

(2021) 04 GAU CK 0017

In the Gauhati High Court

Case No : Criminal Appeal No. 155, 163 Of 2016, 114 Of 2017

Md Jakir Hussain

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 20-04-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 313
Indian Penal Code, 1860 — Section 34, 302

Citation : (2021) 04 GAU CK 0017

Hon'ble Judges : Manash Ranjan Pathak, J; Mir Alfaz Ali, J

Bench : Division Bench

Advocate : P Biswas, M A Sheikh

Final Decision : Allowed

Judgement

M.R. Pathak, J

1. Heard Ms. A. Begum, learned counsel for the appellant Md. Jakir Hussain in Crl. A No. 163/2016, and Mr. S. C. Biswas, learned counsel for the appellant Md. Jiabur Rahman in Crl. A No. 155/2016 as well as for the appellant Md. Akkas Ali in Crl. A No. 114/2017. Also heard Ms. S. Jahan, learned Additional Public Prosecutor, Assam for the State respondents in all the three appeals.

2. The three appeals are against the same judgment and order of conviction and sentence dated 20.04.2016, passed by the learned Additional Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 167/2013 arising out of G.R. Case No. 754/2013 corresponding to Tezpur Police Station Case No. 402/2013, whereby the appellants were convicted under Sections 302/34 of the IPC and sentenced to suffer Rigorous Imprisonment for life with fine of Rs. 1000/- each in default Rigorous Imprisonment for further 1 month each.

3. On 07.04.2013 one Nayab Ali (PW.1) lodged an ejahar before the Borghat Police Out Post in Sonitpur district stating inter alia that on the previous night i.e., on 06.04.2013 at about 7.00 p.m. his son Hussain Ali left his house for

Borguri village on a bicycle along with Rs. 3000/- to purchase a Godrej Almirah from a person, but he did not return home on that night and went missing. However on the morning of 07.04.2013 dead body of his son with severed head was found in the field of Puroi Alimur village wherein he was identified and his bicycle was also found in the place of occurrence. But the money that was taken by the deceased along with the mobile phone that he possessed could not be found. In the said ejahar the informant PW.1 also stated that he suspects one Jakir Hussain, one Jiabur Rahman and Babul Ali son of Abdul Hussain as the persons involved in murdering his son as those persons reside near his house and had been working as labourers along with his son for the last 4/5 months and his said son use to spent his leisure time with them. It was also stated in the ejahar that those person did not come to see the dead body of his son at the place of occurrence nor they took part in the funeral rites of his deceased son.

4. On receipt of the said ejahar from PW.1 it was registered as GD Entry No.113 dated 07.04.2013 in the Borghat Police Out Post, which was forwarded to the Tezpur Police Station and accordingly Tezpur Police Station Case No. 402/2013 under Section 302/34 of the IPC was registered and police started investigating the matter. During the course of investigation the concerned Investigation Officer (I.O.) visited the place of occurrence at Jahajduba, prepared the sketch map, recorded the statement of the informant PW.1, father of the deceased at the place of occurrence itself and also recorded the statements of some of the witnesses present there, forwarded the dead body to Kanaklata Civil Hospital at Tezpur for post mortem examination. On receipt of the information from Md. Fiddus Ali @ Suraj Ali Master (PW.6) that three accused persons were apprehended by police at village Amolapam, the I.O. proceeded to that place, arrested them and recorded the statements of the witnesses from where the accused persons were taken into custody, forwarded PW.7 Md. Amir Hussain to the Magistrate for recording of his statement under Section 164 CrPC, seized the alleged dao and the bamboo stick from the house of PW 7, collected the post mortem report of the deceased, arrested accused Akkas Ali as well as Halima Khatun, wife of the deceased and on completion of the investigation, finding sufficient prima facie materials against the present appellants submitted charge sheet in the case on 25.06.2013 vide charge sheet No. 325/2013 (Exhibit-10). Since no such incriminating materials were found against the alleged arrested accused Babul Ali and Halima Khatun, they were not sent up for trial. As Section 302 IPC is exclusively triable by the Court of Sessions, the learned Magistrate by order dated 08.07.2013 forwarded the records of said GR Case to the Court of learned Sessions Judge, Sonitpur, wherein the same was registered as Sessions Case No. 167/2013. Pursuant to the order dated 17.07.2013 the said Sessions Case was entrusted to the learned Additional Sessions Judge, Sonitpur, Tezpur for disposal.

5. On 01.08.2013, the learned Addl. Sessions Judge, Sonitpur, Tezpur framed charge under Section 302/34 IPC against the appellants herein which were explained to them to which they pleaded not guilty and claimed to be tried and

accordingly the trial of the case began.

6. To being home the charges, prosecution examined as many as 9 (nine) witnesses including the informant, Investigation Officer of the case and the Autopsy Doctor. The learned Trial Judge after completion of recording of evidence of prosecution witnesses recorded the statements of the accused appellants under Sections 313 CrPC. However, the accused persons did not adduce any evidence from their side, but they cross examined the prosecution witnesses.

7. PW 1, Md. Nayab Ali, the informant of the case in his evidence deposed before the learned Trial Court that his son use to work with the accused persons along with others and on the date of the incident they came to his house. In the evening around 07:00 pm his said son Hussain Ali went out of the house in a bicycle with Rs. 3,000/- and his mobile phone to buy a Godrej Almirah from Borghuli village and on the next morning they got the information that his son was lying dead near the cremation ground at Jahajduba. On reaching the place of occurrence he found his son with severed head from his body and thereafter he filed the ejahar that was written as per his instruction by one Ramij Ali on which he had given his thumb impression.

8. During his cross examination by the defence PW.1, Md. Nayab Ali, stated that village Jahajdubi is about 4 Kms away from his house and the residences in that village are far away from the place where the dead body was found. He also stated that he lodged the ejahar after the dead body was found. He also stated that being an illiterate he does not know what was written in the said ejahar and that he did not remember whether the same was read over to him or not.

9. PW.2 Md. Abdul Ajit, brother-in-law of the deceased in his evidence deposed before the learned Trial Court that it is his sister Halima Khatun, who informed him that her husband did not return home till late night and she again rang him up during the midnight and on the next morning, he went to the place of occurrence and saw the dead body of his brother in law Hussain Ali, which was later brought by police.

10. During his cross examination by defence said PW.2 stated that he resides about 14/15 Kms away from his sister's house and that he was informed by elder brother-in-law of the deceased who resides in the village Jahajdubi but he failed to remember his name.

11. PW.3 Md. Firoz Ali in his evidence deposed before the learned Trial Court that the deceased use to look after his cattle in his house and in the morning of 06.04.2013 he came to know that said Hussain Ali was found dead on the bank of Jahajduba River with his head severed. Hearing the same he went to the place of occurrence and found the dead body of the deceased Hussain Ali with his severed head and police on their arrival took away the dead body of the deceased. He also deposed that while the funeral (janaja) of the deceased was going on police arrested one of the accused namely Jakir and took him to police station and in the night when they return after completing the funeral of the

deceased they came to know that other accused Jiabur and Akkas Ali was also arrested and on hearing the same they went to the police station and the accused persons in the police station confessed that they had killed the deceased Hussain Ali. He went on to depose that it is Jiabur Hussain who during his confession stated that the other two accused persons were also involved in the incident of killing of Hussain Ali. PW.3 also stated that as shown by said Jakir, police recovered the dao and one bamboo lathi from the house of Amir (PW.7), father of the accused Jiabur. Said PW.3 was the signatory to the seizure memo that was made by police. He stated that they learnt that the accused Akkas Ali had an illicit relation with the wife of the deceased Hussain Ali and it is because of that the deceased was killed. He also deposed that it is the informant PW.1 who told him that accused Akkas Ali had called Hussain Ali away at about 6 O'clock on the previous evening, i.e., on 06.04.2013. He further deposed that he was present when the accused Akkas Ali and Jakir were making confession of killing of the deceased in the police station which was recorded by police. He stated that the accused Jakir told police that he had killed Hussain Ali 1-2 days before he led police to recovery of the dao and lathi used in the incident.

12. During his cross examination said PW.3 denied the quarries made by the defence and reiterated the statements made by him during his examination in chief.

13. PW.4 Abdul Mazid, a neighbor of the informant in his evidence deposed before the learned Trial Court that on the night of the incident at around 10 pm, when he returned home, he learnt that the deceased Hussain Ali did not return home and he was informed about the same by the informant PW.1. He further deposed that the informant told him that he had sent Md. Ali, Ahmad and Akkas Ali in search for his son. He stated that these three persons returned around 01.30 am in the night and stated that they could not find the deceased Hussain Ali and in the following morning they came to know that a boy with his severed head was lying in a field in Jahajduba village. He along with all the members of the family of the informant, PW.1 went there and found Hussain Ali lying dead with severed head from his body and also found that a bicycle was lying on the ground at some distance away from the dead body and accordingly, police was informed about the same and on their arrival conducted the inquest on the dead body and took the said body to the hospital for post mortem examination. He also deposed that two days after the said incident police arrested accused Jakir and brought him to the house of Amir and then police told people present there including him that Jakir had killed Hussain Ali and asked him to produce the weapons used in the said crime and thereafter, Jakir produced one dao and one split bamboo from the kitchen of Amir's house and handed over the same to police which was seized by police. Said PW 4 was the signatory to the seizure list prepared by police.

14. During his examination in chief said PW 4 also stated that accused Jakir in presence of police and in his presence confessed that he had killed Hussain Ali

with this weapon seized by police that was recorded by police as the accused Jakir's confessional statement on which he put his signature and identified the same during his examination in chief. He also stated that he was also the signatory to the inquest report of the deceased.

15. During his cross examination by defence said PW 4 stated that he knew the accused Jakir after the incident and that said accused made his confession in the house of Amir (PW 7) from which house he produced the dao and a split bamboo stating that by the same he had killed Hussain Ali that was produced before police in the house of Amir 2 days after the incident. During his cross examination by the defence PW 4 category stated that when accused Jakir Hussain went to the police station he found a bit of illness on him and he visited the police station after some time when Jakir was making his confessional statement in presence of villagers including Yunis Ali, Firoz Ali and Suraj Ali. He reiterated that the accused Jakir made his confession before police in Amir's house and it the police who brought Jakir there two days after the incident, after arresting him.

16. PW.5 Md. Muzamil Hoque is a hearsay witness who in his evidence before the learned Trial Court deposed that he visited the place of occurrence after hearing that the dead body of Hussain Ali was found with his severed head. He also stated that on being called by police he went to the police station and on reaching the police station he saw accused Jakir was sitting in the police station along with Akkas Ali. Accused Akkas Ali stated before the police that accused Jakir and accused Akkas in coalition with 2 others had killed Hussain Ali. He further stated that when police interrogated accused Jakir he asked police to take him to the place of occurrence i.e., at Jahajdubi and stated that he would then produce the weapons used in the crime and the said witness along with Jakir, Suraj Ali, Firoz Ali and some other persons accompanied police to the place of occurrence and later one dao and split bamboo were produced from the house of PW.7 wherein Jakir confessed to have been killed Hussain Ali with the said weapon and police recorded his statement to which said PW.5 was the signatory.

17. Said PW.5 during his cross examination by the defence reiterated his deposition made during examination-in-chief. He also stated that Jakir confessed before police that he had killed Hussian Ali in the police station while he was with accused Akkas Ali.

18. PW.6 Md. Fiddus Ali @ Suraj Ali Master in his examination in chief deposed before the learned Trial Court that on the date of the incident, son of the informant went missing from his house and he along with other villagers went out at night in search of him but could not find him and on the following day villagers received information that dead body of Hussain Ali with his severed head was lying in the field on the bank of River Jahajduba. Hearing the same he along with other villagers proceeded to the said place and found the dead body of Hussain Ali with his severed head. He also stated that when police came to the place of occurrence they took away the dead body of Hussain Ali to Kanaklata

Civil Hospital. He further stated that at about 12:30 pm when he returned from school he saw accused Jakir Hussain being taken to Amir Ali's (PW.7) house from where Jakir produced one dao from the kitchen of the Amir's house before police and that the accused person confessed before police as well as before the public that with the said dao, he severed the head of Hussain Ali. PW 6 during his such statement stated that accused Jakir further stated that Jiaur Rahman and Akkas Ali accomplish the killing and police recorded said confessional statement of accused Jakir to which he was the signatory. He also deposed that they came to know that Akkas Ali had illicit affair with the wife of the deceased Hussain Ali and it was because of that accused Akkas engaged the other accused persons to kill Hussain.

19. During his cross examination PW.6 stated that he did not see the dao in the Court that was seized by police and that the said dao was stained with blood. He reiterated that he only saw accused Jakir on the day on which the dao was recovered.

20. During his cross examination said PW.6 stated that accused Jakir was brought by police in handcuff in Amir's house and accused Jakir made confessional statement in presence of villagers.

21. PW.7 Amir Hussain during his evidence in chief deposed before the learned Trial Court that accused Jiabur Rahman is his own son and accused Jakir is the son of the elder brother of his wife whereas accused Akkas Ali is the son of his uncle (own brother of his father). He also deposed that informant Nayab Ali is the husband of his aunt, elder sister of his father and deceased Hussain Ali was his cousin, son of elder brother of his father. He deposed that police brought accused Jakir to his house who was accompanied with Suraj Master (PW.6) and Firoz Ali (PW.3) and police brought out the dao from his house that was stained with blood. He also deposed that police brought him to the Court and got his statement recorded by the Magistrate whereupon he had put his thumb impression.

22. During his cross examination by defence said PW.7 stated that police had beaten the accused Jakir for which he was not able to stand properly and when police came it was Suraj (PW6), Firoz Ali (PW.3), his wife and he himself went there and it was police who brought out a dao from his kitchen which was similar to a knife about 6" long. During his cross examination he further stated that he made his statement before the Magistrate as told to him by police and Suraj Master (PW.6) and Firoz (PW.3) had beaten the accused Jakir and police exerted pressur him to make such statement and also pressurized the said accused Jakir to put his signature. He further stated that he is an illiterate person and police brought him to the Court and got his statement recorded by Magistrate and he made such statement as tutored to him by police. During his cross examination said PW.7 further stated that in connection with theft of rice meant for public distribution Suraj Master (PW.6) was arrested by police and it was Akkas and Jiabur who took the initiative in filing a case against the accused Suraj Master

along with villagers and that is why said PW.6 gave false evidence. During his cross examination he further stated that onion was sticking to the dao that was seized by police.

23. PW.9 Dr. Gopendra Mohan Das, the autopsy doctor who conducted the post mortem examination of the deceased Hussain Ali on 07.04.2013 during recording of his evidence in chief deposed before the learned Trial Court that the deceased was a male of 23 years of age and during such examination he found the following injuries:--

Different injuries are - 1. Head of the person was completely separated from the body by a sharp through and through amputation cut injury over the middle of neck, circular in shape 6 inch anterior posteriorly and 8 inch transversely cutting all muscles vessels thyroid cartilage survival spine etc. gross hematoma with blood cloths seen.

Another sharp cut injury over anterior aspect of amputated head below the chin 5'x3'x2' in size. Amputated head is anatomically found to be exact part of the other lying body of male person, cut injury are ante mortem in nature.

Said autopsy doctor PW.9 also deposed that as per his opinion the cause of death of the deceased was due to hemorrhage and shock sustained by him as a result of amputation, head cut injury over the neck. Said PW.9 proved the said post mortem report (Exhibit 11) of the deceased and also identified his signature on the same.

24. During his cross examination the autopsy doctor PW.9 further stated that during his said report (post mortem report Exhibit 11) he did not write the age of the injury but he opined that it will be within 6 to 12 hours.

25. PW.8 Sri Bidyut Bikash Baruah was the Investigation Officer of the case who in his examination-in-chief deposed before the learned Trial Court that on receipt of the information over telephone from PW.6, Fiddus Ali and Suraj, went to the village Amolapam, arrested the accused Jakir, Jiabur and Babul Ali and on his prayer the learned JMFC allowed him to keep the accused persons in custody for 72 hours and during interrogation the accused persons were in police custody and they confessed before him that they committed the alleged crime which they had admitted in presence of the villagers and witnesses. He deposed that accused Jakir stated before him and the villagers that he kept one split bamboo and one dao used during the assault of the deceased concealed in the house of Amir (PW.7) and the said accused led police personnel including him to the house of PW.7 and on reaching there he found the said split bamboo and the dao in the kitchen of the house of Amir Ali as shown by the accused Jakir which was accordingly seized. He also stated that he recorded the statement of accused Jakir wherein he disclosed about the seizure and concealment of weapon of assault Exhibit-6. Said Exhibit-6 was the disclosure statement and Exhibit 6(1) is his signature. He further deposed that he too receive one confessional statement of the accused in writing from the villagers. He further deposed that during

investigation he also arrested accused Akkas Ali and on his prayer the learned Magistrate recorded the statement of Amir Ali under Section 164 CrPC.

26. During his cross examination by the defence said PW.8 stated that he seized the weapon of assault on 11.04.2013 in presence of PWs. 3, 4 and 5. During his such examination PW.8 stated that he did not know the scribe of the FIR nor he examined him. In the FIR, the informant stated that he suspects involvement of the accused persons in commission of the crime murdering of his son and further, he did not produce the witness Suraj as well as PW.3 for recording of their statement under Section 164 CrPC.

27. Learned counsels for the appellants submitted that as the prosecution has failed to prove the guilt of the accused persons beyond all reasonable doubt and the required completion of chain, they are entitled for acquittal in the case. It was also placed before the Court that as the accused persons made their statements being in police custody regarding commission of the crime, the same cannot be considered in evidence against them so as to punish them under Section 302 IPC. With regard to the statements made by the accused Jakir Hussain before police in the police station with regard to recovery of arms allegedly used in the commission of the crime, it was submitted that the said disclosure statement of the accused Jakir (Exhibit-6) cannot be a valid piece of evidence so as to prove the guilt of the accused persons in the case. It is also submitted by the learned counsels for the appellants that weapon seized, though stated to have the blood stain, was not forwarded to the FSL for its necessary examination and as the prosecution failed to do the same said dao seized by police cannot be said to have been used during commission of the crime by the accused persons.

28. On the other hand Ms. S. Jahan, learned Additional Public Prosecutor, Assam for the State fairly submitted that the confessional statement made by the accused person before police even in presence of other witnesses cannot be entertained as a valid piece of evidence to prove the guilt of the accused persons. She also stated that while the accused Jakir made his confessional statement at the time of recovery of arms from the house of Amir (PW.7) in presence of public/local villagers, that was allegedly used in committing the crime, the same also cannot be considered in evidence as it was done in presence of police persons present there. She further stated that the accused Jakir Hussain made disclosure statement before police (Exhibit-6) which was though duly recorded by police with the signature of the accused Jakir Hussain and that there is a stint that accused Akkas Ali had illicit relation with the wife of the deceased Halima Khatun and that she was also arrested in the case from the same motive of Akkas Ai can be presumed. She also stated that PW.3 in his evidence-in-chief deposed that he was told by the father of the deceased (PW.1) that Akkas Ali had called his son Hussain Ali away at about 6 O'clock on the previous evening of 06.04.2013 which can be presumed to be last seen theory.

29. However, marshalling the evidence of PW.1 we have seen that the informant

PW.1 father of the deceased in his evidence before the learned Trial Court as well as in the FIR filed in the case did not state that accused Akkas Ali had called his son away around 06:00 pm on the previous evening of 06.04.2013. Rather, the informant PW.1 father of the deceased in his evidence before the learned Trial Magistrate as well as in his written ejahar clearly stated that on the evening of 05.04.2013 around 07:00 pm his son left his house in his bicycle with Rs. 3000/- and mobile phone to purchase a Godrej Almirah from Borghuli.

30. Though the death of the deceased was homicidal in nature and gruesome but there was no eye witness to the incident and the prosecution is required to prove the guilt of the accused on the basis of circumstantial evidence beyond reasonable doubt.

31. We have already noticed, which was also admitted by the learned Public Prosecutor, that the confessional statements made by the accused persons in presence of police are not admissible in evidence. Though, the disclosure statement made by the accused Jakir Hussain Exhibit-6 before police and then he led the police persons along with other witnesses to the house of Amir (PW.7) from where the dao and the split bamboo, alleged weapons of offence, used in the commission of the crime, were seized; but police did not send those articles to the FSL for their necessary examination so as to ascertain whether those were used by the accused person in committing the crime or not. The evidence of the prosecution witnesses noted above reflects that police went to the kitchen of Amir Ali's house and seized the dao and a split bamboo and the evidence also shows that onion was sticking to the said dao that was seized by police which goes to show that the dao alleged to have been used in the commission of the crime by the accused persons was used for other purposes and that the prosecution failed to prove as to whether the said seized dao was used for committing the crime as alleged or not. Though there was a claim that the accused Akkas Ali was having an illicit relation with Halima Khatun, wife of the deceased so as to establish the motive of causing death of said Hussain Ali, but in that regard nothing was corroborated by the father of the deceased. Moreover, during investigation of the case Halima Khatun wife of the deceased was also arrested by police. But as no incriminating material was found against her in the investigation her name was not sent up for trial and as such prosecution also failed to prove the ground of motive of murdering of the deceased on the ground of having illicit relation of the accused Akkas Ali with Halima Khatun, wife of the deceased.

32. To prove the guilt of the accused persons in a case on the basis of circumstantial evidence, the prosecution is required not only to prove the circumstances but also to complete the chain of circumstances on the basis of which the guilt of the accused can be established. But in the present case, prosecution has failed to complete the chain of events and the evidence so as to prove the guilt of the accused beyond all reasonable doubt and the said chain of evidences remained incomplete.

33. For the reasons above, we are of the opinion that due to lack of and non completion of chain of evidence and circumstances, the impugned judgment and order of conviction and sentence dated 20.04.2016, passed by learned Additional Sessions Judge, Sonitpur, Tezpur in Sessions Case No. 167/2013 cannot sustain and accordingly, we set aside and quash the said judgment and order of conviction and sentence.

34. Accordingly, we allow these three appeals and acquit the three appellants from all the charges leveled against them .

35. During pendency of these appeals, accused Jakir Hussain was released on bail by this Court vide order dated 24.08.2016, passed in I.A.(Crl) No.112/2016 in Crl.A. No.163/2016. Similarly, accused Jiabur Rahman was also released on bail by this Court vide order dated 15.09.2016, passed in I.A.(Crl) No.89/2016 in Crl.A. No.155/2016 and accused Akkas Ali was also released on bail by this Court vide order dated 28.02.2018 passed in I.A.(Crl) No.231/2017 in Crl.A. No.114/2017. Bail bonds stands discharged.

36. Registry shall return the LCR to the Court of learned Additional Sessions Judge, Sonitpur, Tezpur with a copy of this judgment.