything inherently improbable or incorrect in the evidence given by the doctor. We see, therefore, no reason to disbelieve or discard the medical evidence on record. The medical evidence on record clearly shows the injuries, as described by P.W. 4, having been sustained by the said deceased and these Injuries, it is clear, could have been caused by a weapon, such as, axe.

9. Bearing in mind what is indicated above, we turn to the evidence of P.W. 3 and P.W. 4, whose houses are, admittedly, located in front of the house of the accused-appellant.

10. Broadly in tune with each other, both these female witnesses (P.W. 3 and P.W. 4) have deposed that on the day of the occurrence, at about 7.30 am, they heard hue and cry coming from the house of the accused and saw that the accused and his brother, Bishnu, were having arguments with each other. These two witnesses have also deposed that they saw from their respective houses Bishnu slapping the accused, whereupon accused pushed Bishnu to the ground"

and gave two blows by an axe and when Bishnu cried out by saying, "Oh Father", the accused reacted by saying, "Now only you remember your father", and, by uttering these words, the accused, again, assaulted Bishnu by the axe. Both these witnesses, namely, P.W. 3 and P.W. 4, have deposed that they saw the accused dragging the dead body of his brother to the nearby drain, put the same there and covered the same by soil with help of a spade. These two witnesses have further deposed that after having buried his brother, the accused went to their houses, i.e., the houses of P.W. 3 and P.W. 4, and made enquiries about the whereabouts of his brother, Bishnu, and as there was no male member present, at that point of time, in the houses of P.W. 3 and P.W. 4, both these witnesses told the accused that they had not seen Bishnu, whereupon the accused came back to his house.

11. From the evidence on record, it also transpires that when her father, P.W. 6, came home, P.W. 3 reported to him as to what she had witnessed and, similarly, when her husband (P.W. 5) returned home, P.W. 4, too, reported to him (P.W. 5) as to what she had seen as regards killing of Bishnu. It is in the evidence on record that P.W. 5 and P.W. 6 informed their co-villagers, the co-villagers went to the house of the accused, caught hold of him and tied him and, upon their making enquiry, the accused confessed to have killed his brother.

12. Considering the fact that the accused was apprehended and tied and, then, upon enquiry, he had allegedly confessed to have killed his brother, Bishnu, the confession, even if made by the accused, cannot be, in the circumstances pointed out above, be regarded as being voluntarily made inasmuch as the accused was not the one, who had gone to anyone and confessed to have killed his brother.

13. Notwithstanding, thus, that: the accused-appellant had allegedly confessed to have killed Bishnu, we do not place any reliance on the confession, which had allegedly been made by the accused. However, we find that as far as P.W. 3 and P.W. 4 are concerned, both of them were cross-examined by the defence, but nothing could be elicited from them to show that what they had deposed was untrue or false. Their evidence has remained wholly unshaken and inspire great confidence.

14. What emerges from the above discussion is that P.W. 3 and P.W. 4 were the eye witnesses to the occurrence. Their evidence, having remained unshaken, are found to be wholly reliable. This apart, their evidence stand corroborated by P.W. 5 and P.W. 6 respectively. Moreover, the dead body was found at the place, where P W3 and P W4 had seen the accused burying the dead body, and the medical evidence on record is consistent with the ocular evidence on record.

15. Thus, the evidence, as against the accused-appellant, is entirely believable, clinching and there is no reason for us to doubt that it was the accused-appellant, who had killed his brother, Bishnu, in the manner as have been deposed to by P.W. 3 and P.W. 4.

16. It has been pointed out by Ms. Sharma, learned amicus curiae, that P.W. 2 has deposed, in his cross-examination, that the accused acts, sometimes, like a mad man and, similarly, P.W. 3 has deposed that their co-villagers call the accused mad. Even P W5 has deposed that the accused is known as a mad man. The learned amicus curiae further contends that the case of the accused ought to have been held by the learned trial Court to be covered by the provisions of Section 84 IPC, which absolves a person from the responsibility of committing an offence provided the Court is convinced that the act, which has been done, constituting offence, by a person, who, at the time of doing the act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act or that what he was doing was wrong or contrary to law.

17. Medical insanity, it is trite, is not legal insanity. In order to make an act fall within the ambit of legal insanity, as embodied in Section 84 IPC, one has to prove, as in the case at hand, that the present accused-appellant did not, because of unsoundness of mind, know at the time, when he had assaulted and killed his brother, Bishnu, that what he was doing was wrong or contrary to law or that he was incapable of knowing the nature of his act.

18. The conduct of the accused, as the evidence on record reflect, belie any possibility of the accused being of unsound mind, at the relevant point of time, inasmuch as he did not only react on being slapped by his elder brother in the manner as has been discussed above, but he also had the soundness of mind to drag the dead body to the nearby drain and cover the same by soil, with the help of a spade, in order to cause the evidence of his offence disappear and to screen himself from being caught. This conduct is ample proof of the fact that the accused knew, and knew it well, that what he had done was wrong and contrary to law. This impression gets fortified by the fact that after doing what he did, the accused went to the house of P.W. 3 and P.W. 4 and made enquiries about the whereabouts of his brother, Bishnu, so as to project his own innocence as if he did not know as to where his brother was; whereas the evidence on record speaks eloquently that the accused knew as to where his brother was Situated thus, we do not find that the acts of the accused-appellant can, by any means, be made to fall within the; ambit of Section 84 IPC.

19. The learned amicus curiae has, however, contended that the acts of the accused, even if the evidence on record is believed to be true, squarely fall within the Exception I of Section 300 IPC. For the sake of brevity, we reproduce Exception I to Section 300 IPC, which reads as under:

Exception 1.-When culpable homicide is not murder.-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First-That the provocation is not sought or voluntarily provoked by the offender

as an excuse for killing or, doing harm to any person.

Secondly.-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.-That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation

Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, in as much as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, in as much as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as witness before Z, a Magistrate, Z says that he does not believe a word of A's deposition, and that A has perjured himself A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose, Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, in as much as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.-Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.- Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.-Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation

It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5.-Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

20. Let us, now, examine if the case of the accused-appellant can be held to fall within Exception I of Section 300 IPC and whether his act could have been regarded as culpable homicide not amounting to murder.

21. While considering the above aspect of the case, it is imperative to bear in mind that an argument had, admittedly, taken place between the two brothers and, following the argument, it was not the accused, who had hit his brother, but it was his elder brother, Bishnu, who had, out of provocation, slapped the accused and the accused reacted by pushing Bishnu to the ground and, then, gave him blows with axe and when Bishnu cried out by saying "Oh Father", the accused reacted by saying, "Now only you remember your father" and gave him further blows with the help of the axe.

22. In the facts and attending circumstances of the present case, we are of the view that the accused had received sufficient provocation, which can be regarded as grave and sudden provocation and it was, on being deprived of his power of self-control, because of the grave and sudden provocation, which he had so received that the accused gave blows by the axe on his brother Bishnu.

23. What needs to be further noted is that the accused-appellant was not merely satisfied by injuring his brother, but intended to cause his death and it was for this reason that even after he had already given blows with axe on his brother,

Bishnu, the accused-appellant gave further blows on his brother and killed him.

24. In the circumstances as indicated above, we have no reason to doubt that though the case at hand falls within the Exception I to Section 300 IPC and shall be regarded as culpable homicide not amounting to murder, the fact that the accused-appellant intended to cause death of his brother and he did cause his brother's death with intention to cause his brother's death and the acts of the accused-appellant, therefore, fell within the ambit of Section 304 Part-I IPC.

25. What logically follows from the above discussion is that the accused-appellant, in the facts and circumstances of the present case, as emerged from the evidence on record, ought not to have been held guilty of the charge of murder, but ought to have been held guilty of, and convicted for, an offence u/s 304 Part-I IPC.

26. Because of what have been discussed and pointed out above, this appeal partly succeeds. While we set aside the conviction of the accused-appellant u/s 302 IPC, we hereby hold him guilty and convict him u/s 304 Part-I IPC.

27. Taking into consideration all aspects of the case involving commission of the offence by the accused-appellant, we are of the considered view that a sentence of 10 (ten) years of rigorous imprisonment would, in the fact situation of the present case, serve the ends of justice. We accordingly sentence the accused-appellant to undergo, for his conviction u/s 304 Part-I IPC, rigorous imprisonment for a period of 10 (ten) years and pay fine of Rs. 2,000/- and, in default of payment of fine, suffer rigorous imprisonment for a further period of six months subject to the provisions of set off as embodied in Section 428 Cr. P.C.

28. As far as the conviction of the accused-appellant, u/s 201 IPC, is concerned, we, having found and held to the effect that the accused-appellant buried the said dead body in order to cause the evidence of the offence committed by him disappear with intention to screen himself from punishment, he was rightly convicted u/s 201 IPC and we accordingly maintain his conviction u/s 201 IPC.

29. The learned trial Court has, as already mentioned above, sentenced the accused-appellant to suffer, for his conviction u/s 201 IPC, rigorous imprisonment for 3 (three) years and pay fine of Rs. 1,000/- and, in default of payment of fine, suffer rigorous imprisonment for a further period of one year. We modify, in the facts and circumstances of the present case, this sentence, too, and sentence the accused-appellant to suffer rigorous imprisonment for a period of three years and pay fine of Rs. 1,000/-, and, in default of payment of fine, suffer rigorous imprisonment for a further period of three months. Both the sentences, passed against the accused-appellant, shall run concurrently.

30. With the above modifications, which we have recorded, and the conviction and the sentences, which we have passed against the accused-appellant, this appeal shall stand disposed of.

31. Let the learned amicus curiae be paid a sum of Rs. 5,000/- for her valuable

assistance rendered to the Court. Send back the LCR.