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**(2007) 06 GAU CK 0047**

**In the Gauhati High Court**

**Case No :** Criminal Appeal No. 105 (J) of 2001

Lakhinath Chutia alias Lakhinandan — APPELLANT

Vs

State of Assam — RESPONDENT

**Date of Decision :** 08-06-2007

**Acts Referred:**
Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 201, 302

**Citation :** (2007) CriLJ 3905 : (2008) GLT 513 Supp

**Hon'ble Judges :** B.P. Katakey, J;Aftab H. Saikia, J

**Bench :** Division Bench

**Advocate :** B. Chakraborty, Amicus Curiae, for the Appellant; D. Das, Public Prosecutor, for the Respondent

**Final Decision :** Allowed

## Judgement

B.P. Katakey, J.—The criminal proceeding was set in motion on lodging the First Information Report No. 202/99 (Ext. 2) by Rajen Gowala (who has not been examined by the prosecution) in Rajgarh Police Out Post in the district of Dibrugarh under Tingkhong Police Station wherein it has been alleged that on 19-2-1999 the accused appellant Lakhinath Chutia killed the complainant''s sister Reena Goala and kept her dead body concealed somewhere. On the basis of the said FIR, Tingkhong Police Station case No. 12 /99 u/s 302 /201, IPC was registered. The investigating agency consequently conducted the investigation and having found materials against the present appellant submitted the charge-sheet u/s 302/201, IPC. The case being exclusively triable by the Court of Sessions, it was committed to the Court of Sessions which framed the charge against the accused appellant on 1-10-1999. The charge being read over and explained to the accused appellant, he denied the same and pleaded not guilty and claimed to be tried. Hence the trial commenced.

2. The prosecution in order to bring home the charges against the appellant examined eight witnesses namely Akash Chutia (P.W. 1), Bhaskar Neog (P.W. 2),

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Papu Singh (P.W. 3), Gopal Limboo (P.W. 4), Kanak Phukan (P.W. 5), Nandalal Jaysewal (P.W. 6), apart from Dr. M. N. Gogoi (P.W. 7) who has conducted the autopsy on the body of the deceased Reena Goala and Sanjib Kumar Baruah the Investigating Officer as P.W. 8. During the course of trial P.W. 1, P.W. 2, P.W. 3 and P.W. 5 were, however, declared hostile as they did not support their version before the Police recorded u/s 161, Cr. P.C. On being permitted these witnesses were cross-examined by the prosecution. The defence did not adduce any evidence. The learned Judge after closer of evidence, examined the accused/ appellant u/s 313, Cr. P.C. The trial Court on appreciation of evidences on record convicted the appellant u/s 302/201, IPC vide judgment and order dated 21-12-2000 passed in Sessions Case No. 81/99 and sentenced him to undergo imprisonment for life and to pay a fine of Rs. 10,000/-, in default to suffer rigorous imprisonment for 5 (five) years for commission of offence u/s 302, IPC and to undergo rigorous imprisonment for 4 (four) years and to pay a fine of Rs. 4,000/-, in default to suffer rigorous imprisonment for 2 (two) years u/s 201, IPC. Hence this appeal from the jail.

3. We have heard Mr. B. Chakraborty, learned Amicus Curiae for the appellant and Mr. D. Das, learned Public Prosecutor, Assam for the respondents.

4. The doctor (P.W. 7) namely Dr. M. N. Gogoi who conducted the autopsy over the dead body of the deceased Reena Goala has exhibited the post-mortem report as Ext. 3. P.W. 7 in his deposition before the Court has narrated the injuries found on the body of the deceased Reena Goala which reads as follows:

Injuries

1. One faintly depressed mark in the middle part of the neck below the thyroid cartilage, encircling the neck horizontally. Size 11 cm x 3 cm. The base of the mark was pale and dry.

2. Few fingers nail marks abrasions in the side of the neck. The nail marks are cres-centic."

In the opinion of the doctor the death was caused due to asphyxia resulted from the ante-mortem strangulation of the neck by the ligature, finger (throttling) which was homicidal in nature.

5. The defence did not cross-examine the doctor and hence the injuries found on the body of Reena Goala remain unchallenged. From the nature of injuries found on the body as well as the opinion of the doctor relating to the cause of death, the prosecution could therefore establish that the death of Reena Goala was homicidal in nature.

6. The question which requires consideration by the Court, now, is whether the accused appellant was the author of such injuries.

7. As noted above, the prosecution in order to bring home the charge of murder against the appellant has produced six witnesses apart from the doctor as well as

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the investigating officer, out of which four vital witnesses did not support the prosecution story and were declared hostile and on being permitted were also cross-examined by the prosecution.

8. The learned Sessions Judge convicted, the accused appellant on the basis of the statements of the hostile witnesses namely P.W. 1, P.W. 2, P.W. 3 and P.W. 5. There is no eye-witness to the occurrence and the prosecution case rests on the circumstantial evidence together with the extra-judicial confession allegedly made by the accused appellant before P.W. 1, P.W. 2, P.W. 3 and P.W. 5 which forms the basis for conviction by the learned Sessions Judge.

9. P.W. 1 Akash Chutia in his evidence before the Court has stated that he does not know anything about the incident though he know the accused, being his elder brother. This witness has also stated that he does not know Reena Goala the deceased. At this stage this witness has been declared hostile by the prosecution and was cross-examined. During cross-examination the prosecution has proved the statements made by this witness before the police and recorded u/s 161, Cr. P.C. From the said statement recorded u/s 161, Cr. P.C. as proved by the prosecution, during cross-examination, it appears that Lakhinath Chutia, the appellant came to the house of Akash Chutia (P.W. 1) and met Bhaskar Neog (P.W. 2) and disclosed before Bhaskar Neog that he strangulated Reena Goala to death and also informed that he will go to the Police Station and surrender. P.W. 2 Bhaskar Neog who is not related to the accused was also declared hostile by the prosecution and on being permitted was cross-examined by the prosecution. In his examination-in-chief the P.W. 2 has stated that he heard from the people that accused Lakhinath Goala killed Reena Goala. He has also stated that he did not hear anything from Lakhinath about the offence, at which stage the said witness was declared hostile. During the cross-examination, the prosecution, however, proved the statements made by this witnesses u/s 161, Cr. P.C. before the police, wherein this witnesses has stated that at 12.30 p.m. the accused, elder brother of P.W. 1 came to the rented house of P.W. 2 when Akash Chutia P.W. 1 was not present and informed him that he strangulated the girl to death and asked the said witness to inform his brother (i.e. P.W. 1) and has also stated that he would go to the Police Station to surrender.

10. P.W. 3 Papu Singh another witness produced by the prosecution to prove the charges was also declared hostile by the prosecution as he did not support the case of the prosecution. This witness was also cross-examined by the prosecution and during such cross-examination the prosecution could prove his statement recorded u/s 161 to the effect that the accused killed the girl Reena Gaola by name and concealed her dead body near the cremation ground and surrendered at the Dibrugarh Sadar Police Station.

11. P.W. 4 Ganesh Limboo is not a material witness as he has stated before the Court that he does not know anything about the occurrence. He has, however, stated in his examination-in-chief that on the date of occurrence he saw a gathering of people near the cremation ground and while going to the said place

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he saw the dead body of Reena Goala. This witness was not declared hostile by the prosecution as evidently he has not resiled from his statement recorded u/s 161, Cr. P.C. by the police. The next witness examined by the prosecution in support of the charge is P.W. 5 namely Kanak Phukan who also did not support the prosecution case and was declared hostile when he stated before the Court that he did not know anything about the occurrence. During cross-examination by the prosecution this witness was, however, confronted to his own statement before the police recorded u/s 161, Cr. P.C. The prosecution basically based its case on the evidence of P.W. 1, P.W. 2, P.W. 3 and P.W. 5 for the purpose of proving the extra-judicial confession.

12. Sri Nandalal Jaysewal P.W. 6 being the scribe of the First Information Report (Ext. 2) has stated before the Court that he has written the First Information Report as dictated by the first informant Rajen Gowala, who has not been examined by the prosecution. This witness is also not material for proving the charges levelled against the accused, he being the scribe of the First Information Report only, lodging of which has not been challenged by the defence.

13. The Investigating Officer Sri Sanjib Kumar Baruah has been examined as P.W. 8 to prove the statement made by P.W. 1, P.W. 2, P.W. 3, P.W. 4 and P.W. 5 before the police and recorded u/s 161, Cr. P.C. From the deposition of P.W. 8 it appears that the accused appellant had made an extra-judicial confession before P.W. 1, P.W. 2, P.W. 3 and P.W. 5 which has been stated by this witness during investigation by the police.

14. As noted above, the prosecution relies on such circumstantial evidence more particularly the extra-judicial confession allegedly made by the accused appellant before P.W. 1, P.W. 2, P.W. 3 and P.W. 5. The prosecution, apart from the said witnesses, has not examined any other witness to prove the circumstances appearing against the accused and also the extra-judicial confession allegedly made by the accused appellant. Therefore, the vital witnesses in the present case are P.W. 1, P.W. 2, P.W. 3 and P.W. 5 who have been declared hostile.

15. The evidence of the hostile witnesses can be relied upon to the extent it corroborates the prosecution version. Declaration of the witnesses to be hostile does not ipso facto reject the evidence and the portion of the evidence being advantageous to the parties may be taken advantage of but the Court before whom such a reliance is placed shall have to be extremely cautious and circumspect in dealing with such cases. The Apex Court in Ram Swaroop and Others Vs. State of Rajasthan, has observed that "it is no doubt true that merely because the witness is declared hostile his evidence cannot be discarded. The fact that the witness has resiled from the earlier statement made in course of investigation puts the Court on guard and cautions the Court against acceptance of such evidence without satisfactory corrobo-ration."

16. In the present case, as noted above, apart from the evidence of the P.W. 1, P.W. 2, P.W. 3 and P.W. 5, who have been declared as hostile, there is no other

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evidence on record to prove the circumstances against the accused appellant and also the extra-judicial confession allegedly made by the accused appellant. As the evidence of the hostile witnesses can be taken into consider-ation for the purpose of corroboration of the other evidence adduced by the prosecution, in the absence of any other material evidence on record, there is no question of corrobo-ration of the prosecution version by the evidence of the said hostile witness namely P.W. 1, P.W. 2, P.W. 3 and P.W. 5.

17. It is also a settled position of law that the statements made by the witnesses before the police and recorded u/s 161, Cr. P.C. cannot be treated as substantive evidence and undue importance cannot be given to such statement, as the same cannot be treated as evidence. However, such statement can be used for the limited purpose of impeaching the credibility of a witness.

18. In the instant case, all the material witnesses adduced has been declared as hostile. The prosecution though could prove their statement made u/s 161, Cr. P.C. such statement being not substantive evidence, the conviction cannot be based on the sole testimony of such hostile witnesses, there being no other evidence produced by the prosecution to support the charges levelled against the appellant.

19. It appears from the evidence on record that another circumstance, which according to the prosecution, appears against the accused appellant is that he has surrendered before the Dibrugarh Sadar Police Station before bringing him to Tingkhong" Police Station.

20. P.W. 8 who is the investigating officer in his deposition before the Court has specifically stated that he could not produce any document to prove that the accused appellant in fact had surrendered before the Dibrugarh Police station. There being no evidence at all produced by the prosecution to prove the surrender by the accused the same cannot be treated as the circumstance to link the accused to the commission of offence.

21. The other circumstance i.e. the recovery of the dead body of Reena Goala allegedly at the instance of the accused as pleaded by the prosecution cannot also be accepted against the unexplained contradiction of the place where the accused appellant claimed to have been surrendered and arrested and also regarding the manner of recovery. The prosecution has also failed to produce and prove the statement of the accused appellant, recorded by the investigating officer, leading to recovery of the dead body. No other cogent oral evidence, to prove that the accused appellant led the police to recover the dead body, has been adduced by the prosecution, as the witnesses on which the prosecution has placed reliance on its version that the accused led the police to the recovery, have been declared hostile and have not supported the prosecution. 22-23. In view of the aforesaid discussions, we are of the view that the prosecution has failed to prove the involvement of the accused appellant to the commission of offence of murder of Reena Goala. Hence the judgment of conviction recorded by

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the learned Sessions Judge, Dibrugarh vide judgment dated 21-12-2000 in Sessions Case No. 81/99 and sentence imposed is set aside.

24. The appeal stands allowed.

25. The accused appellant is set at liberty, if he is not wanted in any other case.

26. The Registry is directed to send down the records to the trial Court at Dibrugarh forthwith.

27. The learned Amicus Curiae shall be entitled to the professional fee which is quantified at Rs. 2500/- (Rupees two thousand five hundred) only.

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