
(2017) 12 GAU CK 0034
In the Gauhati High Court
Case No : 8 of 2014

RABI MOHALI

APPELLANT

Vs

STATE OF ASSAM

RESPONDENT

Date of Decision : 08-12-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 161](#), [Section 162](#), [Section 313](#), [Section 162\(1\)](#), [Section 161\(1\)](#)
- Examination of witness

Citation : (2017) 12 GAU CK 0034

Hon'ble Judges : Manash Ranjan, Hitesh Kumar Sarma

Bench : DIVISION BENCH

Final Decision : Allowed

Judgement

1. The Criminal Appeal (J) No. 8/2014, has been preferred by appellants Rabi Mahali, Ratan Mahali and Rajesh Mahali against the judgment and order, dated 11.12.2013, in Session Case No. 38/2007, passed by the learned Sessions Judge, Hailakandi, convicting and sentencing each of them to imprisonment for life and to pay a fine of Rs 1000 each and in default of payment of fine, to undergo rigorous imprisonment for 6 months each for their conviction under Section 302 read with Section 34 of Indian Penal Code (IPC).

2. The facts preceding this appeal are as follows: On 17.11.2005, an FIR was lodged by Sri Dhanu Bawri at Algapur Police Station, alleging that while his son Dilu Bauri was returning home with cows, the accused appellants Rajesh Mahali @ Biswa, Robi Mahali and Ratan Mahali attacked his son with wood causing bleeding injuries on his head. The accused appellants, on seeing the people assembling after the incident, fled the scene. The injured Dilu Bauri was then taken to Algapur Hospital, and thereafter, to Silchar Medical College Hospital where he succumbed to his injuries.

3. On receipt of the FIR, a case under Section 341/302/34 of IPC was registered

being Algapur P.S Case No. 150/2005, investigated into it, collected evidence and finally, on completion of investigation a charge sheet was laid against accused Rajesh Mahali @ Biswa, Robi Mahali and Ratan Mahali for offences under Section 341/302/34 of IPC.

4. The offences being triable exclusively by the Court of Session, the learned Chief Judicial Magistrate, Hailakandi, committed the case to the Court of Session at Hailakandi. After hearing both sides, charges under Section 302/34 of IPC were framed against all the chargesheeted accused persons to which they pleaded not guilty and claimed trial.

5. Prosecution examined ten (10) witnesses including the Medical Officer and the Investigating Police Officers. At the closure of prosecution evidence, as required under Section 313 of CrPC, all the incriminating materials were put to the accused persons. The accused persons denied the accusations levelled against them. They also declined to adduce evidence in their defence. After hearing arguments preferred by the Prosecution and the defence, the learned Sessions Judge, Hailakandi, convicted and sentenced the accused appellants, as indicated above, vide the judgment appealed against.

6. Examined the trial Court's record including the evidence led by the prosecution as well as the judgment put to challenge in this appeal.

7. Heard the learned Amicus Curiae, Mr. BN Gogoi and also the learned Additional Public Prosecutor, Mr. BJ Dutta, for the State.

8. PW1, Sri Dhanu Bauri, is the informant and he deposes in his examination-in-chief that while his son Dilu Bauri was coming home with cow, accused appellants, namely, Rajesh Mahali @ Biswa, Robi Mahali and Ratan Mahali wrongfully restrained him, and thereafter, took him to the courtyard of Subir Mahali (PW4) where the accused appellants, severely beat up him with firewood, resulting in his death.

9. In cross examination, PW1 admits that he did not witness the occurrence. It may also be pointed out that PW1 has also not stated as to from whom he came to know about the incident and the role attributed to the accused appellants in causing the death of the deceased Dilu Bauri.

10. PW2, Prodip Bauri, deposed that deceased was his younger brother. He too narrated the events in the same tone as that of PW1 to the effect that accused appellants had joined together to cause the death of said Dilu Bauri by beating him with firewood. However, PW2, in his examination-in-chief itself, in the same breathe, admitted that he did not see the incident with his own eyes. PW2 has not deposed as to from whom he came to know about the role of accused appellants in causing the death of deceased Dilu Bauri.

11. PW3, Ramcharan Bauri, was projected as eye-witness to the incident. He is heard saying that at the time of the occurrence, all the accused appellants had assaulted Dilu Bauri in the courtyard of Subir Mahali. PW3 further deposed that

he had seen the accused appellant Rajesh Mahali inflicting a lathi blow on the head of Dilu Bauri, and thereafter, all the accused appellants fled away from the place of occurrence.

12. In cross examination, the defence suggested that PW3 did not witness the occurrence, that he had stated in his statement under Section 161 CrPC that at the time of occurrence he was at his home and that he had further stated in his such statement that at about 7 p.m, when he came to his residence, he learnt that deceased was assaulted by Mahali party.

13. Without deferring the appreciation on the aspects of contradiction, as suggested by the defence, when the evidence of PW8, Sri Lokman Choudhury, the Investigating Police Officer was looked into, it is found that he deposed in his cross examination that witness Rameshwar Bauri (PW3) stated before him that on the date of occurrence, at 7 p.m, he came to know that the deceased was assaulted by Mahali party. PW8, further confirmed that PW3 Rameshwar Bauri did not state before him that he had seen the accused Rajesh Mahali in assaulting the deceased.

14. The defence has, thus, successfully confirmed the contradictions appearing in the evidence of PW3, Rameshwar Bauri, and his evidence, therefore, cannot be considered to be reliable.

15. PW4, Sri Subir Mahali, PW6, Sri Pancham Bauri, PW7, Sri Badal Bauri have all been declared as hostile witnesses.

16. PW5, Md. Fakar Uddin Mazumder, the scribe of FIR, marked as Ext. 1, deposed that he did not know anything about the occurrence.

17. The status of evidence, as adduced by the prosecution, is that of the three witnesses, PW1, PW2 and PW3, who have sought to implicate the accused appellants, PW1 and PW2 did not see the occurrence and the evidence of PW3 is found to be unreliable because of contradictions, appearing in his testimony, as noticed above. The rest of the witnesses, except the official witnesses, have been declared to be hostile. All these hostile witnesses, namely, PW4, Sri Subir Mahali, PW6, Sri Pancham Bauri and PW7, Sri Badal Bauri were subjected to cross examination by the Prosecuton after obtaining leave of the Court to declare them as hostile witnesses.

18. Section 154 of Evidence Act allows a party to cross examine his own witnesses with the leave of Court. Though the expression hostile is nowhere used in the Evidence Act yet in legal parlance it is meant to denote a person who does not support the case of the party who calls him as its witness.

19. The learned trial Court had granted leave to the Prosecution to declare PW4, Sri Subir Mahali, PW6, Sri Pancham Bauri and PW7, Sri Badal Bauri as hostile witnesses. Thereafter, the prosecutor cross examined these witnesses with reference to their statements made to police under Section 161 CrPC, and accordingly, the statements made by these witnesses were brought on record. All

the witnesses, however, denied the defence suggestion that they ever made such a statement to the police.

20. Perused the impugned judgment in this regard. The learned trial Court, has relied on the alleged statements made by the PW4, Sri Subir Mahali, PW6, Sri Pancham Bauri and PW7, Sri Badal Bauri under Section 161 CrPC, which is manifestly illegal for, it amounts to sustaining a conviction on the basis of statement under Section 161 CrPC. A statement under Section 161 CrPC is not a substantive piece of evidence and no conviction can be sustained if it proceeds on the basis of statement under Section 161 CrPC. A statement under Section 161 CrPC can be used only for the purposes mentioned in Section 162 CrPC.

21. In the case of V.K. Mishra v. State of Uttarakhand, (2015) 9 SCC 588, the Hon'ble Supreme Court observed that Section 161 CrPC provides for oral examination of a person by any investigating officer when such person is supposed to be acquainted with the facts and circumstances of the case. The purpose for and the manner in which the statement recorded by police under Section 161 CrPC can be used at any trial are indicated in Section 162 CrPC. Section 162 CrPC reads as under: "162. Statements to police not to be signed: Use of statements in evidence.-(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.

Explanation.-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."

22. It was further observed in the case of V.K. Mishra (supra), that Section 162 CrPC bars use of statement of witnesses recorded by the police except for the

limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police under Section 161(1) CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) CrPC. The statements under Section 161 CrPC, recorded during the investigation, are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness, if necessary.

23. In view of the law with respect to use of statement under Section 161 CrPC, even if the statements of the witnesses PW4, Sri Subir Mahali, PW6, Sri Pancham Bauri and PW7, Sri Badal Bauri, made to police under Section 161 CrPC, are confirmed at the most it proves what these witnesses had allegedly stated before the police. As the statement to the police under Section 161 CrPC, not being a substantive piece of evidence, it cannot form the basis of conviction. There is, thus, neither any direct evidence nor any circumstantial evidence which could link the present accused appellants with the alleged commission of the crime. Hence, the finding of the guilt of the accused appellants, on the basis of evidence tendered on record, is erroneous and calls for interference.

24. The accused appellants are, accordingly, acquitted of the charges under Section 302/34 IPC and set at liberty forthwith, if not wanted in any other case.

25. Appeal is, accordingly allowed.

26. The appellants be released forthwith from jail.

27. Send down the LCR with a copy of this judgment.

28. The Registry shall inform the Superintendent of District Jail, Hailakandi, to release the accused-appellant forthwith in the above noted case, with a copy of this judgment and order.

29. Send a copy of this judgment and order to the Superintendent of District Jail, Hailakandi, for furnishing the same to the accused-appellant.

30. This Court appreciates the assistance rendered by the learned Amicus Curiae, Mr. BN Gogoi and directs that an amount of Rs 7000/- be paid to him as honorarium for his assistance.