

(2004) 03 GAU CK 0047
In the Gauhati High Court
Case No : Criminal Appeal No. 84 of 2002

Md. Sukhen Ali and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 24-03-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 172, 172(2), 313

Citation : (2004) 3 GLR 510 : (2004) 2 GLT 1399

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : B. Goswami, for the Appellant; P. Bora, for the Respondent

Judgement

I.A. Ansari, J.—By the impugned judgment and order, dated 28-12-2001 passed by the learned ad hoc Additional Sessions Judge, (First Track Court), Sonitpur, Tezpur, in Sessions Case No. 56 of 1998, the accused-appellants stand convicted u/s 304 (Part-II) read with Section 34 IPC and sentenced to undergo rigorous imprisonment for 10 years and pay a fine of Rs. 2000 each and, in default of payment of fine, to undergo rigorous imprisonment for a further period of 6 months.

2. The case against the accused-appellants, as unfolded at the trial, may in brief, be stated as follows : -

The deceased Motir Ahmed alias Motiur Rahman had married Fatima Begum, sister of the accused-appellants, namely, Md. Suken Ali, Md. Nur Ahmed and Md. Janu Ali. A few months prior to the occurrence, a male baby was born out of the wed-lock of deceased Motir Ahmed Rahman and Fatima Begum. After about 2/3 months of the birth of the said male baby, Fatima Begum left for her father's house, situated at a distance of about 400 yards from her matrimonial house. On 06-01-98, at about 6 AM, Motir Ahmed asked his nephew, Sarif Ali (P.W. 4), to bring his son from the house of his father-in-law Afazuddin (P.W. 4) Sarif Ali, accordingly, brought the baby from the parental house of Fatima Begum. The

deceased, then, sent, once again, Sarif Ali to bring back his aunt, Fatima Begum, too. Sarif Ali (PW 4) left home accordingly but he came back and informed Motir Ahmed that his aunt, Fatima Begum, had refused to come back home. This infuriated Motir Ahmed and he went, accompanied by Sarif (PW 4), to the house of his father-in-law. At the house of his father-in-law, when Motir Ahmed was talking to his wife, Fatima, accused Nur Ahmed gave a blow with an axe on Motir's head. On receiving the blow, Motir fell down and thereafter, accused Suken Ali dealt blows with an iron rod on Motir's chest and accused Janu Ali assaulted Motir with a dao on his face. On witnessing the occurrence, which so took place, Sarif rushed home and informed his father, Nazir Hussain (PW 1), i.e., the brother of the deceased Motir Ahmed, about the occurrence. Nazir Hussain hurriedly came to the house of Afazuddin and found Motir lying dead with injuries on his person at the courtyard of the said house, all the three accused having fled away. Nazir, then, went to Behali Police Station and lodged there a written FIR(Ext. 1). Police accordingly registered a case against the accused-appellants and, on completion of the investigation, laid charge-sheet against the accused-appellants u/s 302/34 IPC.

3. During the trial, the accused-appellants pleaded not guilty to the charge framed against them u/s 302 read with Section 34 IPC. As many as six witnesses were examined by the prosecution in support of their case. The accused-appellants were, then, examined u/s 313 Cr. P.C and in their examinations aforementioned, they denied that they had committed the offence alleged to have been committed by them, the case of the defence being a mixed plea of the denial and of Motir having died as a result of injuries sustained by him by falling on the boulders lying in the said courtyard. In support of their case, evidence was adduced by the defence. On the conclusion of the trial, the learned trial Court found the accused-appellants not guilty of the charge framed against them u/s 302/34 IPC but found them guilty of offence punishable u/s 304(Part-II) read with Section 34 IPC. The accused-appellants were accordingly convicted and sentenced, as mentioned hereinabove, was passed against them. Hence, the present appeal.

4. I have heard Mr. D. Goswami, learned counsel for the accused appellants, and Mr. P. Dora, learned Public Prosecutor, Assam.

5. Assailing the conviction of the accused-appellants, Mr. Goswami has pointed out that the FIR does not reveal the name and identity of any eye witness to the alleged occurrence of assault on Motir. Mr. Goswami has also submitted that several houses are located between the house of the accused-appellants, where the occurrence alleged to have taken place, and the house of the deceased, but none from amongst the neighbours were examined as an eye witness to the occurrence. It is pointed out by Mr. Goswami that the entire case of the prosecution rests on the testimony of the sole eye witness, namely, Sarif (PW 4), but his evidence is full of contradictions in as much as though this witness claimed that he, on being asked by his uncle, deceased Motir, had gone to the

house of his uncle's father-in-law house and had brought the said baby to the house of his uncle and had also gone, on being, again, asked by the said deceased, to the house of his aunt's father to bring his aunt, no such statement was made by PW 4 before the police as is reflected from the evidence of Investigating Officer (I/O). Referring to the evidence of the I/O (PW 6),

Mr. Goswami has emphasized that the evidence of the I/O (PW6) indicates that PW 4 had not stated before him that he had gone, accompanied his uncle, i.e., the said deceased, to the house of the father-in-law of the said deceased nor had he stated before the I/O that accused Suken had assaulted the said deceased by iron rod, accused Nur by an axe and Janu by a dao. In the face of such serious omissions, it is clear, submits Mr. Goswami, that PW 4 had made extensive and substantial improvements on his previous statement recorded during the course of the investigation of the case and a witness, who is capable of making such improvements, cannot be held as a trustworthy and reliable witness. This apart, submits Mr. Goswami, the specific assertion of PW 4 is that accused Suken had assaulted Motir three or four times on his chest, but neither the post mortem report nor the inquest report reveals any injury on the chest of the said deceased. This is yet another circumstance, contends Mr. Goswami, which ought to have been held by the learned trial court as an adequate circumstance to discard the evidence of PW 4.

6. Coupled with the above, Mr. Goswami has also pointed out that according to the evidence of PW 4, besides PW 4, three more persons, namely, Abu, Bihuram and his grand mother had witnessed the assaults on Motir, but none of these witnesses were examined by the prosecution. In the face of such evidence given by PW 4 himself, submits Mr. Goswami, it cannot be said that PW 4 was the sole eyewitness to the alleged occurrence. As, according to Mr. Goswami, at least, 3 witnesses, other than PW 4, could have testified to the alleged assaults on the said deceased and yet the prosecution had withheld them from the Court, it is a fit case in which adverse inference needs to be drawn against the prosecution for withholding the material witnesses. It is also pointed out by Mr. Goswami that so far as the accused-appellant, Janu, is concerned, the evidence on record is that he used to live separately from his father and his very presence at the place of occurrence is doubtful, but none of these aspects of the matter was taken into account by the learned trial court, while determining the veracity of the case, which the prosecution had set up against the accused-appellants.

7. Controverting the submissions made on behalf of appellant, Mr. Bora has submitted that the contradictions, which have been pointed out in evidence of PW 4 vis-a-vis his previous statement, are on account of error committed by the learned trial court, at the time of recording of the evidence of the I/O as much as the learned trial court has, while recording evidence of the I/O, recorded the contradictions, pointed out on behalf of the accused-appellants, as if the I/O (PW6) had accepted the contradictions pointed out by the defence, though careful scrutiny of the evidence of the I/O, recorded by the learned trial Court,

will reveal that the omissions pointed out to the I/O had not actually been accepted by him as true. To strengthen this submission, Mr. Bora further points out that the learned trial Court was empowered u/s 172 Cr.P.C. to peruse the case diary and the case diary clearly reveals that all the omissions, in the previous statements of PW 4 put to the I/O, were not, as a matter of fact, omissions inasmuch as the statement of PW 4 made before the I/O did contain his assertions that, he had gone to the house of his uncle's father-in-law and brought the baby to. his uncle and on being asked, once again, by his uncle to call his aunt, he had gone to call his aunt, but when she refused to come back home, he (PW 4) accordingly informed his uncle and his uncle got angry and, accompanied by PW4, went to the house of his father-in-law, where all the three accused appellants assaulted the said deceased with axe, dao and iron rod. It is also submitted by Mr. Bora that if these contradictions are not take into account, then, PW 4, who is an eye witness, can be safely held to have withstood well the test of cross-examination and in such situation, the contradictions between the ocular and medical evidence cannot be given any importance at all. If PW 4 is found to be wholly reliable, which, according to Mr. Bora, PW4 is, then, there is no impediment under the law in sustaining the conviction of the accused appellants based on the sole testimony of PW 4. Mr. Bora has pointed out that while giving oral evidence, a child witness, such as PW 4, may, at times, imagine certain things, which may not per se make his evidence unreliable. Reliance in support of his submission is placed by Suryanarayana Vs. State of Karnataka, It is further submitted by Mr. Bora that the evidence of PW 4 given about the said occurrence coupled with the fact that the said deceased was found lying in the courtyard of the accused-appellant immediately after the assaults were reported by PW 4 to PW 1 and PW 4 as well as other neighbouring witnesses, who arrived at the scene of occurrence, found the accused-appellants absent from their house and Motir lying dead in the courtyard with injuries on his person are such vital pieces of evidence, which, when considered together, leave no room for doubt that the accused-appellants were the ones, who had injured Motir and caused his death.

8. Without entering into the merit of the rival submissions made before me on behalf of the parties, it is imperative to note that Section 172 Cr.P.C. makes it mandatory for every police officer carrying out investigation to maintain a diary and make entries therein day-by-day as the investigation progresses. The case diary is, thus, a contemporaneous record of the investigation and a criminal Court is empowered under Sub-section (2) of Section 172 Cr.P.C. to use such diary, not as evidence, but as aid in inquiry or trial. A trial judge is not to be a recording machine and must remain alive to the happening during the course of the trial. An omission and/or contradiction put to an I/O is not to be recorded mechanically and without application of mind. While recording the evidence of the I/O with regard to any omission or otherwise, the trial judge cannot ignore and may use the case diary. Since it has been pointed out, on behalf of the prosecution, that the omissions shown to have been admitted by the I/O (PW 6)

as regards the statement of P.W. 4, recorded during the course of investigation, were not really omissions and since it has also been pointed, on behalf of the prosecution, that the tenor of the recording of the evidence of the I/O (PW 6) shows that the learned trial judge incorrectly recorded the I/O's evidence as admissions of the omissions in the statement of PW 4, though it was, in fact, not so, it is, to my mind, necessary that this controversy is resolved by the learned trial Court itself and for this purpose, the trial Court shall recall the investigating Officer and ascertain if the omissions, put to him, on behalf of the defence, as regards the statements of PW 4, recorded during the investigation, have been correctly recorded in the evidence of the I/O and after ascertaining the same by looking, if necessary, to the Relevant case diary, the learned trial Court shall examine the accused-appellants u/s 313 Cr.PC. A careful perusal of the examination of the accused-appellants made u/s 313 Cr.P.C. reveals a disturbing feature inasmuch as the learned trial Court has not put to the accused-appellants many of the incriminating pieces of the evidence on which the learned trial Court, eventually, relied for founding the conviction of the accused-appellants. The act of examination of an accused, u/s 313(2) Cr.P.C. is solemn act of a trial Court and shall not be treated as an empty formality.

9. Considering, therefore, the matter in its entirety, I am firmly of the view that this case needs to be remanded to the learned trial Court for Recalling the I/O for the purpose indicated hereinabove and also for effective and meaningful examination of the accused-appellant; u/s 313(2) Cr.P.C. In view of the fact that this Court has decided to remand back the case to the trial Court for the purposes indicated above, I have consciously refrained myself from expressing any opinion on the correctness or otherwise of the rival submission made before me on behalf of the parties.

10. In the result and for the reasons discussed above, this appeal partly succeeds. The conviction and sentence passed against the accused-appellants are accordingly set aside and the case is remanded to the learned trial Court to resume the trial by recalling the Investigating Officer in terms of the observations made hereinabove and, then, dispose of the case in accordance with law.

11. The learned trial Court shall dispose of the case expeditiously and, preferably, within a period of three months from the date of receipt of the LCRs.

12. Send back forthwith the LCRs.