
(2009) 09 GAU CK 0062
In the Gauhati High Court

Nantulal Biswas and Another

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 11-09-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34, 447

Citation : (2010) CriLJ 501 : (2010) 2 Crimes 763 : (2010) 1 GLR 647 : (2009) 5 GLT 426

Hon'ble Judges : Maibam B.K. Singh, J;C.R. Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Maibam B.K. Singh, J.—Heard Mr. R. Datta, learned Counsel appearing on behalf of the appellants and Mr. D. Sarkar, learned PP assisted by Mr. R. C. Debnath, learned Counsel appearing on behalf of the State respondent.

2. This appeal is directed against the judgment dated 20-12-2004 passed by learned Addl. Sessions Judge, North Tripura, Dharmanagar in S. T. No. 44 (NT/D) of 2004 convicting the present two appellants for the commission of the offences u/s 302 IPC and 447 IPC read with Section 34 IPC and also against the order of sentence dated 22-12-2004 passed in the same case sentencing them to life imprisonment and a fine of Rs. 10,000/- each to be given to the widow of the deceased, Gyanmani Biswas.

3. Both the accused appellants are charged with the commission of the offence u/s 302 IPC read with Section 34 IPC stating that on 29-5-2004 at about 1 p.m. at Mukumcherra under Kanchanpur Police station, they committed murder by intentionally causing death of Gyanmani Biswas in furtherance of their common intention and also with the commission of the offence u/s 447 IPC read with Section 34 IPC stating that on the above said day and time, they, in furtherance of their common intention, committed criminal trespass by entering into the land of the informant and the said Gyanmani Biswas with intention to assault and to cause death of the informant and the said Gyanmani Biswas. Both the accused

appellants were tried in respect of the said charges. After the trial, they were convicted as per the impugned judgment dated 20-12-2004 and they were sentenced as per the impugned order of sentence dated 22-12-2004.

4. It is the case of the accused appellants that the learned Addl. Sessions Judge misconceived and misconstrued the facts and circumstance of the case and as such reached an erroneous and perverse findings leading to the impugned conviction and sentence. According to the learned Counsel appearing on behalf of the accused appellant, there are discrepancies and contradictions in the statements of the alleged eye witnesses, the investigation of the case was proceeded irregularly and illegally and the materials before the Court are not sufficient for convicting the accused appellants. Further, according to the learned Counsel of the accused appellants, as per evidence before the Court, the accused appellants assaulted the said Gyanmani Biswas without any intention to cause his death but only as a result of provocation caused by the said Gyanmani Biswas, they assaulted him without any intention to cause his death. It is also submitted on behalf of the accused appellants that even assuming that the accused appellants assaulted the said Gyanmani Biswas on that day leading to his death, on the basis of the materials before the Court, the Trial Court should have convicted the two accused only for the commission of the offence under either Section 325 IPC or Section 304 IPC and not for the offence u/s 302 IPC.

5. On perusal of the records, we find that the prosecution produced 12 (twelve) PWs to substantiate the charges against the accused appellants. 3(three) of the PWs, namely. Smt. Pranati Biswas (PW-2), Smt. Suma Biswas (PW-3) and Shri Abhiral Nath (PW-11) are said to have seen the said assault made on the deceased by the accused appellants. PW-2 is the wife of the deceased. PW-3 is the wife of the informant. PW-2, PW-3 and PW-11 are persons residing within a short distance from the place of the occurrence. They (PW-2. PW-3 and PW-11) are found to have stated to the effect that on the said day when they came out of the respective houses after hearing cries, they saw the two accused appellants holding a wooden lathi each and assaulting the deceased inside his bagan tilla and that they saw the accused appellants fleeing away towards their house. Further, these witnesses (PW-2, PW-3 and PW-11) testified to the effect that the deceased died at the spot as a result of the said assault. According to the PW-3. she saw severe bleeding injuries on the head and body of the deceased. We do not find any material contradiction in the statements of these witnesses as regard the fact that they saw the assault made by the accused appellants on the deceased on the said day inside his bagan tilla leading to his death at the place of occurrence.

6. These witnesses (PW-2, PW-3 and PW-11) were residing near the place of occurrence at the relevant time and their conducts of coming out from their respective houses after hearing cries on the said day were quite natural and in normal course of human conduct. They (PW-2, PW-3 and PW-11) are the natural witnesses. Since they are the persons who were in a position to see the

occurrence with their own eyes, their competency to depose about the occurrence cannot be doubted, unless it is found that they were not actually present at or near the place of occurrence at the point of time when the occurrence took place. Their (PW-2, PW-3, and PW-11) position is different from a chance witness who happened to be present at or near the place of occurrence at the time of the occurrence, although it is not the place ordinarily visited by him. There is no suggestion from the side of the defence that these witnesses (PW-2, PW-3 and PW-11) were not actually present at or near the place of occurrence at the relevant time. There is also no evidence to show that PW-2, PW-3 and PW-11 were not actually present at or near the place of occurrence at the time when the occurrence took place.

7. At the same time, there is nothing substantial to show that these witnesses (PW-2, PW-3 and PW-11) are partisan and not independent witnesses. No suggestion is found to have been made in this regard from the side of the defence. The deceased being the husband of PW-2 and the elder brother of the husband of PW-3, they (PW-2 and PW-3) are relatives of the deceased. However, mere fact that a person is a close relative of the victim does not make him a partisan or interested witness. Thus PW-2 and PW-3 are not interested witnesses. In absence of anything to show that the said two witnesses (PW-2 and PW-3) were having some animus towards the accused appellants at the relevant time, the mere fact of the said two witnesses being relatives of the victim is not a sufficient ground for either disbelieving their testimonies or requiring corroboration thereof for acting on the same. It is well settled that a witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity with the accused, to wish to implicate him falsely. A close relative would be the last to screen the real culprit and falsely implicate an innocent person.

8. As regards the time of the occurrence, as per the testimony of PW-2, it was at about 2 p.m., and as per testimony of PW-3, it was at about noon. In this regard, the testimony of PW-11 is that it was at 1 p.m. The above said differences are not sufficient to discredit these witnesses and to have any reasonable doubt about the occurrence. Such type of differences are quite understandable and they are to be treated as minor discrepancies.

9. On perusal of the statements of these witnesses (PW-2, PW-3 and PW-11), we do not find any material discrepancy creating a reasonable doubt in the prosecution case. It is to be noted that powers of observation and of remembering the facts seen or words heard and of correctly narrating the same subsequently when deposing about the occurrence in Court, differ greatly with different persons, with the result that some discrepancies necessarily arise in the statements of the different witnesses as given in the Court, although they all may have actually been eye witnesses of the same occurrence, even in the absence of any desire or any attempt on the part of such witnesses to suppress

any fact or to make any embellishment or improvement.

10. Shri Luchanmani (PW-1) is also a resident of the locality where the occurrence took place. According to PW-1, he came to know about the occurrence from his neighbour, Sumanta Biswas and when he went to the place of occurrence, he found the dead body of the said Gyanmani Biswas lying with serious bleeding injuries on his face, head and forehead. PW-1 also found two wooden lathis at the place of occurrence. According to PW-1. he informed police by going to Kanchanpur Police Station and when a darogababu came to the spot along with some police personnel, Shri Akarshan Biswas (PW-4) made oral complaint and the same was recorded by the darogababu. PW-1 testified about seizure of the two wooden lathis by police under seizure memo /list and also about putting his signature on the list as a witness.

11. The informant (PW-4) did not say that he saw the occurrence. According to him (PW-4), when he came to the tilla land from his paddy field after hearing cry of his wife, he found his elder brother, Gyanmani Biswas, lying dead on the ground with serious bleeding. PW-4 also saw two wooden lathis near the dead body. PW-4 testified that when the police came to the spot he narrated the incident to the police officer and that the same was recorded by the officer. PW-4 identified the report marked as Exb. "2" and his signature marked Exb. "2/1" appearing on the report. He (PW-4) also signed on the inquest report marked Exb. "3" . His (PW-4) statement before the Court to the effect that he did not see the occurrence is found contradictory to his version in his report marked Exb. "2" wherein he is found to have stated as if the two accused appellants assaulted his elder brother, Gyanmani Biswas, in his presence and also as if he intervened and tried to stop the accused appellants. In fact, he (PW-4) was declared as a hostile witness. Even though PW-4, at the time of his giving evidence before the Court, was not supporting the prosecution case that the occurrence took place in his presence, he (PW-4) supported the prosecution case that the said Gyanmani Biswas died on the said day i.e. on 29-5-2004 at about 1 p.m. inside his tilla land and that he is the informant. There is no sufficient reason as to why the portion of his testimony consistent with the prosecution case should not be accepted. So far as the main portion of the prosecution case that on the said day, inside the said tilla land, the accused-appellants assaulted the said Gyanmani Biswas leading to his death is concerned, we have seen that there are evidence given by the three eye witnesses (PW-2, PW-3 and PW-11).

12. Learned Counsel appearing on behalf of the accused-appellant draws our attention to the statement of PW-2 and submits that as per the said statement of PW-2, it appears that at the time of the occurrence, she and the informant (PW-4) were present at the place of occurrence and as such, the statements of PWs. No. 3 and 11 that they also saw the occurrence-appear to be false.

13. We have carefully perused the statements of PW-2, PW-3 and PW-11. It is to be noted that PW-2 nowhere stated that she saw the occurrence only after reaching place of the occurrence. Both PW-3 and PW-11, testified to the effect

that they saw the occurrence after coming out of their respective houses. These witnesses are persons residing within a short distance from the place of occurrence. PW-3 stated that the occurrence took place at a distance of 20 cubits from her hut. PW-11 also stated that his house was within hearing distance of the cry and that there was no house in between his house and the place of occurrence. We do not find sufficient reason for disbelieving the statements of the eye witnesses (PW-2, PW-3 and PW-11). Further, since the informant (PW-4) has already been declared as a hostile witnesses, the statements of PW-2, PW-3 and PW-11 should not be disbelieved on the basis of the statement of the hostile witness.

14. Shri Anil Nama (PW-5) was also a resident of the locality of the deceased. His (PW-5) wife is the sister of the mother of the accused-appellant's. According to him (PW-5), he did not see the occurrence as he was at Kanchanpur at the relevant time and when he went to the place of the occurrence at about 4.00 p.m. on the same day, he saw the dead body of the Gyanmani Biswas lying there. PW-5 learnt that the said Gyanmani Biswas died as a result of assault made by the accused-appellants. He (PW-5) signed on the inquest report.

15. Shri Birendra Nath (PW-7) was also a resident of the locality of the deceased. PW-7 did not see the occurrence but he saw the dead body of the said Gyanmani Biswas with bleeding injuries at the place of occurrence. PW-7 witnessed the seizure of the two wooden lathis by the I. O. Shri Sushen Nama (PW-8) and Shri Sushil Nama (PW-9) testified about seizure of wearing pant of the deceased Gyanmani Biswas under the seizure list marked Ext. "4" by police.

16. On 30-5-2004, Dr. T. K. Majumder (PW-10) conducted post-mortem examination on the dead body of the said Gyanmani Biswas. He (PW-10) found the following injuries on the dead body :- (1) lacerated wound on right parietal region, crack and fracture on right parietal bone. Through the wound the brain matter was coming out, parietal lobe was congested with haemorrhage, haematoma was present on the parietal lobes; (2) lacerated wound present on face below nose and above chin, right lateral 1st and 2nd, incisor teeth were broken.

16.1. The measurement of the first injury was found to be 3" x 1" x 1 1/2" and measurement of the second injury was found to be 3" x 1" x 1/2" depth. According to PW-10, both the injuries were ante-mortem and homicidal in nature. In the opinion of the doctor (PW-10), the cause of death was cardiac respiratory failure due to coma following blunt injury over head which was homicidal in nature. Further, PW-10 opined that the injury No. 1 was sufficient to cause death of a person and that the injuries found on the dead body could have been caused by the seized wooden lathis. PW-10 identified Ext. "5" as the post mortem report bearing his signature, Ext. "5-1".

17. The testimony of PW-10 substantially corroborates the prosecution case that the death of the said Gyanmani Biswas was caused on 29-5-2004 as a result of

assault made on him using the seized two wooden lathis. However, according to the learned Counsel of the accused-appellants, the Trial Court should not have relied on the postmortem report inasmuch as it (Ext. 5) is a carbon copy. PW-10's testimony is to the effect that he prepared the post-mortem report in four copies at one time by using carbon papers in his own handwriting and that he signed separately on all the four copies. PW-10 identified his original signature appearing on the report produced before the Court. We do not find any valid reason as to why the unshaken testimony of PW-10 given before the Court on oath as well as the postmortem report (Ext. 5) which he identified as the one prepared by himself and bearing his original signature should not be taken into account in support of the prosecution case.

18. Shri Manik Dey (RW-12) is the Police Officer who investigated the case. His (PW-12) testimony is of formal nature regarding various steps taken during the course of investigation. According to PW-12, he recorded the oral complaint made by the informant (PW-4) as reported to him at the place of occurrence. PW-12 obtained signature of the informant (PW-4) on the recorded complaint (Ext. "2") after the same having been admitted to be correct on being read over. We do not think that it is necessary to reproduce the I. O.'s, statement regarding various steps taken by him during the investigation of the case.

19. The learned Counsel appearing on behalf of the accused-appellants submits that the Investigating Officer, who recorded oral complaint of PW-4, was in the position of the very person who lodged the complaint and as such, in the light of the decision of the Hon'ble Apex Court in Megha Singh Vs. State of Haryana, as well as the decision of this Bench in Cril. Appeal No. 23 of 2004, dated 14-11-2008 and also the decision of State of Karnataka, Paper Town Police Station Vs. Sheshadri Shetty and Others, the entire investigation was tainted and the accused-appellants are entitled to be acquitted by giving benefit of doubt.

20. We have considered the matter in the light of the decisions cited by the learned Counsel of the accused-appellants. In our considered opinion, PW-12 was not the informant who lodged the complaint which was treated as the FIR. PW-12 simply recorded the oral complaint of the informant and he obtained the signature of the informant on the recorded complaint after ascertaining its correctness from the informant. The said recorded complaint was treated as FIR in the case. In the facts and circumstance, PW-12 cannot be considered as an informant who lodged the complaint which was treated as the FIR. Accordingly, the investigation made by the PW-12 cannot be considered as a tainted investigation and not an impartial one. In the present case, the above said decisions cited by the learned Counsel of the accused-appellants will not help their case.

21. The learned Counsel of the accused-appellants further submits that the I. O. (PW-12) committed illegality and irregularities in the investigation of the case and as such, the accused-appellants are entitled to be acquitted. According to the learned Counsel of the accused-appellants, the I.O. (PW-12) failed to take

appropriate steps for ascertaining if the seized wooden lathis, were stained with blood of the deceased and also to examine some witnesses of the locality.

22. On careful consideration of the submissions of the learned Counsel of the accused-appellants in the light of the materials before the Court, we do not find anything to show that the prosecution evidence must have been manipulated or shaped by reason of the illegality or irregularities in the matter of investigation or that the accused-appellants were prevented by reason of any of the alleged irregularities from putting forward their defence or adducing evidence in respect thereof. In short, there is nothing to show that the said failure on the part of the I. O. has brought about miscarriage of justice. In fact, none of the PWs stated that the seized wooden lathis were stained with blood and as such in the facts and circumstances, there was no need of sending them for chemical examination. Non-examination of other witnesses of the locality cannot be considered as fatal to the prosecution case when three reliable eye witnesses were found to have been examined. In the absence of anything to show that the alleged irregularity or illegality has brought about the miscarriage of justice, the impugned conviction cannot be set aside on the ground of the alleged irregularity or illegality.

23. It is well settled that a prosecution case fully established from the testimony of the eye witness is not to be disbelieved only on the ground of illegality or irregularity in the investigation of the case. A defect in the investigation of a case, however serious, has no bearing on the competence or procedure relating to the cognizance or the trial. *State of Rajasthan Vs. Kishore, The State of Uttar Pradesh Vs. Bhagwant Kishore Joshi, ; Leela Ram (Dead) Through Duli Chand Vs. State of Haryana and Another, ; Amar Singh Vs. Balwinder Singh and Others, Surendra Paswan Vs. State of Jharkhand, and Ram Sewak v. State of U.P. (2005) 12 SCC 143*). In view of the above well settled position of law and in the absence of anything to show that miscarriage of justice Has been brought about as a result of any illegality or irregularity in the investigation of the case by PW-12, the accused-appellants are not entitled to any acquittal order in respect of charges against them as submitted by their counsel.

24. The learned Counsel of the accused-appellant, further draws our attention about the absence of any indication in the sketch map of the place of occurrence about growing of jack fruit and mango trees thereon contrary to the statements of some PWs. that jack fruit and mango trees were growing there. The learned Counsel submits that at the time of cross examination, the I. O. (PW-12) stated to the effect that there was no mango or jack fruit tree at the place of occurrence and as such there are contradiction in the statement of PW-12 and the statements of some other PWs regarding the place of occurrence. According to the learned Counsel of the accused-appellants, the above said contradiction creates doubt to the prosecution case. In our opinion, the above said contradiction in describing the place of occurrence cannot be considered as a material contradiction, in the statements of the PWs creating any reasonable

doubt to the prosecution case. The fact if the said types of trees were growing or not at the place of occurrence is not a relevant issue in the case. Apparently the I. O. (PW-12) did not take notice of the said fact of growing of the said trees as the said fact was not relevant in the investigation of the case. The above said discrepancy/contradiction on the immaterial point will be of no consequence.

25. The last point to be considered is if the accused-appellants assaulted the said Gyanmani Biswas on the said day leading to his death as a result of a grave and sudden provocation made by him. The learned Counsel appearing on behalf of the accused-appellants submits that the assault on the deceased took place as a result of a provocation caused by him by his acts of abuse and assault on the mother of the accused-appellants immediately before the occurrence. According to the learned Counsel of the accused-appellants, the offence committed by the accused-appellants would be either u/s 325, I. P. C. or u/s 304, I. P. C. and not u/s 302.I. P. C.

26. On perusal of the records before the Court, we find evidence to show that there was an altercation/quarrel in between the deceased and the informant (PW-4) on one side and both the accused-appellants on the other side in connection with the matter relating to irrigation on the day of occurrence in the morning at about 7.00 a.m. but there is no evidence to show that the deceased abused and assaulted the mother of the accused-appellants just immediately before the occurrence. The mother of the accused-appellants, who was allegedly abused and assaulted by the deceased immediately before the occurrence, was not examined on behalf of the defence. In fact, no witness was examined as a defence witness. At the examination of the accused persons u/s 313, Cr. P. C., none of them stated anything about the alleged provocation made/caused by the deceased just before the occurrence. At the time of his cross-examination, PW-1 is found to have denied about having any knowledge of any assault having been made on the mother of the accused persons by the deceased on the day of the occurrence and also of the deceased having abused the accused persons. PW-2 and PW-3 also denied suggestion made to them in respect of the said facts. As per testimony of PW-4, who was declared as a hostile witness, he was informed by the mother of the accused persons about an assault having been made on her by the deceased. PW-4 did not say that he was having personal knowledge of the said assault. At the same time, PW-4 denied a suggestion made to him that the deceased died due to his own fault and that the deceased rebuked the accused persons. PW-5 also stated at the time of his cross-examination that the mother of the accused-appellants told him about assault having been made on her by the deceased. Apart from some vague statements given by some of the PWs. during their cross-examinations, there is no clear evidence about any act of the deceased which might have caused grave and sudden provocation to the accused persons immediately before or within a short period before the occurrence. In our opinion, there is no material before the Court to form any opinion to the effect that the two accused-appellants were suddenly and gravely provoked by the deceased before the occurrence. On the basis of the materials before the

Court, in our opinion, the accused-appellants were having a grudge against the deceased in respect of the quarrel in the morning and they assaulted the deceased because of the said grudge. In any case, the factum of the assault on the deceased by the accused-appellants is established by cogent and reliable evidence before the Court. There is no any reasonable doubt about the said findings. There is no basis for concluding that offence committed was one u/s 304, I. P. C. or Section 325, I. P. C. and not u/s 302, I. P. C.

27. As per evidence before the Court, the two accused-appellants assaulted the deceased in furtherance of their common intention by giving vicious blows on the head of the deceased resulting fracture of parietal bone and thereby leading to his death. The offence committed by the accused-appellants was one u/s 302, I. P. C. read with Section 34, I. P. C. There are also materials for convicting the accused appellants for the commission of the offences u/s 447, I. P. C. read with Section 34, I. P. C.

28. In the result, in the light of the considerations made above, we are of the opinion that this appeal has no merit and it is hereby rejected. The impugned judgment and the order of sentence are not interfered with. With this, this appeal stands disposed of.