
(2019) 12 GAU CK 0009
In the Gauhati High Court
Case No : Criminal Appeal No. 126 Of 2019

Md. Sahidul Islam And Anr	Vs	APPELLANT
State Of Assam And Anr		RESPONDENT

Date of Decision : 04-12-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 302
Code Of Criminal Procedure, 1973 — Section 161, 162(1), 164

Citation : (2019) 12 GAU CK 0009

Hon'ble Judges : Mir Alfaz Ali, J;S. Hukato Swu, J

Bench : Division Bench

Advocate : S Parveen

Final Decision : Allowed

Judgement

M.A. Ali, J

1. This appeal is directed against the judgment and order dated 24.01.2019 passed by the learned Sessions Judge, Morigaon, in Sessions Case No. 15/2013. By the said judgment, the learned Sessions Judge convicted the appellants under Section 302 IPC and sentenced them to imprisonment for life and fine of Rs. 10,000/- each with default stipulation.

2. As per the prosecution case, on 09.08.2012, at about 6.30 PM in pursuance of a conspiracy hatched by the present appellants, took the deceased on a motorcycle and he was killed by inflicting multiple injuries with sharp weapons. Besides the present appellants, five others, who were named in the FIR were also involved in the commission of the offence. An FIR was lodged by Nur Mohammed (PW-2), on the basis of which, police registered Mikirbheta P.S. Case No. 163/2012 under Section 120(B)/302/34 IPC and commenced investigation. During investigation, police recorded statement of the witness, recover the weapon of offence, prepared inquest report, sent the body for postmortem examination and Autopsy doctor, Dr. Jayanta Dutta (PW-1) conducted the

postmortem examination.

3. According to PW-1, the following injuries were found on the person of the deceased.

"1. Lacerated wound over right shoulder region posteriorly of size 2 inch x ½ inch x 1 inch.

2. Incised type wound extending above left eye to lower part of the nose towards right with expulsion of left eye and total disfigurement of the nose with exposure of nasal bone.

3. Incised type wound over from of next (right side laterally) below right ear 1cm towards the middle of occipital area of size 8 inch x 4 inch x 3 inch. With involvement of arteries, veins, nerves, muscle and bone deep.

4. Linear lacerated wound over the right of the neck posteriorly 2cm x 1cm x 1cm.

5. Incised wound causing linear full amputation of right hand with partial fixation at the level of the wrist joint by a thin skin.

6. Incised wound in the left wrist joint 4 inch x 2 inch x bone deep.

7. Lacerated type wound in the right arms posteriorly 3cm x 1cm x 1cm.

8. Lacerated type wound in the left deltoid region 4cm x 2cm x ½ cm.

9. Lacerated type wound in the left shoulder in deltoid region 4cm x 2cm x ½ cm.

10. Multiple lacerated type wound (a) right parieto temporal region 5cm x 1cm x bone deep (b) left parietal region 4cm x 1cm x 1cm (c) Occipital region 3cm x 1cm x bone deep."

In the opinion of the doctor, the death was caused due to shock (hemorrhage and neurogenic) leading to cardio respiratory failure, due to massive blood loss as a result of multiple injury sustained by the injured.

4. On completion of the investigation charge sheet was laid against the present appellants, who eventually stood trial.

5. In course of trial, charge under Section 302/34 IPC was framed against both the appellants, to which, they pleaded not guilty. In order to establish the charge, the prosecution examined as many as 18 witnesses and on appreciation of evidence, learned Sessions Judge convicted the appellants under Section 302 IPC and awarded sentence as indicated above.

6. Learned counsel for the appellant, Ms. S. Parbin submits that there was no eye witness of the occurrence and the learned Sessions Judge convicted the appellants solely on the basis of circumstantial evidence. The circumstances relied by the learned Sessions Judge was not proved beyond reasonable doubt and therefore, the conviction and sentence of the appellants cannot be

maintained, submits Ms. Parbin.

7. Par contra, Mr. M. Phukan, learned Addl. P.P. contends, that there was complete chain of circumstances starting from last seen, till the arrest of the appellant immediately after the occurrence as well as recovery of weapons at the instance of the appellant and therefore the impugned conviction and sentence warrants no interference. We take note of the submissions made by the learned counsels.

8. On our assessment of the evidence and materials available on record and also the impugned judgment, we find that the learned Sessions Judge convicted the appellants primarily relying on the following circumstances:

(i) Last seen theory.

(ii) The appellants running away from the place of occurrence and met with an accident.

(iii) Recovery of weapon of the offence.

9. Learned trial court heavily relying upon the oral testimony of PW-2, PW-5 & PW-17, whose testimony was considered to be most important to establish the circumstances.

10. PW-2, stated in his evidence, that on the day of occurrence at about 6.30 PM, he along with Abdul Kadir and Azizul Hoque were taking Ifter in a shop. The deceased Moinul Hoque and the present appellants were also taking Ifter in a different table in the same shop. After finishing the Ifter, the appellants left the place along with the deceased on a motorcycle and proceeded towards Kolopia. After arriving home he got a phone call from Ahmed Ali (PW-8), who informed, that Moinul Hoque was killed and his body was found lying on the Boribazar Kolopia road. He further stated, that in the meantime, someone informed the police and the police also arrived and local people caught the appellant Sahidul and handed over him to police, however, the appellant Hipjur had fled away. He also stated to have noticed multiple injuries on the body of the deceased including amputation of hand. During cross examination, he stated that he has forgotten the name of the shopkeeper, where they took Ifter. It was also elicited from his cross examination, that the occurrence took place at a lonely place and there was no habitant within 200 to 300 meter from the place of occurrence.

11. This witness was also cross examined with regard to certain contradiction and it was brought on record through PW-18 that he did not state before police in his statement recorded under Section 161 CrPC that when he was taking Ifter, he had seen the appellant taking Ifter along with the deceased and thereafter they left for Kolopia on a motorcycle. In the FIR also, which was lodged by PW-2 himself, there was not even a whisper regarding his taking Ifter in the shop or having seen the deceased in the company of the appellant taking Ifter in the same hotel or going with them on a motorcycle. Therefore, this PW-2, apparently for the first time in court deposed, that he had seen that the appellants were

taking Ifter with the deceased in a shop and thereafter all of them left on a motorcycle towards Kolopia. In fact his statement in the FIR reflects a different story of the occurrence, wherein he sought to implicate as many as 7 persons including the present appellants as perpetrator of the offence. The omission of material facts by the PW-2 in the FIR lodged by himself as well as in his previous statement recorded under Section 161 CrPC, in our considered view is a serious contradiction, having the consequence of affecting the credibility of the oral testimony of this witness. True it is, all omissions are not contradiction. The explanation to Sub-section 2 of Section 162 provides that an omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction, if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. When the PW-2 stated in his evidence categorically, that he had seen both the appellants taking Ifter with the deceased in a shop and leaving the shop along with the deceased on a motorcycle, which is considered to be a vital circumstance in the instant case by the learned Sessions Judge as 'last seen together', such statement having not been made either in the FIR or in the statement recorded under Section 164 CrPC, certainly a material omission on the part of the PW-2 amounting to contradiction, which affects credibility of the testimony of the PW-2. Evidently, the other two persons, who were accompanying PW-2 as per his evidence in court, were not examined in this case. In view of the material contradiction with his previous statement in the FIR and statement recorded under Section 161 CrPC, the testimony of the PW-2 for the first time in court, that he had seen the appellants in the company of the deceased about half an hour before the occurrence is hardly inspiring confidence and therefore, in our considered view, no credibility can be attached to the said testimony of the PW-2. If the oral testimony of PW-2 that he had seen the appellants with the deceased immediately before the occurrence is not taken into consideration, the prosecution is left with no other evidence to substantiate the circumstance of last seen theory. Situated thus, the circumstance of the victim having been seen with the appellants immediately before the occurrence or last seen together, in our considered view cannot be held to have been proved beyond reasonable doubt.

12. PW-5 stated that at about 7.45 PM, having heard hue and cry, he came out of the house and had seen the deceased Moinul Hoque lying on the road with injuries. He also stated to have seen two persons fleeing from the place of occurrence on a motorcycle. He further stated that when the two persons were fleeing away, people assembled in the place of occurrence raised alarm and some of the persons assembled there chased them. He further deposed that the two persons riding motorbike met with an accident, half a kilometer away from the place of occurrence, and one of them identified as appellant Sahidul was caught by the villagers at the place of accident. However, the other one had fled away. In his cross examination, this witness stated that his house is at a distance of

100 meter from the place of occurrence and on his arrival at the place of occurrence, he found that 8/10 persons have already arrived there at the place of occurrence. He also stated that he did not notice the registration number of the motorbike. According to him, after 20 minutes, police arrived at the place of occurrence.

13. PW-11 stated that his house is situated at a distance of 2 kilometer from the place of occurrence. According to him, at about 7.30 PM one motorbike which was proceeding in high speed met with an accident and fell in the pond near his house. He came out and rescued the rider of the bike from the pond. He also stated that the appellants were the rider of the said bike. According to him, after 10/15 minutes, he heard that a murder had taken place near the house of Bolobhadra and thereafter police arrived there and arrested the appellant Sahidul Islam. According to him, the other appellant had fled away.

14. PW-10, deposed that at about 6-7 PM having heard that two persons met with an accident, he came out and found a large number of people gathered there, who brought out the rider of the bike from the pond. He further stated that the appellants were the person, who met with the accident. He further stated that the people assembled caught Sahidul Islam and his companion had fled away.

15. PW-2, in his evidence stated that the occurrence took place in a lonely place and there was no habitants within 200-300 meter from the place of occurrence. The sketch map (Ext.11) also shows that there is no residence in the proximity of the place of occurrence, which is apparently an isolated place and the nearest residential houses belong to Abdul Latif and Nurzamal, who were not examined in this case. If the evidence of PW-2 and the sketch map is taken into account, the evidence of PW-5 that his house is situated at a distance of 100 meter from the place of occurrence is hardly inspiring confidence. PW-11 stated that after about 10/15 minutes, he heard that a murder had taken place and thereafter people assembled there. The oral testimony of PW-11 also rendered the testimony of the PW-5 that the people assembled at the place of occurrence chased the appellants highly improbable. If the evidence of PW-11 is believed, than the testimony of PW-11 belies the evidence of PW-5, that he had seen two persons moving in a hurry from the place of occurrence, chased by others from the place of occurrence. There is also no material on record to show that PW-5 or any other witness identified the appellants or had seen the appellants having running way from the place of occurrence. This apart, the oral testimony of the PW-5, that already 8/10 persons arrived at the place of occurrence before his arrival, again creates serious doubt on the veracity of the oral testimony of the PW-5 that he had seen two persons fleeing from the place of occurrence in a motorbike, reason being that it was already dark, when the occurrence took place or PW-5 came to the place of occurrence. Though, the learned trial court heavily relied on the circumstance that the appellants were found fleeing from the place of occurrence, we find no legal evidence on record to substantiate the

said circumstance, that the appellants were seen running away from the place of occurrence immediately after the occurrence.

16. PW-18, the Investigating Officer deposed that on the basis of disclosure statement made by the appellant Sahidul, that the dagger used in the offence was thrown away in a fishery, was recovered and seized vide Ext.5 in presence of the witnesses. PW-4 stated that after 3 days of the occurrence, Sahidul led police to the place of accident and had shown the pond, where the dao was kept concealed and one Homeguard brought out the dao from the pond, and same was identified by Sahidul. PW-12, deposed that he had noticed some persons gathered at Kolopia near a pond, and police was also there along with the accused Sahidul Islam. According to him, he had seen a police personnel fell a magnate in the pond and one dao was lifted from the water. Thereafter seizure list was prepared and his signature was obtained therein. PW-13 stated that after 4 days of the occurrence, when he came to Morigon, he had seen police going towards a fishery with the accused Sahidul. As he was President of the Co-operative Society, he was also asked by police to accompany them. According to him (PW-13) appellant Sahidul had shown the place in the fishery, as to where the dao was concealed, and on being shown by him the 'dao' was lifted by using a magnet. According to him, the fishery was situated by the side of a road.

17. A dispassionate scrutiny of the oral testimony of the PW-4, PW-12, PW-13 & PW-18 shows that according to PW-4, the alleged dao was recovered from a pond, where the appellant fell due to the accident. PW-13, however, could not give any specific description as to where the pond was located. He only stated that the pond was near the place of occurrence. However, according to PW-12, it was recovered from a pond near Kolopia, where the occurrence took place. The 'dao' purportedly recovered on being shown by the accused Sahidul, though, sent for forensic examination, the evidence of PW-3, the Scientific Officer transpires, that the seized dao gave negative test for blood.

18. What we find from the oral testimony of PW-4, PW-12, PW-13 & PW-18 is that the testimony as to recovery of the weapon is also not consistent with regard to the place of recovery as well as the nature of weapon. Even if it is assumed for the sake of argument, that a dao or dagger, whatever may be was recovered, mere recovery of the weapon may not be of any use in view of evidence of PW-3, the Scientific Officer, who stated that there was no stain of blood or it gave negative test for blood, inasmuch as, there was no link evidence to connect the seized weapon with the commission of offence.

19. PW-6 & PW-16 were declared hostile, rather, testimony of such witnesses at least to the extent, found to be consistent with other prosecution evidence can be taken into consideration, we find nothing in their testimony, which can be of any use for the prosecution. What therefore crystallizes is that the evidence adduced by the prosecution fall short of proving the vital circumstances, beyond reasonable doubt.

20. It is the settled principle that in order to prove a charge in a criminal trial by circumstantial evidence, prosecution needs to prove each and every circumstance solidly beyond all reasonable doubt and the circumstances so proved, must form a complete chain, which unerringly leads to the conclusion, consistent only with the hypothesis of the guilt of the accused and inconsistent with his innocence. The Apex Court in *Hanumant Vs. State of Madhya Pradesh* reported in AIR 1953 SC 343 dealing with the nature of proof required to establish a criminal charge by circumstantial evidence observed as under:

"It is well to remember that in cases where the evidence in of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and pendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

21. The above principle has been constantly followed by the Apex Court in a catena of subsequent judgments. In *Sharad Birdhi Chand Sardar vs State Of Maharashtra* reported in AIR 1984 SC 1622 the Apex Court laid down the following golden principles for proof of a criminal charges which solely rests on circumstantial evidence:

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade & Anr. V. State of Maharashtra* where the following observations were made "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. 153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

22. On our assessment of the evidence as indicated above, we find that not to speak of a complete and unbroken chain of circumstance, so as to enable the court to arrive at a conclusion of the guilt of the accused, even the circumstances relied by the learned Sessions Judge has not been proved conclusively beyond reasonable doubt. The chain of event having not been proved beyond doubt, the conviction and sentence of the appellants cannot be sustained. Accordingly, we set aside the impugned judgment of conviction and sentence of the appellant.

23. The appeal is allowed. The appellants be released and set at liberty forthwith, if not required in any other case.

26. Send down the LCR.