
(2012) 05 GAU CK 0024
In the Gauhati High Court

Lokeswar Gogoi, s/o.Late Hendu Ram Gogoi, R/O.Teka
Dalang, Lakamhabi Gaon, Dist – Sivsagar.

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 08-05-2012

Acts Referred:

Citation : (2012) 05 GAU CK 0024

Hon'ble Judges : Amitava Roy, J and P.K.Saikia, J

Bench : Division Bench

Advocate : Mr. P Bora, Advocate.??For the respondents : Mr. KA Mazumdar,
Addl. Public Prosecutor, Assam., Advocates appearing for Parties

Judgement

Amitava Roy, J.—The appellant, who stands convicted by the judgment and order dated 09.06.2005, rendered by the 2nd Addl. Sessions Judge, Sivasagar, in Sessions Case No. 49 (SC)/2002 and ordered to suffer rigorous imprisonment for life and also to pay a fine of Rs 2000/, in default to undergo rigorous imprisonment for further 6 months, is in appeal.

2. We have heard Mr. P Bora, learned counsel for the accused appellant and Mr. KA Mazumdar, learned Addl. Public Prosecutor Assam.

3. A FIR was lodged by one Nagen Gogoi with the Officerin Charge, Sonari Police Station, Sivasagar, Assam on 16.08.2001, alleging that at about 04.00 p.m. on that day, the accusedappellant had chased his brother, Jogeswar Gogoi, the deceased and had repeatedly assaulted him with a dao, so much so that the injured succumbed to the injuries sustained. On the FIR, Sonari P.S. Case no. 70/2001, under section 302 IPC was registered and investigation followed. Charge sheet was laid on the completion thereof against the accusedappellant under the said provision of law. The trial Court also framed charge against him under section 302 IPC, to which he pleaded not guilty and claimed to be tried. At the time of trial, the prosecution examined 13 witnesses, including the Investigating Officer and the Doctor, who had performed the autopsy over the dead body. The accusedappellant, thereafter, was crossexamined under section

313 Cr.P.C and he also cited two witnesses in defence. The impugned judgment and order followed.

4. Before adverting to the rival arguments, it would be appropriate at this juncture to have a brief resume of the evidence on record.

5. PW 1, Nagen Gogoi, the brother of the deceased, deposed on oath that on the date of the incident while he was at home, Smti. Numali Gogoi, the wife of the accusedappellant called him to convey that the deceased, Jogeswar Gogoi had been assaulting the former. As, a commotion was heard in the house of Jogeswar Gogoi, the deceased, the witness went out, whereupon, he was shown his dead body in the enclosed yard of his brother, Khagen Gogoi. This witness was declared hostile and in course of his crossexamination, the prosecution confronted him with the statement made by him before the police. The witness, however, denied to have stated before the police that he had seen the accusedappellant chasing the deceased through the enclosed yard from his house and that the latter, eventually, was felled by repeatedly cutting him by the dao in the compound of their brother, Khagen Gogoi. In crossexamination, by the defence, this witness, inter alia, testified that the deceased was a ruffian by nature and used to pick up quarrel with the villagers in the state of intoxication now and then. That, at times, he also used to assault Smti. Numali Gogoi, the wife of the accusedappellant, was disclosed as well.

6. PW 2, Sri Khagen Gogoi, the brother of the accusedappellant having stated that he had come to learn of the occurrence, was declared hostile by the prosecution. He, however, proved the inquest report, Ext. 2 as well as the seizure of a dao from the house of the accusedappellant vide Ext.3. He denied to have disclosed before the police in course of the investigation that the deceased under the influence of liquor used to quarrel with them and abuse their elder brother, the accusedappellant in filthy language. He denied also to have stated before the police that on the date prior to the occurrence, he had taken liquor and had abused the accusedappellant and his family members with obscene words. He also denied to have stated before the police that on the date of the occurrence, the deceased had gone to the house of the accusedappellant, picked up a quarrel and assaulted his wife, whereafter, he (accusedappellant) with a dao in hand chased him (deceased) and cut him with the said weapon. In his crossexamination by the defence, the witness stated that he could come to learn from the wife of the accusedappellant and others that the deceased after entering the house of the accusedappellant on the date of the incident had assaulted the latter's wife with a lathi.

7. PW 3, Bhadra Kanta Konwar deposed on oath that while he was sitting in the house of Nagen Gogoi, the wife of the accusedappellant came therein and informed them of a quarrel at her house and requested them to separate the fighting brothers. At this, the witness went to the house of the accusedappellant and found that he and the deceased were engaged in a scuffle. The prosecution has not declared this witness to be hostile.

8. PW 4, Smti. Numali Gogoi, the wife of the accusedappellant stated on oath that at about 03.00 p.m. of the date of the occurrence, while she was in the kitchen, the deceased came to her house and assaulted her with a lathi. As she raised hue and cry her husband arrived at the spot, whereupon, the deceased assaulted him with the lathi as well. The witness stated that the deceased also assaulted her son, Pabitra Gogoi then aged about 2 years with the said lathi. According to her, an altercation followed and, thereafter, a fight between the deceased and the accusedappellant ensued. At that point of time, the witness stated that her husband had a pruning knife in hand. According to her, these two continued to scuffle and jostle with each other for some time and in course thereof, the deceased ran away from the spot and fell in the enclosed yard of Khagen Gogoi. This witness having been declared to be hostile was also confronted with the statements made by her relating to the incident before the police. For the sake of brevity, suffice it to mention that her statements, which she had denied to have made before the police are substantially the same as recited for PW 3 as above. In her crossexamination by the defence, this witness, inter alia, stated that the deceased used to abuse her and her family members very often by taking liquor. She also mentioned about injuries on the body of the accusedappellant, her husband, caused by lathi.

9. PW 5, Siva Ram Tipoamia and PW 6, Phanidhar Gogoi had been examined by the prosecution to prove the factum of inquest and the seizure of the dao vide Ext. 2 and 3 respectively. PW 5, in particular, however, clarified that the police had not seized any dao in his presence. PW 6, however, underlined that to his knowledge and information, Jogeswar Gogoi, the deceased, had killed by his own brother, the accusedappellant.

10. PW 7, Punaram Gogoi, a police constable at the Sonari Police Station on the date of the incident narrated about the surrender of the accusedappellant thereat, disclosing to him and the OfficerinCharge, Madhab Sarma that he (accusedappellant) had assaulted the deceased with a sharp cutting weapon. 11. PW 8, Kuladhar Konwar was the Assistant SubInspector of Sonari Police Station on the relevant date. His evidence, on oath, is identical to that of PW 7 as above. He, however, stated to have made the G.D. Entry on the basis of the disclosures made by the accusedappellant. He stated as well that a FIR on the incident was also lodged subsequent thereto.

12. PW 9, Dr. Diganta Kr. Das, who had performed the post mortem examination on the dead body, in his evidence referred to the following injuries:

?2. Wounds (1) 3 Nos. of incised wounds in the vault of the scalp, size 2? x 1? extending from occipital region to the left parieto temporal region at a gap of about ? inches. (2) 2 Nos. of incised wounds on the left cheek extending to the left ear. Size 3" x ? at a gap at ? c.m. (3) 2 Nos. of incised wounds on tip of the nose size 1 cm x 1 cm at a gap of 1 cm. (4) 4 Nos. of incised wounds on the back of the neck Size 4? x 1? and runs obliquely from the occipital region towards the 3rd cervical vertebrae on right side. (5) One incised wound, size 1?

x ?? present in the right side of the cheek to the tragus right ear. (6) One incised wound present in the right forearm. Size 1? x 2 cm. (7) One incised wound size 2? x 1? presenting the left shoulder joint. Clotted blood found adherent to the edges of the wound. All the injuries are ante mortem in nature.? According to this witness, injuries No. 1 & 4 independently were sufficient to cause death in an ordinary course of nature. He stated as well 1, 2, 3, 4, 5, 6, & 7 could be caused by hacking by means of dao seized as Material Ext. 1. He proved the post mortem report as Ext. 4. This witness, thus, while enumerating the injuries detected by him on the dead body, also tried to corelate the weapon of assault seized in course of the investigation i.e. Material Ext. 1.

13. PW 10, Smti. Dulagi Gogoi, the wife of the deceased having stated that on hearing hue and cry from her house, she came and saw the deceased lying dead with injuries on his body was declared hostile. In response to the crossexamination made by the prosecution, this witness denied to have stated before the police that on that day, she had heard from her house that an altercation had taken place between the deceased and the accusedappellant and that the genesis of this confrontation was traceable to a quarrel between them from the day before. In crossexamination by the defence, she admitted that the deceased had a lathi in his hand at the time of the incident.

14. The evidence of PW 12, Joysingh Hanse and PW 13, Phuleswar Gogoi do not reveal additional factual features to supplement the testimony of the other witnesses as summarized hereinbelow. Even, their statements (denied by them) made before the police are in identical lines. In crossexamination, PW 12 stated that when he was in the house of Nagen Gogoi, he heard that the deceased had entered the house the accusedappellant with a lathi in hand and had assaulted the accusedappellant, his wife and his son. He, however, stated of not having seen the deceased being chased and assaulted by the accusedappellant. PW 13, in his crossexamination by the defence stated that he deceased had assaulted her, whereafter, a melee ensued between Lokeswar Gogoi (accusedappellant) and the deceased, Jogeswar Gogoi resulting in free and cutting assaults.

15. PW 11, Phuleswar Gogoi, the Investigating Officer stated that on the date on which the FIR was filed, Sri Madhab Sarma was the Officerin Charge of the Sonari Police Station. He admitted that the charge of the investigation was entrusted to him. He amongst others, proved the seizure of the weapon of assault, the dao, vide Ext. 3 and identified the same to be Material Ext. 1. He, with reference to his case diary proved the statements made by the prosecution witnesses, who on being declared hostile, were confronted therewith by the prosecution. In crossexamination by the defence, he, amongst others, disclosed that in course of the investigation, it revealed that taking liquor, the deceased had gone to the house of the accusedappellant and had picked up a quarrel seeking a share of the ancestral property. He, however, conceded of not having sent the seized weapon for chemical analysis nor examined the blood sample or compared the same with that of the deceased.

16. The accusedappellant in course of his examination under section 313 Cr.P.C responded as herein below to the following questions:

?Q. It is alleged against you that around 4 p.m. on 16.04.2001 you killed your younger brother Jogeswar Gogoi by cutting him with dao. What do you say? Ans. As Jogeswar assaulted my wife I cut him with "Nalua Katari" (handle knife). Q. P.W. No. 3 Bhadrakanta Konwar has stated in evidence that around 2.30/3 p.m. on the day of occurrence he was at Nagen Gogoi's house when your wife told that a quarrel had taken place he went there and saw you and Jogeswar scuffling through the door. What do you say? Ans. Yes. Q. PW No. 4 Numali Gogoi has stated in evidence that around 3 p.m. on the day of occurrence a fighting took place between you and Jogeswar at your house. At that time you had a pruning knife in your hand. What do you say. Ans. Yes. Q. PW No. 4 Numali Gogoi has stated in evidence that after the fighting Jogeswar Gogoi came out of the house and fell in Khagen Gogoi's enclosed yard. What do you say? Ans. Yes. Q. PW No. 7 Punaram Gogoi has stated in evidence that on 16.04.2001, at about 5.45 p.m. you appeared at Sonari Police Station and told the O/C Madhab Sarma, in his presence, that you had cut your younger brother Jogeswar Gogoi. What do you say? Ans. Yes. Q. PW No. 8 ASI Kuladhar Konwar has stated in evidence that around 5.30/6 p.m. on 16.04.2001 you appeared at Sonari P.S. and confessed in his presence that you had cut your younger brother. What do you say? Ans. Yes I stated only to have a quarrel with him. Q. PW No. 14 Jaisingh Hanse has stated in evidence that 3 years ago following a quarrel between you and Jogeswar the later died and that he saw Jogeswar Gogoi's dead body bearing injury under the tree of Khagen Gogoi's enclosed yeard. What do you say? Ans. Yes. Q. Do you have anything to say? Ans. I heard commotion in my house. At that time I was on the rear Varandah of my house. Coming inside the house I saw Jogeswar assaulting my wife Numali Gogoi with a lathi. When I asked him as to what he was doing, Jogeswar assaulted me too. I too, hit Jogeswar with the knife. I do not know how much I hit him. Jogeswar went out. Jagannath Chetia was at my house. I being injured, was lying inside the house. My wife told that Jogeswar had hit my little son too. When asked by wife I went to Sonari. At the time of occurrence my wife was inside the house. Going to Sonari police station I told the police that coming to our house Jogeswar entered our house and assaulted my wife and son which I could not bear and killed Jogeswar. Police sent me to the hospital to treat my injuries. I killed Jogeswar only to save myself.? 17. The answers provided by the accusedappellant, on a cumulative consideration of the above extract, demonstrate that on the date of the incident, while he was on the verandah of his house, he saw the deceased assaulting his wife with a lathi and when he intervened, the latter assaulted him as well. He, thereafter, retaliated and assaulted the deceased with the knife that he was holding. According to him, he did not know ?how much? he had assaulted the deceased, who went out of his house. He also had referred to the assault of his son by the deceased. He pleaded that he had killed the deceased to save himself. The evidence of the defence witness, Sri Jagannath Chetia is to the effect that on the date of the

incident while he was sitting in the house of the accused appellant, the deceased had arrived there and had assaulted the former's wife and their 3 years old son, whereafter, the deceased also assaulted the accused appellant with a lathi. According to his witness, the accused appellant had a pruning knife in his hand and in view of a confrontation a fight between the two ensued. Subsequent thereto, the deceased came out of the house of the accused appellant.

18. Mr. Bora has emphatically argued that none of the prosecution witnesses being credible in their versions pertaining to the incident and the alleged assaults, the learned trial Court had erred in law and on facts in convicting the accused appellant under section 302 IPC and sentencing him accordingly. According to him, the disclosures made by the accused appellant in his examination under section 313 Cr.P.C., per se, did not prove the charge of murder against him. According to the learned counsel, having regard to the background in which the quarrel between the two brothers had ensued, the accused appellant having acted in exercise of his right of private defence, he could not have been held to be guilty of any offence under the 302 IPC. As, neither the weapon of assault had been seized in accordance with law nor, admittedly, had been sent for forensic examination, the prosecution had failed to prove the involvement thereof in the incident, he urged. According to Mr. Bora, not only the so-called admission made by the accused appellant before the PW 7, Punaram Gogoi and the Officer in Charge, Sonari Police Station, Madhab Sarma is admissible in law, the latter having not been examined by the prosecution, the same is wholly inconsequential. He further urged that even assuming that a quarrel had ensued between the two brothers in the house of the accused appellant on the date of the incident followed by a scuffle, the prosecution story of the accused appellant chasing the deceased and repeatedly assaulting with a sharp cutting weapon is totally belied, inter alia, by the absence of any trail of blood from the house of the accused appellant to that of Khagen Gogoi's court yard. Relying on the decision of the Apex Court in DARSHAN SINGH VS. STATE OF PUNJAB & ANR., (2010) 2 SCC 333, the learned counsel has insisted for clear acquittal of the accused appellant.

19. Mr. Mazumdar, in reply, has submitted that on a conjoint consideration of the evidence of the prosecution, no interference with the impugned judgment and order is called for. The background of the incident coupled with the proved assaults made by the accused appellant resulting in the death of the deceased when considered in conjunction with the findings of the post mortem examination, unmistakably prove his (accused appellant) culpability, he urged. According to the learned Addl. Public Prosecutor, the plea of right to private defence would not be available to the accused appellant in the facts and circumstances of the case, he, even otherwise, having, admittedly, exceeded the same beyond the permissible limit and, thus, his conviction for murder and the sentence ought to be left uninterfered.

20. A scrutiny of the materials on record starting from the FIR, the testimony of

the prosecution witnesses, the responses of the accusedappellant in course of his examination under section 313 Cr.P.C. and the version of the witnesses, according to us, leaves no manner of doubt of the complicity of the accusedappellant in the assaults by a sharp cutting weapon resulting in the death of the deceased, Jogeswar Gogoi. Though, several of the prosecution witnesses, i.e. PW 1 & 2, PW 4, PW 10, PW 12 and PW 13 have been declared to be hostile, their testimony as a whole exude persuasive compatibility and consistency to engender trustworthiness thereof. As it is the evidence of a hostile witness, it is no long res integra, is not liable to be effaced as a whole and that depending on the nature thereof, in context of the facts and circumstances of the case, it can be salvaged to support the case of prosecution or the defence as the case may be.

21. To reiterate, not only, this prosecution witnesses have, in substance, proved the involvement of the accusedappellant in the incident of assault, they have narrated with sufficient clarity of the background thereof, indicating the sequence of events leading to the eventual fatal assaults by the accusedappellant on the deceased. These witnesses have been consistent in their versions before the police as well, as has been proved by the Investigating Officer with reference to the case diary. Though, their statements so recorded for all intents and purposes may not be of substantive in nature, the same when considered along with their evidence at the trial in course of their examination in chief and crossexamination by the defence, in our view, adds to the credibility of the case of the prosecution.

22. The background of the instant case as has been disclosed by the prosecution witnesses, the version of accused appellant in course of his examination under section 313 Cr.P.C. and the evidence on record as a whole is persuasive enough to conclude that the accusedappellant and the deceased in view of the continuing developments one after the other were engaged in an animated conflict with temper running high with every passing moment. The progression of events disclosed by the materials on record reveal that it was the deceased, who in an inebriated condition had entered the house of the accusedappellant, abused him and his family members, assaulted his wife and his minor son aged about 2/3 years with a lathi and accosted him as well with abusing language. When the accusedappellant intervened to object, he was assaulted by the deceased with a lathi. At this, the latter retaliated with the weapon, colam/nalua katari that he was holding, resulting in severe injuries on the deceased, who, eventually, succumbed thereto. Though, Mr. Bora has tried to impress upon us that the prosecution has failed to establish the fact of chasing by the accusedappellant with repeated assaults on the deceased, in absence of any evidence worth the name suggesting the intervention or participation of any third agency, we are unable to extend any benefit of doubt to him (accusedappellant) on this count. We, thus, are of the view that it was the accusedappellant alone, who had inflicted all the injuries found by the medical witness in course of the post mortem examination on the dead body. A bare perusal of the post mortem report, Ext. 4 reveals 14 incised wounds of different shapes and sizes spread

over the dead body. According to the Doctor, the injuries at Sl. No. 1 & 4 independently were sufficient to cause death in the ordinary course of nature. Having regard to the number of injuries, the nature thereof and the organs of the body targeted, we are of the unhesitant opinion that the accusedappellant while inflicting the same was possessed of the intention of eliminating the deceased.

23. Be that as it may, in the background of the instant case as narrated hereinabove, we are persuaded to hold that the accusedappellant is guilty of an offence of culpable homicide not amounting to murder. Having regard to the attendant facts and circumstances, we are inclined to conclude that he had committed the assaults being deprived of the power of selfcontrol due to extreme provocation resulting from the belligerent and consistently confrontative conduct of the deceased and in course of a sudden fight in the heat of passion. Though, the accusedappellant seem to have unleashed a series of assaults by a sharp cutting weapon, the same having been inflicted in the course of the same incident in a violent state of mind induced by the preceding acts of the deceased, the same, according to us, to not constitute murder.

24. In the above view of the matter, the conviction of the accused appellant is scaled down to one under section 304 PartI of the Indian Penal Code. It had been submitted at the Bar that before his conviction by the judgment and order impugned, the accusedappellant had undergone imprisonment for a period of 8 months. We notice from the impugned judgment and order that at the time of his conviction along with his wife he had three minor children, the eldest son then aged about 8 years. On a totality of the factors bearing on the sentence to be awarded, we are of the view that the appellant ought to suffer rigorous imprisonment for a period of 7 years in all for the offence committed by him. Ordered accordingly. The accusedappellant would also be required to pay a fine of Rs. 1,000/, in default of payment thereof, he would have to undergo rigorous imprisonment for another 3 months. Needless to say, the period already undergone, would be setoff against the sentence herein awarded. The appeal stands partly allowed.