
(2023) 09 GAU CK 0039
In the Gauhati High Court
Case No : Criminal Appeal No. 107 Of 2019

Niren Bordoloi

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 27-09-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 313, 374
Indian Penal Code, 1860 — Section 34, 120B, 302, 304II
Evidence Act, 1872 — Section 25, 27, 101, 106

Citation : (2023) 09 GAU CK 0039

Hon'ble Judges : Malasri Nandi, J

Bench : Single Bench

Advocate : P J Saikia, S H Bora

Final Decision : Dismissed

Judgement

1. Heard Mr. P.J. Saikia, learned counsel for the petitioner and also heard Ms. S. H. Bora, learned Addition Public Prosecutor for the State of Assam.
2. This appeal has been preferred under Section 374 of the Code of the Criminal Procedure, 1973, against the judgment and order dated 22.01.2019 passed by the learned Sessions Judge, Morigaon in connection with Sessions Case No. 46/2013, whereby, the accused/appellant was convicted under Section 304 Part-II IPC and sentenced him to undergo rigorous imprisonment for 7 years.
3. The brief facts of the case is that one Gopal Chandra Bora lodged an FIR on 28.09.2010, stating inter-alia, that on 27.09.2010, at about 8 p.m. in the evening hour his brother Narayan Saikia went to the house of Hari Bordoloi situated at Belaguri village. When his brother was sitting at the varanda of Hari Bordoloi's house, the appellant Niren Bordoloi attacked him with a dao causing grievous injuries on his person as a result of which he died on the spot. At that time Hari Bordoloi was standing nearby and helped the assailant to assault the victim.

4. On receipt of the complaint, a case was registered vide Dharamtul P.S. Case No. 70/2010 under Section 302/34 IPC and the investigation was initiated. During investigation, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, inquest was done on the dead body of the deceased and subsequently, the dead body was sent for post-mortem examination. After completion of investigation charge-sheet was submitted before the Court of learned Additional Chief Judicial Magistrate, Morigaon against the accused/appellants Niren Bordoloi and Hari Bordoloi under Sections 302/34 IPC. As the offence under Section 302 IPC is exclusively triable by the Court of Sessions, the Case was committed accordingly.

5. During the course of trial, Charge was framed under Sections 302/34 IPC to which the accused/appellant pleaded not guilty and claimed to be tried. The prosecution examined 12(twelve) witnesses and exhibited some documents and one material exhibit vide Material Exhibit-1, the seized dao. It is pertinent to mention here that during trial one of the accused Hari Bordoloi died and on receipt of the report from the Executing Officer regarding his death, the case against Hari Bordoloi was abated. Due to death of the co-accused, the trial court was proceeded with the accused/appellant. After completion of trial, statement of the appellant/accused was recorded under Section 313 Cr.P.C, wherein the incriminating materials found in the evidence of the witnesses were put to him to which he denied the same and pleaded his innocence. After hearing the argument advanced by the learned counsel for the parties, the learned trial Court convicted the accused/appellant as aforesaid. Hence, this appeal.

6. It is submitted by the learned counsel for the appellant that there are lots of contradictions in the statement of the witnesses as such the judgment of trial Court cannot be taken into consideration against the accused/appellant that he had committed the crime. Though the prosecution has projected PW-2 & PW-10 as eye witnesses to the incident, but PW-2 though stated that he had seen the incident but subsequently, when he was re-examined, he has resiled from his earlier statement. According to the learned counsel for the appellant, PW-10 is the daughter of Hari Bordoloi who was one of the accused in the case but he died during the trial. PW-10 implicated the present appellant to be involved in the commission of crime which she did not state before the Investigating Officer, while her statement was recorded under Section 161 Cr.P.C, as such her statement is not convincing to convict the accused/appellant.

7. It is also the submission of the learned counsel for the appellant that the evidence of the Medical Officer is not reliable on the basis of which the appellant was convicted as because the Medical Officer has admitted in his evidence that to conduct the post-mortem examination a doctor should be qualified and expert to perform the same. According to the learned counsel for the appellant, PW-9 i.e., the Medical Officer, has no such expertise to conduct post-mortem examination, as such, the post mortem examination vide exhibit -7 cannot be taken into consideration in the case.

8. It is further submitted by the learned counsel for the appellant that the learned trial Court has failed to take note the cross-examination of PW-10, who stated that when the incident took place it was dark and there was no electrification in their house. It was specific admission by PW-10 that the deceased was sitting with her father i.e., co-accused Hari Bordoloi but at the time of committing the crime, Hari Bordoloi was absent at the place of occurrence. It is further submitted that according to PW-10, the appellant had no talking terms with the family of PW-2 and he never visited the house of PW-10 i.e the co-accused Hari Bordoloi's house due to strained relationship. The learned counsel has pointed out that this vital piece of evidence was simply brushed aside by the trial Court while coming to the finding of guilt of the accused/appellant. Hence, the impugned judgment and order passed by the learned trial Court is liable to be set aside.

9. In support of his submissions the learned counsel for the appellant has relied on the following Case laws: -

1. Sattatiya alias Satish Rajanna Kartalla vs. State of Maharashtra reported in (2008) 3 SCC 210.

2. Bathula Nagamalleswara Rao and Ors. vs. State represented by public prosecutor reported in (2008) 11 SCC 722.

3. Ponnusamy vs. State of Tamil Nadu reported in (2008) 5 SCC 587.

4. Rajiv Phukan and Anr. vs. State of Assam reported in 2009 (2) GLT 414.

5. Nagaraj vs. State represented by Inspector of Police, Salem Town, Tamil Nadu reported in (2015) 4 SCC 739.

6. Gagan Konojia and Anr. vs. State of Punjab reported in (2006) 13 SCC 516.

7. Krishna Janardhan Bhat vs. Dattatraya G. Hegde reported in (2008) 4 SCC 54.

8. Subhas vs. State of Haryana reported in (2007) 12 SCC 63.

10. Per contra, the learned Additional Public Prosecutor has submitted that the accused/appellant had committed murder with the help of co-accused who died during the trial but the admitted position is that PW-2 and PW-10 had seen the incident of committing murder by the present appellant. The Medical Officer who has supported the evidence of the witnesses that he found cut injury on the neck of the deceased, as a result of which he died on the spot. The learned trial Court has rightly convicted the accused/appellant under Section 304 Part-II IPC, which does not call for any interference by this Court.

11. I have considered the submissions of the learned counsel for the parties. I have also perused the record of Sessions Case No. 46/2013 and the documents available in the record.

12. PW-1, is the informant who is the brother of the deceased, deposed in his evidence that the occurrence took place on 27.09.2010 at about 8:00 to 8:30

p.m. in the house of accused Hari Bordoloi. At that time, he was in his house at Thekeraguri. One Purnakanta Bhuyan of Patrobori village informed him over phone that the accused Niren Bordoloi killed his brother Narayan Saikia in the house of Hari Bordoloi and on receipt of the information, he went there and found dead body of his brother on the varanda of Hari Bordoloi with pool of blood. He noticed the injury on the left side of his neck and he also noticed blood in a plastic chair. The deceased went there with a motor-cycle of his another brother Dimba Borah. The accused Niren Bordoloi after inflicting dao blow to his brother, cut the tire of his motor-cycle. Thereafter, he informed Dharamtul Police Station and police arrived there and he lodged the FIR vide exhibit-1. On the following day, police again came with the accused and recovered dao from a pond situated on the boundary, by which Niren Bordoloi caused injury to his brother. At that time, he was present and the police seized the said dao vide Exhibit-3 (seizure list).

13. In his cross-examination, PW-1 replied that he did not have talking terms with Hari Bordoloi or Niren Bordoloi. The house of Niren Bordoloi is situated by the side of Hari Bordoloi and the pond is situated in the back side of their house. He did not see the house of any other person on the back side of the house of Hari Bordoloi.

14. PW-2, who claimed to be the eye witness to the incident. According to him, the incident occurred in the house of accused Hari Bordoloi at around 8 p.m. At that time, he went to a fishery belong to his Jethai Peulamai. At the time of returning, he visited the house of Hari Bordoloi, there he had seen Narayan Saikia sitting in a plastic chair in the varanda along with the co-accused Hari Bordoloi. After sometime when he came out from the house of Hari Bordoloi, at that time Niren Bordoloi suddenly came out and inflicted injury with a dao on his head. He ran towards the house of Hari Bordoloi to save himself. Then Niren Bordoloi came with a dao to the house of Hari Bordoloi and caused injury to Narayan Saikia on his neck while he was sitting on the chair. After inflicting injury to Narayan Saikia, Niren Bordoloi came out and cut the tire of a bike parked by the side of the road. Thereafter, he fled away and Narayan Sakia died on the spot. After sometime, the brother of the deceased came there who informed the police and police also arrived. The dead body was taken for post-mortem examination. His statement was recorded by the Magistrate vide Exhibit-4.

15. In his cross-examination, PW-2 replied that he also visited the house of Hari Bordoloi prior to the incident. He had no any quarrel with Hari Bordoloi. He got introduced with the deceased on that day only. He did not meet Niren Bordoloi in the house of Hari Bordoloi in his previous visit.

16. This witness was further cross-examined by the defence counsel wherein, he stated that when he reached the house of Hari Bordoloi, he and one guest were sitting at the varanda. He stayed there for one hour. When he was returning back from that place, somebody had struck him from behind on his head. Due to darkness of night, he did not identify the person who had assaulted him.

17. PW-3, is the Scientific Officer, who examined the blood sample sent for serological examination. According to PW-3, the exhibit number Sero- 2700/A and Sero- 2700/B gave positive test for human blood.

18. PW-4, is the wife of the deceased Narayan Saikia. She deposed in her evidence that on the day of occurrence at about 12:30 noon Hari Bordoloi came with a cycle in their house and requested her husband to go to Kahibari. Her husband first refused to go but, on his request, he agreed. Thereafter, Hari Bordoloi kept his cycle in their house and went with her husband in motor bike belonging to her husband. But till evening her husband did not return back home. One girl at about 7:00 p.m. informed her that her husband was being assaulted by Niren Bordoloi in the house of Hari Bordoloi. Then she informed one Dhanti Bhuyan to go to the house of Hari Bordoloi to enquire about the matter. At about 10:00 p.m. she came to know that her husband was killed in the house of Hari Bordoloi.

19. In her cross-examination, PW-4 replied that Hari Bordoloi kept his mobile phone and cycle in their house and one unknown girl informed her about the occurrence in the mobile phone of Hari Bordoloi. Hari Bordoloi frequently visited their house and his relationship was good with her husband.

20. PW-5, is the seizure witness. According to him, on 28.09.2010, he went to the house of Hari Bordoloi. At that time he had seen that the police brought the accused Niren Bordoloi and on being asked about the weapon used for committing offence, he told before the police that he threw the dao near the pond. Thereafter, police engaged one boy and recovered the dao from the nearby pond. The dao was seized by the police vide Exhibit-3 (seizure list), wherein he put his signature as seizure witness. This witness also proved the said dao before the trial Court vide Material Exhibit-1.

21. PW-6. is the person who informed about the incident to PW-1 (the informant). He deposed before the Court that on 27.09.2010 at about 7:30 p.m. to 8:00 p.m. while he was coming from Telahi towards his house, he met accused Niren Bordoloi on the road and he shouted that he cut Narayan Saikia who died. He stopped a while in front of the house of Hari Bordoloi. Thereafter, left the place. Accordingly, he informed the matter over phone to the informant about the incident.

22. PW-7 is the adjacent neighbor of the deceased (Narayan Saikia). He deposed in his evidence that on the day of incident at about 9:30 p.m. to 10:00 p.m. after hearing hue and cry in the house of the deceased, he went there and came to know that the incident occurred in the house of Hari Bordoloi. On receipt of the information, he went there and found the dead body of the deceased lying on the varanda of Hari Bordoloi. He was informed that Niren Bordoloi killed Narayan Saikia.

23. PW-8 is the ejahar writer who has no knowledge about the incident. As per the instruction of the informant, he wrote the FIR vide Exhibit-1.

24. PW-9 is the Medical Officer. He deposed in his evidence that on 27.09.2010, he was posted at Morigaon Civil Hospital. On that day, he conducted post-mortem examination of the dead body of the deceased on police requisition and on examination, he found the following-

1. one cut injury on the left side of the neck with clavicle bone fracture. Injury was extended to cervical spine. Size of cut injury was 6" × 4"× 3".
2. One haematoma on posterior side of occipital region. Rigor mortis present. Injuries are ante-mortem.

PW-9 (Doctor) opined that cause of death was due to Haemorrhage, shock and spinal injury. PW-9 proved the post- mortem report vide Exhibit-7.

25. In his cross-examination, PW-9 replied that he did not collect the blood sample of the deceased. He suggested the police personnel to collect the blood sample for sending the same to FSL for expert opinion. He is an Orthopaedic surgeon. It was suggested that he has not conducted the post mortem examination properly.

26. PW-10 is another eye witness to the incident. She is also the daughter of the co-accused Hari Bordoloi who died during trial. From her deposition it reveals that the occurrence took place in their house. At that time the deceased was sitting in their house. Then accused Niren Bordoloi came there and assaulted him on his neck with a dao. She had seen the incident. She made hue and cry and then local people gathered. The deceased was taken to hospital. Police came and examined her. She stated before the police that Niren Bordoloi assaulted Narayan Saikia and fled away.

27. In her cross-examination, PW-10 replied that accused took away the dao by which he committed the crime. It was dark night on the date of incident. There was no electrification in their house. She was standing in the door at the time of occurrence and she saw the accused Niren Bordoloi committing the crime.

28. PW-11 is the Investigating Officer. He deposed in his evidence that on 27.09.2010, he was posted at Dharamtul Police Station as Officer-In-Charge. On that day at about 9:45 p.m. one Pitambar Baruah the president of Patrabori Gaon Panchayat informed him over phone that one Niren Bor doloi of Belaguri village killed one Narayan Saikia by inflicting dao blows in the house of Hari Bordoloi. Accordingly, a GD entry No. 529 was recorded vide Exhibit-8. Thereafter, he proceeded to the place of occurrence. He found the dead body was lying on the ground in a pool of blood. He inspected the place of occurrence and drew the sketch map vide Exhibit-9. He recorded the statement of the witnesses at the place of occurrence. He conducted the inquest on the dead body of the deceased vide Exhibit-10 inquest report. On the next day, from Morigaon Police Station it was informed over phone that the accused had surrendered before the Morigaon Police Station admitting his guilt. Accordingly, he went to Morigaon Police Station and took the accused to his custody. On being asked, the accused

admitted his guilt that he had killed the deceased. The accused also showed him the place where he kept the dao by which the deceased was killed. The accused stated that after causing the incident he had thrown away the said dao in a ditch. He had recovered the said dao from the said ditch and seized the same vide Exhibit-3 (seizure list). Thus, the accused led him to the place of discovery of the weapon of offence which was used in order to kill the deceased. Then he recorded the statement of the accused vide Exhibit-11, disclosure statement.

29. PW-12 is another Investigating Officer. He deposed in his evidence that his predecessor SI Fazlul Hoque was the Investigating Officer of this Case who completed substantial part of the investigation. The Case was only pending for collection of Post-mortem report and FSL report. After being endorsed with the case, he thoroughly gone through the case diary and collected the Post-mortem and FSL reports. After being satisfied with the investigation, he finally submitted charge-sheet against the accused Niren Bordoloi and Hari Bordoloi under Section 302/120B/34 IPC vide Exhibit 12.

30. I have perused the judgment of the learned trial Court from which it reveals that the trial Court relied on the evidence of PW-10 and PW-2 being the eye witnesses to the incident.

31. According to the learned Sessions Judge, PW-2 though was re-cross-examined but the testimony of PW-2 remained unshaken and the evidence of PW-2 was inspiring and convincing. It is also stated by the learned trial Court that during investigation the statement of PW-2 was recorded by the learned Magistrate under Section 164 Cr.P.C which has been exhibited during trial vide Exhibit-4 and PW-2 proved his signature in his statement vide Exhibit- 4(1). The learned trial Court also noted that the nature of the incident narrated by PW-2 in his statement recorded under Section 164 Cr.P.C tallied with his evidence in Court. In the said statement, he clearly stated that the accused Niren Bordoloi assaulted the deceased with a dao and that he saw the incident happening in front of him. The said statement of PW-2 fortified the evidence adduced in the trial and therefore found the evidence of PW-2 to be very solid and trustworthy.

32. The learned trial Court has also mentioned that PW-10 who is the daughter of the co-accused Hari Bordoloi also testified that the incident took place in their house. When the deceased Narayan Saikia was sitting on their varanda, at that time accused Niren Bordoloi came their house and assaulted the deceased on his neck. The learned trial Court also took the note of the fact that the testimony of PW-10 corroborated the evidence of the PW-2 and the trial Court found the evidence of PW-10 to be reliable. On the basis of evidence of PW-2 and PW-10 and the Medical Officer, the trial Court held that the accused/appellant committed the crime by inflicting injury to the neck of the deceased with a dao.

33. Though the charge was framed under Section 302 IPC but the learned Sessions Judge held that the appellant did not have any intention to cause death of the deceased, as the manner in which the crime was committed i.e., the

accused inflicted a single blow though it was inflicted on his neck, the learned trial Court has converted the sentence from 302 IPC to 304 Part-II IPC to undergo rigorous imprisonment for 7 years.

34. After going through the evidence of aforesaid witnesses, it reveals that PW-2 and PW-10 were present when the incident occurred. PW-2 stated in his examination in chief that he had seen that the appellant assaulted the deceased with a dao causing injury on his neck. It appears that the cross-examination of PW-2 was declined for appellant on 23.10.2013. Subsequently, PW-2 was re-cross-examined after 3 years i.e., on 16.07.2016, wherein, PW-2 stated that when he was returning back from the place, somebody struck him from behind on his head. As it was dark at that time, he had not seen the person who struck him. After that he got panic and started running towards the house of Hari Bordoloi. There was no electric connection in the house of Hari Bordoloi. Thereafter, he had seen the dead body of the deceased in a sitting position but he had not seen Hari Bordoloi there. PW-2 also stated that the daughter of Hari Bordoloi had seen the actual occurrence.

35. It is apparent that PW-2 did try to somehow help the appellant. As I have already stated that on the first occasion PW-2 was not cross-examined and his cross-examination was declined. But subsequently, after 3 years when he was cross-examined, he resiled from his earlier statement what he stated in his examination in chief. The reason is that, PW-2, it is apparent that was under pressure to resile and exonerate the appellant. Possibly he feared for his life and therefore, had gone to the extent of stating that he failed to identify the person who had struck him and subsequently he had seen the dead body of the deceased. I find that the version given by PW-2 in his examination in chief is the true and correct rendition of facts which duly stands corroborated from the testimony of PW-10.

36. It also appears that the statement of PW-2 was recorded by the Magistrate under Section 164 Cr.P.C, wherein, he also stated that on the date of incident he came to the house of his uncle Hari Bordoloi. At that time Hari Bordoloi was sitting in the house of his veranda along with one guest. They were talking to each other. After that his uncle went inside the house and he also stated to the guest that he wanted to leave the place. While he was coming out from the house of his uncle, Niren Bordoloi suddenly came out and gave a blow with a dao on the left side of his neck. Out of fear he was running towards the house of Hari Bordoloi and entered into a room and locked the door. At that time the daughter of Hari Bordoloi was along with him and through the hole of the door he noticed that Niren Bordoloi inflicted injury with a dao towards the deceased's neck and left the place.

37. The witness who makes two inconsistent statements, it can be urged as unreliable but there can be instances where the Court can rely upon the earlier or verifiable statement if the same is true and the witness has falsely resiled to protect the perpetrator. For this, there should be intrinsic circumstances and/or

corroborative circumstances or material which support and enables the Court to draw the inference that the first or part statement is true and correct.

38. In the instant case, it is true that PW-2 replied in his cross-examination that he failed to identify the assailant who inflicted injury towards the deceased. His evidence has been taken into consideration by the learned trial Court strictly in accordance with law. Some omissions, improvements in the evidence of PW-2 have been pointed out by the learned counsel for the appellant, but I find them to be very trivial in nature.

39. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and shifting through the evidence to separate truth from untruth, exaggeration and improvements, the Court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of prosecution witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statement of the witnesses. [Vide Sohrab vs. State of M.P. (1972) 3 SCC 751, State of U.P. vs. M.K. Anthony (1985) 1 SCC 505, Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat (1983) 3 SCC 217, State of Rajasthan vs. Om Prakash (2007) 12 SCC 381, Prithu vs. State of H.P. (2009) 11 SCC 588, State of U.P. vs. Santosh Kumar (2009) 9 SCC 626, State vs. Saravanan (2010) 4 SCC (Cri) 580].

40. Herein this case, I have already pointed out that PW-2 has stated in his examination in chief that he had seen the incident while the appellant was inflicting injury towards the deceased with a dao causing injury on his neck but denial of the matter in his cross-examination does not come to the fact that his examination in chief has no value in the eye of law. In the case in hand, there is another eye witness i.e., PW-10 who is the daughter of co-accused Hari Bordoloi. PW-2 has confirmed that PW-10 also had seen the incident and the fact was not denied by the accused by putting any suggestion at the time of cross-examination. Admittedly the incident occurred in the house of Hari Bordoloi. Hence, it is apparent and possible that the PW-10 who is the daughter of the co-accused Hari Bordoloi had got the chance to see the incident.

41. Conviction of an accused can be sustained even on evidence of a single eye witness if the evidence given by the said witness is credible or the implication made by the said witness when read with other corroborative evidence and material, conclusively makes out a watertight case against the accused. As noted above, there is sufficient corroborative evidence against the appellant when we read and examine the truthful part of the version and deposition of PW-2 along with the corroborative evidence of PW-10 and other witnesses.

42. Coming to the point of disclosure statement vide Exhibit-11, the appellant

made disclosure statement, before the Investigating Officer on 28.09.2010 i.e., on the following day of the incident. Pursuant to the said disclosure statement, appellant led the police party to the disclosed place and got the weapon i.e., one iron made dao fitted with wooden handle recovered which was seized accordingly vide Exhibit-3 (seizure list).

43. The disclosure statement and seizure memo were signed by the Investigating Officer in presence of the witnesses. Though the learned counsel for the appellant attempted to assail the said document on the ground that neither the disclosure statement nor the recovery were made in presence of any independent witness, but this Court is unable to accept the said contention as there is no mandate of law that under all circumstances, such document should be prepared in presence of independent witness only. The prosecution has examined the Investigating Officer PW-11 as well as the seizure witnesses PW-1 and PW-5 who have specifically stated about the appellant/accused having made the disclosure statement in their presence and having got the recovery effected thereof. The Investigating Officer had recorded the disclosure statement of the appellant vide Exhibit-11 in discharge of his official duty and he had no axe to grind against the accused so as to depose falsely. In these circumstances, this Court does not find any reason to doubt that the appellant had made the said disclosure statement and pursuant to the same had got the recovery effected.

44. The Hon'ble Supreme Court in the Case of John Pandian v. State represented by Inspector of Police, Tamil Naidu, reported in (2010) Vol-14 SCC 129, Hon'ble Supreme Court held as follows: -

".... The discovery appears to be credible. It has been accepted by both the courts below and we find no reason to discard it. This apart from the fact that this weapon was sent to the forensic science laboratory (FSL) and it has been found stained with human blood. Though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. This discovery would very positively further the prosecution case."

45. The Hon'ble Supreme Court in Pawan Kumar v. State of U.P, reported in (2015) Vol-7 SCC 148, while discussing the scope of admissibility of information furnished by accused in terms of Section 27 in context of Section 25 of Evidence Act held as follows: -

"It is settled principle of law that statements made by an accused before a police official which amount to confession is barred under Section 25 of the Evidence Act. This prohibition is, however, lifted to some extent by Section 27 In the light of Section 27 of the Evidence Act, whatever information given by the accused in consequence of which a fact is discovered only would be admissible in the evidence, whether such information amounts to confession or not Simply denying their role without proper explanation as to the knowledge about those incriminating materials would justify the presumption drawn by the courts

below as to the involvement of the accused in the crime. The confession given by the accused is not the basis for the courts below to convict the accused, but it is only a source of information to put the criminal law into motion. However, the accused cannot take shelter under Section 25 of the Evidence Act."

46. Thus, this Court does not find any reason to discard the factum of recovery of the weapon i.e., one iron made dao fitted with wooden handle, at the instance of the appellant which is incriminating piece of evidence against him. It appears that there is no explanation from the side of accused/appellant while his statement was recorded under Section 313 Cr.P.C, regarding disclosure statement and leading to discovery of the weapon.

47. According to PW-5, on 28.09.2010, he went to the house of Hari Bordoloi and at that time he had seen that the police brought the accused Niren Bordoloi and on being asked about the weapon used for committing the offence, he told before the police that he threw the dao near the pond. Thereafter, police engaged one boy who recovered the dao from nearby pond. The dao was seized by police vide Exhibit-3 (seizure list) and he put his signature in the said seizure list vide Exhibit- 3(2). This witness also stated that the said dao was exhibited in the Court vide material Exhibit-1 which was recovered by police in his presence as shown by the accused Niren Bordoloi. In his cross-examination, the witness confirmed his statement in examination in chief that the contents of exhibit-3 were read over to him. So far as he could remember that it was written in Exhibit-3 that Niren Bordoloi assaulted Narayan Saikia in the house of Hari Bordoloi and the dao was recovered.

48. Coming to the evidence of another seizure witness PW-1, he stated that on the following day police again came with the accused and recovered the dao from a pond situated on the boundary of Hari Bordoloi by which Niren Bordoloi caused injury to the deceased. At that time, he was present. A seizure list is prepared vide Exhibit-3, wherein, he put his signature vide Exhibit-3(1).

49. In this context, reference may be made to prohibition of Section 106 of Indian Evidence Act, 1872 which is in the nature of an exception to general rule enshrined in Section 101 of Evidence Act, which mandates that burden of proof lies on the person who asserts existence of such facts. 106 of the Evidence Act is reproduced as follows: -

"106 Burden of proving fact especially within knowledge'- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

50. In the Case of Prithipal Singh v. State of Punjab, reported in (2012) Vol-I SCC 10, the Hon'ble Apex Court held that if a fact is especially in the knowledge of any person, then burden of proving that fact is upon him and that it would be impossible for the prosecution to prove certain facts particularly within the knowledge of the accused. It was further held therein that Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused

beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, offers some explanation which might drive the court to draw a different inference. Thus, it was held that Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. To similar effect is ratio of judgement reported in (2016) Vol-12 SCC 665 (Harijan Bhala Teja vs, State of Gujarat).

51. In view of the above discussion, this Court accepts the prosecution version by relying upon the examination in chief of PW-2 and other eye witness PW-10 that they had seen the incident that the appellant had inflicted injury with a dao towards the deceased causing injury on his neck, as a result of which he died on the spot. The said version mentioned in the FIR (exhibit-1) which stands duly corroborated with the subsequent recovery of the weapon of offence i.e., one iron made dao fitted with wooden handle after disclosure statement vide exhibit-11. The recovery was made on 28.09.2010, after the appellant was arrested on the same day.

52. I do not find any reason to interfere in the order of conviction and sentence passed by the learned trial Court. Hence, the appeal is dismissed.

Send back the LCR.