
(2013) 08 GAU CK 0083
In the Gauhati High Court
Case No : Criminal Appeal No. 151 of 2008

Legal Heirs of Phanidhar Das

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 06-08-2013

Acts Referred:

Citation : (2014) 1 GLD 63 : (2013) 5 GLT 229

Hon'ble Judges : Iqbal Ahmed Ansari, J; Indira Shah, J

Bench : Division Bench

Advocate : P. Katakya, Amicus Curiae, for the Appellant; K.A. Mazumdar, Addl. PP, for the Respondent

Judgement

Indira Shah, J.—This is an appeal against the judgment and order, dated 16.08.2010, passed, in Sessions case No. 21 (K) 2006, by the learned Addl. Sessions Judge (FTC) No. 4, Kamrup, convicting the sole accused-appellant (since deceased) u/s 302 IPC and sentencing him thereby to undergo imprisonment for life and also to pay a fine of Rs. 5,000/- in default of payment of fine, to undergo rigorous imprisonment for another period of 6(six) months. The case of the prosecution may, in brief, be described thus:

(i) The present appellant's husband, Phanidhar Das, was Sub-Inspector of Police. On 28.04.2000, at about 1.30 A.M., Phanidhar Das, along with three other police personnel, visited the house of Ahindra Kalita (since deceased) in connection with investigation of Chandmari Police Station Case No. 107 of 2000, u/s 468 /420 IPC, because Ahindra Kalita was allegedly involved in the case aforementioned.

(ii) During the house search of Ahindra on the fateful night, the appellant's husband, Phanidhar Das, shot Ahindra Kalita with his service revolver. The injured, Ahindra Kalita, was carried to Guwahati Medical College and Hospital; but, on his way to hospital, Ahindra Kalita died.

(iii) Sanjoy Kalita, son of the said deceased, lodged formally an Ejahar on

21.04.2000. On the basis of the Ejahar, Dispur Police Station Case No. 358 of 2010, under Sections 302 /323 /34 IPC, was registered.

(iv) On completion of investigation, charge-sheet, u/s 302 IPC, was laid against accused Phanidhar Das (since deceased), husband of the present appellant.

2. At the trial, when a charge, u/s 302 IPC, was framed against the said accused and the particulars of offence were explained to him, he pleaded not guilty to the charge and claimed to be tried.

3. In order to prove its case, prosecution examined altogether 36(thirty six) witnesses. The statement of accused Phanidhar Das was, then, recorded u/s 313 Cr.P.C. In his examination aforementioned, the accused, while admitting the fact that he, along with three other Police personnel, had gone to the house of the said deceased in connection with Chandmari P.S. Case No. 107/2000 aforementioned, he denied that he had shot dead the said Ahindra Kalita. No evidence was adduced by the defence.

4. Having, however, found accused Phanidhar Das guilty of the offence, u/s 302 IPC, which he stood charged with, learned trial Court convicted him accordingly and passed sentence against him as stated earlier.

5. Challenging his conviction and the sentence, accused Phanidhar Das preferred this appeal and this Court found that it was a fit case, wherein additional evidence was required to be taken, regarding the legal custody of the weapon, which was allegedly used in the commission of the offence. In pursuance to the order, dated 11.08.2009, passed in this appeal, the learned trial Court has recorded additional evidence of two Court witnesses and re-examined PW 35. In view of the additional evidence, so brought on record, the statement of accused-appellant, Phanidhar Das (then alive), was, again, recorded. The accused-appellant, Phanidhar Das, however, declined to adduce any defence evidence, when additional evidence, as indicated before, was recorded pursuant to the order, dated 11.08.2009, passed in this appeal.

6. During pendency of this appeal, Phanidhar Das died and, on his death, his wife, Smt. Moni Das, has substituted herself as appellant.

7. We have accordingly heard Mr. P. Kataki, learned counsel, as Amicus Curiae. We have also heard Mr. Z. Kamar, learned Public Prosecutor, Assam.

8. Before entering into the merit of the case, it will be relevant to discuss, in brief, the material evidence brought on record by the prosecution.

9. Sanjoy Kalita (PW 1) and Manas Kalita (P.W. 2), both sons of deceased Ahindra Kalita, and Khargeswar Talukdar, brother-in-law of the said deceased (PW 8) and Dilip Das, who is adopted son of the said deceased (PW 4), were present at the house of the said deceased, when the incident occurred.

10. PW 5 (Lakshi Kanta Das), PW 6 (Kesharam Das) and PW 15 (Ratul Ch. Medhi) are neighbours of the deceased. PW 10 (Uday Deka), PW 19 (Balendra

Kalita) PW 21 (Mohindra Kr. Kalita) and PW 20 (Hemen Choudhury) are relatives of the said deceased.

11. PW 9 (Arbinda Das) and PW 13 (Jonmejoy Barman) were co-workers of the said deceased. Others are official witnesses i.e., doctor, police personnel and officers from the Forensic Science Laboratory, Assam.

12. Although PW 1, PW 2 and PW 8, inmates of the house of deceased, Ahindra Kalita, were, on the fateful night of occurrence, present at the house of the said deceased, where they all used to live, they did not see as to who had fired the gun, which caused the death of the said deceased. They have deposed that some police personnel came to their house and took them to another room, where they were locked, and while the police personnel were asking the deceased to produce the money, which the said deceased had allegedly obtained by forgery and cheating, they heard, within a short while, sound of a gunshot and, thereafter, someone opened the door and they saw the deceased lying injured on a bed. They, however, failed to identify if the accused-appellant was one amongst the group of the police personnel present there.

13. PW 5 (Lakshi Kanta Das), a neighbour of the deceased, has deposed that police came to him and asked him to show the house of Ahindra Kalita (since deceased) and he (PW 5) accordingly led the police to the house of the said deceased. However, PW 5 could identify that accused Phanidhar Das was present amongst the group of police personnel and that another police man introduced himself as SI Singh. PW 5 has further deposed that the police officers were accompanied by three police constables.

14. The fact that accused Phanidhar Das, along with other police personnel, i.e., constable Uday Saikia (PW 10), constable Promod Ch. Nath (PW 11) and Sub-Inspector Sukumar Sinha (PW 12) had gone to the house of the said deceased in connection with investigation of an offence has not been in dispute. The police personnel were accompanied by PW 13 (Jonmejoy Barman), who had been working, at the relevant time, in the Flood Control Office, along with Ahindra Kalita (since deceased).

15. Broadly in tune with each other, the police constables, namely, PW 10 and PW 11 as well as PW 13, a worker in Flood Control Department, have deposed, that keeping them out of the house of Ahindra Kalita, the police officers, (i.e., accused Phanidhar Das and SI Sinha), entered into the house of the said deceased and a little later, they heard the sound of a gunshot, which emanated from inside the house. The police constable, Uday Deka (PW 10), has deposed that after some time, SI Sinha and the inmates of Ahindra Kalita's house carried Ahindra Kalita to the hospital.

16. PW 10 (Uday Deka) was declared hostile; but during the cross-examination by the prosecution, he has admitted that in his statement, made before the Investigating Officer, he had stated that after hearing the sound inside the house, he had seen the said deceased lying on bed and SI Phani Das (accused)

standing there, armed with a revolver, and that SI Sinha took the revolver away from the accused and handed over the said revolver to him (PW 10), who, in turn, handed over the said revolver to SI B.N. Choudhury (PW 27) at Chandmari Police Station.

17. Close on the heels of the evidence of PW 10, SI B.N. Choudhury (PW 27) has deposed that on 12.04.2000, which was the night of occurrence, he had been assigned duty by the then Officer-in-Charge, Chandmari Police Station, because SI Sukumar Sinha (PW 12) had gone on a raid. It is in the evidence of SI B.N. Choudhury that constables, Uday Deka and Nath, both of whom were members of the said raid party, arrived at Chandmari Police Station and Constable Deka (PW 10), giving a revolver to him (PW 27), told him that a shot had been fired from the revolver and he was also informed by Constable Deka (PW 10) that the revolver belonged to accused SI Phani Das. It is in the evidence of PW 27 that he uncorked the revolver and found blank shell inside the revolver and, on arrival of the Officer-in-Charge, he (PW 27) handed over the said revolver to the Officer-in-Charge.

18. PW 12 (Sub-Inspector Sukumar Sinha) has deposed that he, along with Phanidhar Das, went inside the house of Ahindra Kalita for searching his house leaving two constables at the verandah of the house. According to this witness (PW 12), while he was searching the almirah, kept in the first room, he heard mild sound and when he tried to find out what had happened, he saw Ahindra Kalita lying on the bed with blood oozing out of his mouth.

19. It is in the evidence of Sub-Inspector Sukumar Sinha (PW 7) that he had not asked Ahindra Kalita why he had been bleeding, but he sent Ahindra Kalita to hospital for treatment. This witness has, however, deposed that he neither ascertained the cause of injury nor did he notice where accused Phani Das had been, when he (PW 12) had begun to search the almirah. In cross-examination, PW 12 has deposed that Ahindra (deceased) was not there in the room, wherein he had been conducting the search.

20. PW 11 (Promod Chandra Nath), a police constable, has deposed that the police officers, i.e. PW 12 and the accused (i.e., Phanidhar Das), leaving him outside the house, went inside Ahindra's house and, after a short-while, they heard a sound and, then, they were called by Sub-Inspector Sinha (PW 12), who gave Phanidhar Das's revolver to Uday (PW 10). The victim, with injury, was lifted and carried to hospital in a vehicle and, at the hospital, the said injured was declared dead.

21. PW 16 (Sarat Chandra Rabha) has deposed that the Investigating Officer seized one service revolver of 0.38 caliber, bearing No. 16H1892, 0.38 live ammunitions, one empty case of 0.38 ammunition and a pair of police uniform belonging to S.I. Phani Das (accused).

22. Lending support to the evidence of PW 16, PW 17 (Sujit Kumar Saikia), who was attached to Dispur Police Station, as Second Officer, has deposed that the

Investigating Officer, during investigation, seized one 0.38 caliber service revolver, bearing No. 16H1892, 0.38 live ammunitions, one empty case of 0.38 ammunition and a pair of police uniform belonging to S.I. Phani Das (accused).

23. In his evidence, PW 24 (Apurba Kumar Sarma), a Senior Scientific Officer, Forensic Science Laboratory, Assam, has deposed that on 20.04.2000, he examined one 0.38 revolver (Ext. A), bearing No. 161-11892, one 0.38 fired cartridge case (Ext. B) and one fired bullet (Ext. C). It is in the evidence of PW 24 that he examined the above articles and found the following result:

a. Test firings were done through A by using 0.380 revolver cartridge which proves that Ext. A is serviceable firearm.

b. The firing pin impression on Ext. B was compared with the firing pin impression on the test cartridge cases under a Comparison Microscope and were found to be similar. Hence, it may be opined that Ext. B is the fired cartridge case of the cartridge, which was fired by Ext. A.

c. The striation marks on Ext. C were compared with those on test fired bullets under a Comparison Microscope and were found to be similar. Hence, it may be opined that Ext. C was fired through Ext. A.

24. In his cross-examination, PW 24 has categorically denied that it is not a fact that Mat. Ext. A was not the revolver, which had been sent to him for examination. This witness has also denied that he had not compared the striation mark, found on Ext. C (i.e., the fired bullets) with those tested fired bullets. It is the assertion of PW 24, as a ballistic expert, that Ext. B is the fired cartridge case of the revolver, which was marked as Ext. A, Ext. A being a 0.38 revolver bearing number 161-11892.

25. In the light of the evidence of PW 24, as a ballistic expert, we have no reason to doubt that the revolver bearing number 161-11892, was the one from which the bullet, in question, was fired. If this piece of evidence, given by PW 24, is compared with the unshaken evidence of PW 16, it clearly emerges that the investigating officer had seized one service revolver 0.380 caliber with an empty cartridge and the expert's opinion is that the said bullet was fired by the said revolver.

26. With regard to the above, it is pointed out by Mr. P. Kataki, learned amicus curiae, that PW 24, as ballistic expert, examined a revolver bearing number 161-11892; whereas the revolver bore the number 16H-1892. On comparing the two numbers, namely, 161-11892 and 16H-1892, we find that the error, which has crept in describing the number of the revolver, was merely clerical in nature.

27. PW 25, Nomal Chandra Gogoi, was the then Officer-in-Charge of Chandmari P.S. He has deposed that S.I. Sukumar Sinha (PW 12) was entrusted to investigate the case against Ahindra Kalita (since deceased) as regards misappropriation of a sum of Rs. 3,18,519/- and S.I. Sinha, along with accused Phani Das and a couple of constables, moved to the house of Ahindra Kalita to

raid his house and that at around 10 P.M., he (PW 25) went to his house leaving S.I. B.N. Choudhury (PW 27) at the police station. PW 25 has also deposed that at around 2 A.M., S.I. Sukumar Sinha (PW 12) rang him up from Dispur Police Station and informed him that in course of search, at the house of Ahindra Kalita, a scuffle had ensued and a bullet was fired from S.I. Phani Das" revolver and that Ahindra Kalita had been injured. On receipt of the information, PW 25 came to Dispur Police Station and from Dispur Police Station, he went to the GMCH to see the injured and found the injured, Ahindra, dead. Thereafter, PW 25 came to the police station, at Chandmari, where S.I., B.N. Choudhury told him that S.I. Phani Das had returned the holster and six live ammunitions. PW 25 took into his custody the articles handed over to him by B.N. Choudhury, and, later on, those articles were seized by the Investigating Officer.

28. PW 26 was attached to GMCH outpost at the relevant time and, according to his evidence, he handed over one bullet, recovered from the bed of the deceased, to the Investigating Officer and the said bullet was seized by the Investigating Officer.

29. Coupled with the above, the evidence of the investigating officer, S.I. Kalyan Kumar Gogoi, who has been examined as PW 35, is that during investigation of the case, he seized one service revolver of 0.38 caliber, bearing No. 16H1892, one empty case of 0.38 ammunition and a pair of police uniform belonging to S.I. Phani Das (accused) and he also seized the register by which the sized articles had been issued to the accused and, later on, when CID was asked to re-investigate the case, he handed over the case diary to the CID Inspector and he sent the seized revolver to DSP(City) and the said revolver was, in turn, sent to Forensic Science Laboratory by the DSP.

30. Although PW 35 has denied that he had not seized the arm and ammunition from the accused, it emerges from the evidence of the Officer-in-Charge as well as the police constables that the arm and ammunition was handed over to the Officer-in-Charge and were seized from the possession of the Officer-in-Charge.

31. PW 36 is a CID Officer, who, on completion of investigation, collected the FSL report and submitted the charge-sheet against the accused.

32. In his re-examination, the Investigating Officer, Kalyan Gogoi (PW 35), has deposed that, on 28.04.2010, at about 5.20 PM, he seized one 0.38 caliber service revolver, five rounds of 0.38 live ammunition, one 0.38 empty cartridge case and one pair of police uniform belonging to S.I. Phanidhar Das. He also seized one issue register of Guwahati City of the year 1980 to 1995. After seizure of the register, it was given in the zimma of Havildar Jatindra Narayan Baishya. PW 35 has categorically deposed that at page 95 of the said register, there is an entry that on 08.06.1996, revolver No. 161-11892, along with 12 rounds of live ammunitions, were issued to the accused Phani Das, who was then in-Charge of Garchuk Police Out Post. This witness (PW 35) has also exhibited the relevant entry as Ext. 12.

33. Nothing was elicited from the cross-examination of PW 35 to show that the aforesaid revolver and ammunitions, in question, were, in fact, never issued to S.I. Phani Das (accused).

34. Situated thus, it becomes amply clear that the revolver, which fired the bullet and caused death of Ahindra Kalita, had been issued to, and received by, accused Phanidhar Das.

35. Court Witness No. 1, Jatindra Narayan Baishya, a Havildar of Armour Branch, City Police Reserve, Guwahati, has deposed that Ext. 12 (the register) was maintained by him, the said register was in his custody and, on 28.04.2000, Kalyan Kr. Gogoi (PW 5) seized the aforesaid register in connection with this case. Court Witness No. 1 has also proved the relevant entry, whereunder the revolver, bearing No. 161-11892, along with 12 rounds of live ammunitions, were issued to S.I. Phani Das on 08.06.1996.

36. In his cross-examination, CW 1 has made it clear that when the arm and ammunition, issued to a particular Police Officer, are returned by him to the Armour Branch, the receipt of the arm and ammunition are acknowledged by Armourer Branch putting signature against the relevant entry already made as regards issuance of the arm and ammunitions to the concerned police officer. The revolver and ammunition, which were issued to the accused, on 08.06.1996, were, once again, issued to S.I. Phani Das (accused).

37. Lending support to the evidence of Court Witness Nos. 1, Court witness No. 2, Matin Basumatary, a constable of Armour Branch, City Police Reserve, Guwahati, has deposed that during the relevant time, he also used to make some entry in the said register in connection with the issuance of arms and ammunitions to different police officers. He has also deposed that the relevant entry, i.e., Ext. 12, was made by him in his own hand writing on 08.06.1996 and the said entry shows that the revolver No. 161-11892, along with 12 rounds of live ammunitions, were issued to the accused, which the accused acknowledged by putting his signature.

38. When we compare the evidence of Court witness Nos. 1 and 2 and prosecution witness No. 35 with the evidence of Senior Scientific Officer (PW 24), what transpires is that one revolver, bearing No. 161-11892, along with 12 rounds of live ammunitions, were issued to the accused. PW 24 examined the said revolver and found that the fired bullet had been fired by the said revolver. The accused, in his statement, recorded u/s 313 Cr.P.C., after recording the evidence of Court witnesses and re-examination of the Investigating Officer, gave no explanation whatsoever as to what happened to the revolver and ammunitions, which had been issued to him (i.e., the accused), for, the accused merely denied that any revolver was issued to him on 08.06.1996. The accused has also unsuccessfully denied the acknowledgement of the revolver, in question, as well as his signature acknowledging receipt of the arm and ammunitions. To support this denial, there is nothing at all on record and there is no evidence on

record to show that accused Phanidhar Das was falsely implicated by the members of the Police Force.

39. What emerges from the above discussion is that Ahindra Kalita's death was caused due to shock and hemorrhage, which resulted from the head injury sustained by him, the head injury having been caused by a bullet.

40. It has clearly emerged from the evidence on record that one revolver No. 161-11892, along with ammunitions, were issued to the accused, but the said revolver and ammunition were not returned back to the Armour Department by the accused until after the death of Ahindra Kalita.

41. It has been pointed out by Mr. P. Kataki, learned amicus curiae, that as per the evidence of B.N. Choudhury (PW 27), Uday Deka, a police constable, gave him a revolver and said that a shot had been fired by the revolver and he also pointed out that the revolver belonged to accused Phani Das and, on the following day, on arrival of the Officer-in-Charge, this witness handed over the revolver to the Officer-in-Charge; whereas PW 25 was, then, Officer-in-Charge of Chandmari PS, has deposed that the revolver was handed over to him by PW 27. This apart, points out the learned amicus curiae, the Investigating Officer (PW 35) has not specifically stated from whose possession he had seized the revolver and the ammunitions. However, from the Seizure List (Ext. 9), what transpires is that six(6) numbers of live ammunition and one pistol were seized from the possession of PW 25, i.e., the Officer-in-Charge, Chandmari PS, and that the said service revolver and five rounds of ammunition were produced by the accused Phani Das and they were seized vide Ext. 6.

42. PWs 16 and 18, namely, Sarat Ch. Rabha and Jitu Saikia, PW 17 (Sujit Saikia), are as the seizure witnesses. PW 16 has stated that the revolver, live ammunition, one empty case of 0.38 ammunition and a pair of police uniform, belonging to S.I. Phani Das (accused), were seized on being produced by the accused. PW 17 simply stated that the aforesaid articles were produced in his presence. The statement of the accused was recorded u/s 338 Cr.P.C., wherein he denied that any arm and/or ammunitions were seized from his possession. The accused has also denied that those arm and ammunitions belonged to him. However, he has admitted that he along with S.I. S.K. Singh went to search the house of the said deceased.

43. There is no denial of the fact that the said deceased sustained bullet injury and succumbed to his injury. The bullet injury was caused to him, while the accused along with other police personnel, went to search the house of the said deceased.

44. PW 8 (Khargeswar Talukdar) is the brother-in-law of deceased Ahindra Kalita. According to his evidence, he was present, at the house of the said deceased, between 1.15 am to 1.30 am on 20.04.2000 and that on that night of the occurrence, he was sleeping in the house of his brother-in-law, Ahindra Kalita. With regard to the occurrence, this witness (PW 8) has deposed that he woke up,

on being called by his brother-in-law, and saw police-men inside the room and he also saw accused Phanidhar Das inside the room of his brother-in-law. It is in the evidence of PW 8 that he had seen accused Phanidhar earlier also during his visit to the Court; but accused Phanidhar was not present in Court on that day. It is also in the evidence of PW 8 that the accused was armed with a pistol and he heard the sound of a gunshot, the sound having come from the room in which the police-man and Ahindra had been present. On hearing the sound, they pushed the door, the door was opened and when they went into Ahindra's room, he (PW 8) saw a police-man grabbing accused Phanidhar's hand in which he had been holding a pistol and said to Phanidhar, "Das what have you done?" and the police man said to them, "Hold, hold, he needs to be taken to hospital".

45. Describing the condition of his brother-in-law, PW 8 has deposed that his brother-in-law was lying on the bed with blood gushing out of his mouth and when they raised hue and cry, one police-man held his collar, but he (PW 8), somehow, managed to escape and, on reaching his sister's house, he informed, telephonically, his brother-in-law's wife.

46. In his cross-examination, PW 8 has deposed that the accused, who was present at the dock, was not the police man Phanidhar Das, whom he had seen in Ahindra's house. It has, however, been observed by the learned trial Court that the occurrence took place on 20.04.2000 and PW 8 was examined on 24.01.2007 and that on the day of the occurrence, the accused was wearing police uniform, but during the trial, he was in civil dress and, hence, after a lapse of 7 years, PW 8 may not be able to identify the accused as the person, who was seen by him at the time of occurrence.

47. Considering the fact that it has not been disputed that it was accused Phanidhar Das, who was inside the house of the deceased, at the time of the occurrence, the finding of the learned trial Court, with reasonings so assigned, deserves acceptance, particularly, when the other police personnel, who were the members of the raiding party, have categorically spoken about the presence of the accused at the time and the place of occurrence. In fact, the presence of the accused, at the time of the occurrence, at the house of the deceased, has been proved beyond reasonable doubt.

48. As regards the seizure of arms and ammunition, PW 27, B.N. Choudhury, has stated, as already indicated above, that one revolver was handed over to him by the constable, Uday Deka, and the next morning, he handed over the revolver and empty cartridge to the Officer-in-Charge. PW 27 has also deposed that just at the time, when he handed over the revolver and cartridge, accused Phanidhar Das entered into the office room and they had some discussions.

49. The evidence of PW 13, Swapan Kr. Dasgupta, then DSP, Dispur Division, is not of much importance inasmuch as his evidence is hearsay inasmuch as he came to know from the local people that accused had opened fire causing bullet injury to the said deceased.

50. Admittedly, none of the witnesses has deposed that they saw the accused opening fire, which caused bullet injury to Ahindra Kalita, which led to his death. However, from the evidence discussed above, following circumstances have emerged against the accused:

(1) The accused, along with other police personnel, visited the house of the said deceased in connection with investigation of a criminal case;

(2) The said deceased died, while his house was searched by the accused and other police personnel;

(3) The said deceased died due to bullet injury sustained by him;

(4) From the evidence of Court Witnesses as well as the Investigating Officer, it appears that the revolver was, in fact, issued to the accused and the said revolver was, in the light of the evidence of the Ballistic Expert, used at the time of the occurrence.

(5) Only two police officers, including the accused, entered into the house of the said deceased. There is no explanation from the side of the accused as to who had opened the fire causing death of Ahindra Kalita, when SI Sukumar Sinha was, admittedly, not the one, who had opened fire and injured Ahindra Kalita leading to the tatter's death.

51. Although none of the police personnel, who were members of the raiding party, directly implicated the accused, we are conscious of the fact that when one police officer is on trial, the other police personnel would, ordinarily, prefer to remain silent in order to save their colleague.

52. In the case of Munshi Singh Gautam (D) and Others Vs. State of M.P., the Supreme Court has observed, at paragraph 6 of its decision, as follows:

6. Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues - and the present case is an apt illustration - as to how one after the other police witnesses feigned ignorance about the whole matter.

53. In the case of Raju Singh and Another, Kailash Chand and Khem Singh Vs. State, it has been observed, at Para-34, as follows:

34. It is common knowledge that atrocities within the precincts of the police station are often left without any ocular or other direct evidence to prove who the offenders are. In such cases the principles of law enshrined in Section 6 being *Res gestae* and Section 106 of Indian Evidence Act come into play and the facts which may not be facts in issue become relevant if they form part of the same transaction and the burden shifts on the person to explain the facts which are exclusively in his knowledge.

54. In Para No. 80, the principle, laid down by the Supreme Court, in AIR 2001 2842 (SC) was relied on which is quoted as under:

In Para No. 82 of the said judgment it has been observed that- "Although it is a cardinal principle of law that the prosecution has to prove the case against the accused beyond reasonable doubt and any act or omission on the part of the prosecuting giving rise to any reasonable doubt would go in favour of the accused, yet in a case like the present one, where the record shows that the necessary documentary record was tampered with the police personnel preferred to remain silent or resile from their previous statements so as to help their colleagues or for any extraneous reasons, the interest of justice demands that such acts or omissions of the officers of the prosecution should not be taken in favour of the accused, for, that would amount to giving premium for the wrongs of the prosecution designedly committed to favour the appellants. In such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied by the aggrieved party and this would obviously shake the confidence of the people not merely in the law-enforcing agency but also in the administration of justice.

In Para No. 102 of the said judgment the Hon"ble Apex Court citing the decision of D.K. Basu Vs. State of West Bengal, it was observed that:

The exaggerated adherence to and insistence upon the establishment of the proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact-situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouraged by this type of an unrealistic approach of the courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society. Torture in custody flouts the basic right of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/ under-trial prisoners of suspects tarnishes the image of any civilized nation and encourages the men in "Khaki" to consider themselves to be above the law and sometimes even to become law unto themselves. Unless stern measures are taken to check the malady, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequences of heading towards perishing. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may lose faith in the judiciary itself, which will be a sad day, for anyone to reckon with.

55. In the case at hand, the accused and other police personnel had, admittedly,

gone to the house of the said deceased to search his house. The said deceased was interrogated, where his family members were kept in a separate room. The said deceased sustained bullet injury. Only two police personnel were present inside the house of the said deceased. One of those two persons was SI Sukumar Sinha (PW 12) and the other one was accused Phanidhar Das. It has never been the case of the accused that it was SI Sukumar Sinha, who had shot Ahindra Kalita. This apart, the revolver, which fired the bullet, has been proved to be the one, which had been issued to the accused and had not been returned until the night of the occurrence, when the said service revolver was taken away by the accused and, later on, seized.

56. Coupled with the above, the accused offered no explanation as to what had happened with the revolver, which was issued to him and which had been used for firing upon the said deceased. The accused simply denied that any revolver or ammunitions were issued to him; whereas the prosecution has convincingly proved that the seized revolver and cartridges, which were used in connection with the offence, had, indeed, been issued to the accused.

57. We, therefore, find that the principles of law enshrined u/s 6 being *res gestae* and Section 106 of the Indian Evidence Act come into play and the facts, which may not be facts in issue, become relevant if they form part of the same transaction, and, hence, the onus, in the facts and attending circumstances of the present case, shifts to the accused to explain the facts, which were exclusively within his knowledge. In the present case, accused Phanidhar Das had miserably failed to explain as to who else had entered into the room and opened fire causing death of Ahindra Kalita nor could he convincingly establish that the said revolver had not been issued to him and the bullet, in question, had not been fired from his revolver.

58. In view of the discussions, held above, we find that the learned trial Court rightly convicted accused Phanidhar Das. The finding of guilt, reached against accused Phanidhar Das, and the sentence, passed against him, does not suffer from any infirmity, legal or factual. Consequently, his conviction does not deserve interference.

59. In the result and for the reasons discussed above, this appeal fails and the same shall accordingly stand dismissed.

60. Let the *amicus curiae* be paid a sum of Rs. 5,000/- for his valuable assistance rendered to the Court. Send back the LCR.