
(2018) 11 GAU CK 0024
In the Gauhati High Court
Case No : Criminal Appeal(J) 51 ,52 Of 2017

Sagar Mura S/O Lt. Mongala Mura, Nagar Mura
Vs
State of Assam

APPELLANT

RESPONDENT

Date of Decision : 15-11-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 299, 300, 302
Code of Criminal Procedure, 1973 — Section 164, 174(4), 209, 313, 315
Evidence Act, 1872 — Section 138

Citation : (2018) 11 GAU CK 0024

Hon'ble Judges : A. K. Goswami, J;Ajit Borthakur, J

Bench : Division Bench

Advocate : U. Choudhury, Bhuyan, B. Baruah, Bhuyan,

Final Decision : Dismissed

Judgement

1. Heard Mr. U. Choudhury, learned amicus curiae for the appellant in Crl.A.(J) 51/2017 and Mr. B. Boruah, learned amicus curiae for the appellant in

Crl.A.(J) 52/2017. Also heard Ms. B. Bhuyan, learned P.P., Assam, for the respondents.

2. The above two appeals are directed against the judgment & order, dated 14.03.2017, passed by learned Addl. Sessions Judge, Sivasagar, in

Sessions Case No. 276(S-C)2013, whereby each of the appellants is convicted and sentenced to undergo life imprisonment and to pay fine of Rs.

30,000/-, in default, to under rigorous imprisonment, for 6(six) months under Sections 302/34 of the IPC.

3. The appellantsâ?? case, in brief, is that, one Dipali Gogoi, wife of late Biren Gogoi, resident of village Raidingia Nakachari, under Sonari Police

Station, lodged an F.I.R., on 16.06.2013, before the Officer-in-Charge of Sonari Police Station, inter alia, alleging that on 15.06.2013, at around

2.30/3.00 PM, her husband late Biren Gogoi went to his tea garden, situated at Dulakharia Habi Gaon and after some time, she came to know that her

husband was chased by the appellants to kill him. To save himself from the attack of the appellants, her husband took shelter at the house of one Ram

Mura, where his sister Gita Mura (PW.6), who was present at the relevant time, witnessed the appellants trying to assault Biren Gogoi with machete.

Perplexed, Biren, however, fled away from her home and the appellants still kept him chasing for some distance and thereafter, killed him by

assaulting with sharp weapons on all over his body. Then the appellants concealed his dead body under the waters of the river Doisolong, camouflaged

by cut out bamboo groves.

4. Based on the above F.I.R., Sonari Police Station case No. 171/2013, under Sections 302/34 of the IPC, dated 16.06.2013, was registered and after

completion of investigation, the police laid a charge-sheet under Sections 302/34 of the IPC against the appellants and another as the charge-sheeted

offence is exclusively triable by the Court of Sessions, learned Sub-Divisional Judicial Magistrate(M), Charaideo at Sonari, by order, dated 01.11.2013,

passed in G.R. Case No. 475/2013, committed the case to the Court of learned Sessions Judge, Sivasagar, under Section 209 of the Code of Criminal

Procedure, 1973 (â??Cr.P.C.â??) for trial. Thereafter, the case was registered as Sessions Case No. 276(S-C)/2013, and learned Sessions Judge,

Sivasagar, transferred the case to the Court of learned Addl. Sessions Judge, Sivasagar, for disposal. On consideration of the materials on the case

diary and hearing the learned counsel of both the sides, learned Addl. Sessions Judge, Sivasagar framed charges under Sections 302/34 of the IPC,

vide order, dated 25.02.2014. The appellants pleaded not guilty. In order to prove the charges, the prosecution examined 17 witnesses including the

autopsy surgeon and the investigating officer. After completion of the evidence of the prosecution side, the statements of the appellants were recorded

under Section 313 of the Cr.P.C. The appellants pleaded innocence and declined to examine any witness in defence. Thereafter, on hearing the

arguments advanced by learned counsel of both sides and appreciating the evidence on record, held the appellants guilty of the charges and convicted

and sentenced, as stated above. The co-accused Tarik Munda was acquitted of the charges and he was set at liberty for want of sufficient

incriminating evidence.

5. Mr. U. Choudhury, learned amicus curiae, appearing for the appellant in Criminal Appeal (J) No. 51 of 2017 submitted that the prosecution failed to examine any eye-witness to the incident of murder of Biren Gogoi. Mr. Choudhury further submitted that there was no link between the alleged incidents of quarrel that took place between the appellants and the deceased, on the previous evening, to the finding of his dead body on the following day, morning. Drawing attention of this Court to the evidence of PW-6 Gita Munda, Mr. Choudhury submitted that although in her examination-in-chief, she deposed to have seen the appellants being armed with machete and stick chasing the deceased Biren into her house, in cross-examination, however, she deposed to the contrary deposing that she did not see Biren entering her house and thereafter, in which direction, he moved away from her house and further, that there was no hue and cry. In regard to the other circumstantial evidence deposed by PW-10, Poto Munda to the effect that on the same day at about 3:00 PM, he saw from a distance, the appellants armed with knife and stick quarrelling (fighting) with the deceased Biren at the village and his intervention therein to separate them, cannot be believed as there is no explanation on evidence as to how he happened to be present at the place, situated about 1 mile away from his home. Mr. Choudhury, learned amicus curiae, also submitted that both the aforesaid circumstances being not proved by cogent and convincing evidence and in absence of any hint of evidence to show the possibility of motive behind the appellants killing Biren as well as finding of his dead body on the following day, morning, there was a long gap, and possibility of coming of any other person in between could not be ruled-out. According to Mr. Choudhury, if the previous day incidents are believed to be true, still the mere fact that the appellants and the deceased were seen together does not by itself lead to an irresistible inference that the appellants must have murdered Biren and so also, mere recovery of machete and stick at the instance of one of the appellants do not link them with the crime for want of evidence of use of the said seized weapons. Mr. Choudhury submitted that the impugned judgment of the Court below being delivered based on conjectures and surmises, the same is not sustainable in law.

6. Mr. B. Boruah, learned amicus curiae appearing for the appellant in Criminal

Appeal (J) No. 52 of 2017 submitted that there is no credible and trustworthy evidence to show that the stick M. Ext. 1 was used by the appellant as use of blunt weapon in causing the death of the deceased has been negated by the evidence of PW. 1, the autopsy surgeon, who did not find any injury caused by blunt weapon like a stick and the same was not recovered at the instance of the appellant, rather found by the villagers at a distance of about 1 k.m. from the place, where the dead body was found as stated by PW 4 and further, the same was not even sent for examination to the FSL to ascertain whether it was ever used in the commission of the offence. Mr. Boruah further submitted that although P.W. 16, ASI Umesh Ch. Borah stated to have seized the machete and stick on the basis of the statement of co-accused Sagar Mura, the same had not come in any of his legally admissible evidence such as his confessional statement under Section 164 of the Cr.P.C. which was not done and in his explanation given in the statement under Section 313 of the Cr.P.C. termed the same as falsely stated. Referring to the last seen theory, Mr. Boruah, learned amicus curiae, submitted that there being considerable time lay in between the time when the appellants were seen confronting with the deceased and the finding of dead body of the deceased on the following day at a far away place, some other person coming in between the period cannot be ruled out beyond reasonable doubt.

7. Controverting the above argument of learned amicus curiae, Ms. B. Bhuyan, learned Addl. Public Prosecutor, Assam, submitted that there is consistent and cogent testimony of the prosecution witnesses to show that they were the appellants only who caused death to Biren Gogoi and then concealed his dead body in Doisolong river. Ms. Bhuyan further submitted that the dead body was found, after the appellants, who were armed with machete and stick, were found quarrelling with him in the village, as PW-10 stated, on the previous day at about 3:00 PM, and again chasing him to assault at about 4:00 PM, as stated by PW-6. Ms. Bhuyan further submitted that the time gap between the said two incidents on the previous day, evening and finding of dead body of Biren on the following day, morning, do not appear to be a long gap to delink those circumstances to the complicity of the appellants and this positive presumption is reinforced by absence of any evidence of coming of any other person in between. Ms.

Bhuyan, learned Addl. Public Prosecutor, submitted that in the facts and infallible circumstances that emerged from the evidence on record, learned

trial Court has rightly convicted the appellants.

8. We have considered the arguments advanced by learned counsel of both sides and appreciated the evidence on record.

9. In the instant case, the entire prosecution case rests on circumstantial evidence as there was no eye-witness to the alleged incident of killing of the

deceased Biren Gogoi. Dealing with a case of circumstantial evidence, the Honâ??ble Apex Court in Padala Veera Reddy v. State of A.P., reported

in 1991 SCC(Cri) 407, laid the following tests: â??(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and

firmly established; (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances,

taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was

committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of

explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused

but should be inconsistent with his innocence.â??

10. A perusal of the F.I.R., dated 16.06.2013, vide Ext.2, lodged by PW-2, Dipali Gogoi, the wife of the deceased Biren Gogoi, disclosed that the

occurrence had taken place, on the previous day, that is, on 15.06.2013, at around 2.30/3 PM, at Dulakhori Habigaon, in and near the house of PW-6,

Gita Munda. PW-6, Gita Munda witnessed the appellants armed with machete and stick preparing to assault her husband, after a chase. The F.I.R.

further disclosed that the appellants chased after her husband for a considerable distance and inhumanly inflicted cut and piercing injuries causing his

death and then concealed the dead body in the nearby Doisolong river. The aforesaid F.I.R., thus, contained the details of the entire occurrence as the

deceasedâ??s wife, Dipali(PW-2) came to know, immediately after the incident. It needs to be mentioned that an F.I.R. is not a substantive evidence

and it is used to contradict or corroborate the maker of the statement. The scribe of the said F.I.R. was Bulen Lahon, who, as stated by PW-2, Dipali,

the informant, wrote the same as per her dictation. The scribe Bulen was not

examined in the case. However, we find his non-examination is not an infirmity in the prosecution case as PW-2, the informant, wife of the deceased in her evidence, corroborated the facts stated in the said F.I.R., which was written as per her dictation. It appears that PW-2 lodged the F.I.R. giving a detail account of the incident as reported to her by her nephew one Putu @ Hemanta, who was, of course, not examined in the case. We find his non-examination is also not material in the case as there were eye-witnesses namely, PW-6, Gita Munda and P.W. 10, Poto Munda to the previous day, evening, quarrels in broad daylight.

11. Now, let us see whether the death of Biren Gogoi was the consequence of an act of culpable homicide and if so, whether his death amounted to murder. In this regard, we have taken into consideration of the evidence of the autopsy surgeon(PW-1), the inquest report(Ext-1), the sketch map of the place where the dead body of Biren Gogoi was found (Ext.8), the weapons used and the evidence of the prosecution witnesses.

12. PW-1, Dr. Pradip Kumar Saikia, the Medical Officer of Sivasagar Civil Hospital, who performed the post-mortem examination on the body of

Biren Gogoi, on 16.06.2013, in connection with Tingalibam Police Out Post G.D. Entry No. 235, dated 15.06.2013, found multiple deep cut injuries on

vital parts of the body and held the opinion that he died due to coma following the injury caused by massive cut injury, which was ante-mortem in

nature. He recognised Ext.1, the post-mortem report. The defence declined to cross-examine the autopsy surgeon(PW-1) and as such, his findings on

injuries, the deceased sustained and his opinion as to the cause of his death remained undisputed. Perusal of the sketch map of the place of recovery

of the dead body vide Ext. 8 and the inquest report, vide Ext.3, drawn by PW-16, S.I. Umesh Chandra Borah, the investigating officer and the

Executive Magistrate, Charaideo, at Sonari, respectively, show that the dead body bore multiple abrasions and cut injuries and was recovered from

Doisolong river side under bamboo grove indicated at mark A of Ext.8, the sketch map. Be it mentioned that although sketch map of the place

of occurrence and the inquest report do not form substantive evidence in criminal trial, they carry significance from the point of view of the testimony

of the witnesses as the same throw light on the vital collateral circumstances to commission of a crime as deposed to by the witnesses in the case.

Added to the contents of the aforesaid two documents, on marshalling through the oral testimony of the remaining unofficial witnesses, we find, as a whole, that there is no evidence whatsoever to indicate that the death of the deceased was caused by any accidental act, but certainly by culpable homicidal acts of the assailant(s), coming within the definition of "culpable homicide" defined in Section 299 of the IPC and being not under any of the circumstances falling within any of the five Exceptions to the definition of "murder" given in Section 300 of the IPC, his death was definitely the consequence of culpable homicide amounting to "murder", which is punishable under Section 302 of the IPC, beyond all reasonable doubt.

13. The next relevant question is whether the appellants caused death of the deceased Biren Gogoi? The learned trial Court observed that PWs-4 and 6, who were eye-witnesses to the incident, saw the appellants armed with machete and stick, and chasing Biren Gogoi, thrice, on 15.06.2013, at about 4:00 P.M. Learned trial Court further observed that PW-10 corroborated their (PWs-4 and 6) evidence deposing that he saw fighting between the appellants and the deceased and he (P.W. 10) asked them to stop and further, deposed to have seen the appellant Nagar Mura with a knife in hand and the other appellant Sagar Mura with a stick in his hand. Thus, learned trial Court observed that the sequence of events only point to the guilt of the appellants beyond all reasonable doubt.

14. Learned trial Court seemed to have appreciated the evidence based on the principles of the circumstantial evidence. However, it needs to be borne in mind that the accuracy, credibility, and general value of the evidence given by a witness in-chief can be called in question, by cross-examining him, as cross-examination is directed to : (i) the credibility of the witness; (ii) the facts to which he had deposed in-chief, and (iii) the facts, which the witness had not deposed, but to which the cross-examiner thinks he is able to depose. In this regard, Section 138 of the Evidence Act is not only a technical rule, but it is a rule of essential justice. In other words, the veracity of testimony of a witness made in-chief can be tested by way of cross-examination only.

15. In the instant case, PW-6, Gita Munda and PW-10, Pota Munda were the eye-witnesses to the incident at its various stages and they had given

their statements under Section 164 of the Cr.P.C. which were recorded by PW-17, Sayed Ahadur Rahman, learned Sub-Divisional Judicial Magistrate

(M), Chariadeo at Sonari. The evidence of PW-6 shows that on the previous day of the incident of finding of dead body of Biren, at around 4:00 PM,

when she was cooking meal at her home, the deceased Biren Gogoi was seen coming hurriedly into her home. Biren was seen being chased by the

appellants. Sagar wielded a dao and Nagar a stick. She asked Biren to leave her home lest the appellants would kill her too and accordingly,

Biren left and the appellants were seen chasing after him. Later on, she came to know that Biren was killed. PW-6 corroborated these most material

facts stated in her statement, under Section 164 of the Cr.P.C. vide Ext.-12 in material particulars. In cross-examination, PW-6 deviated from her

evidence in-chief as regards entry of Biren into her home and that there was no hue and cry, but stated that at that time, she was alone at home and

that Biren did not talk to her and further, that she did not know who killed him. However, we find the aforesaid deviation from examination-in-chief,

which stood corroborated to the statement under Section 164 of the Cr.P.C. did not weaken the credence of her evidence in-chief as her evidence of

having seen Biren being chased by the appellants, who were armed with machete and stick at the relevant time, remained uncontroverted in cross-

examination by the defence.

16. PW-10, who is the uncle of the appellants, deposed to have seen the appellant Nagar, who was armed with a knife, and Sagar with a stick, fighting

with Biren, at around 3:00 PM, and he asked them to stop fighting. Later on, he came to know from the police that they again fought and the

appellants killed Biren. He deposed to have given two statements under Section 164 of the Cr.P.C. vide Exts.-5 and 6. Perusal of his (PW-10)

aforesaid two statements under Section 164 of the Cr.P.C. reveals that he corroborated the facts stated in his statements in material particulars so far

as his evidence-in-chief is concerned. His cross-examination shows that he reaffirmed the facts of having seen them quarrelling verbally in the village.

It is noticed that the aforesaid incident of quarrel took place in daylight in the month of March. Although he stated to have seen them involving in

altercations, there was no indication that the aforesaid incident had taken place in the afternoon of any other day other than in the afternoon of the

previous day of recovery of the deadbody, when PW-6 witnessed the aforesaid incident of the appellants wielding with machete and stick chasing after the deceased Biren Gogoi, who, therefore, evidently ran for safety to the house of PW-6. We, therefore, find that the incident of altercations between the appellants and the deceased preceded the incident of chasing after of him apparently to assault him. The aforesaid inference based on the evidence of PWs-6 and 10 is reinforced by the appellant Sagar Mura, who admitted in his statement under Section 313 of the Cr.P.C., to a pointed query of learned trial Court, stating â??I knew Biren Gogoi. He lived near us. But we did not assault him. There was just an altercation.â? The other appellant namely Nagar Mura simply denied all the implicating evidence that emerged from evidence and put to him. What is noticed is that the appellants refrained from advancing any evidence in defence nor examined themselves under section 315 of the Cr.P.C. There is no answer on record as to why the appellants remained themselves out of the witness box to afford an opportunity to cross-examine them by the prosecution. Here, we find it apposite to refer to the relative evidential value of the statements recorded under Sections 313 and 315 of the Cr.P.C.

17. In *Dehal Singh v. State of Himachal Pradesh*, reported in (2010) 9 SCC 85, the Honâ??ble Apex Court observed as hereinbelow extracted:

â??Statement under Section 313 of the Code of Criminal Procedure, 1973, is taken into consideration to appreciate the truthfulness or otherwise of

the case of prosecution and it is not an evidence. Statement of an accused u/s 313 of the Code of Criminal Procedure, 1973, is recorded without

administering oath and therefore, said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act. Appellants have

not chosen to examine any other witness to support this plea and in case, none was available, they were free to examine themselves in terms of

Section 315 of the Code of Criminal Procedure, 1973, which, inter alia, provides that a person accused of an offence is a competent witness of

the defence and may give evidence on oath in disproof of the charges. There is reason not to treat the statement under section 313 of the Code of

Criminal Procedure, 1973, as evidence as the accused cannot be cross-examined, with reference to those statements. However, when an accused

appears as a witness in defence to disproof the charge, his version can be tested by his cross-examination.â??

18. The evidence, as a whole, shows that from the time, the deceased left the house of PW-6, Gita Munda, who was further followed by the appellants, remained untraced, till his dead body was recovered, on 16.06.2013, morning, from a buried place under a bamboo grove on the bank of river Doisolong, which is indicated in Ext.-8, the sketch map of the aforesaid place. In this regard, PW-15, A.S.I. Pradip Saikia, the in-charge of Tinalibam Police Out-Post stated that after receipt of the information about the occurrence from one Jogen Gogoi, over phone, on 15.06.2013, at about 6:30PM, he made Tinalibam G.D. Entry No. 235, and then he along with a police party rushed to the place of occurrence at Dekadolong and launched preliminary investigation. On search, both the appellants were not found. On the following day, morning, they spotted the dead body near the river Doisolong in a half-buried state. This place was situated about 1½ KM away from the forest area. Then he informed the Officer-in-Charge, Sonari Police Station, who arranged holding of inquest on the dead body in presence of an Executive Magistrate as per Section 174(4) of the Cr. P.C., to ascertain prima-facie the nature and cause of his death.

19. It is pertinent to be mentioned here that the evidence of last seen may provide for a link in the chain of the circumstantial evidence to establish the complicity of the appellants in the commission of murder of Biren Gogoi. In the case of State of U.P. v. Satish, reported in (2005) 3 SCC 114, the Honâ??ble Apex Court succinctly explained the theory of last seen and observed, thus: â??The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.â??

20. As observed above, from the evidence of PW-10, the uncle of the deceased, it appears that he saw his nephews, the appellants herein, being armed with a knife and a stick getting involved in a fight with him, on the

previous day at about 3:00 PM and then considering from the perspective of the time gap, thereafter, at about 4:00 PM, PW-6 also saw the appellants, armed with a dao and a stick chasing after the deceased Biren at Dulakhari Habigaon. Later on, both of them came to know that Biren was killed. The dead body was found on the following day, early morning at about 7:30 AM, after vigorous search, being conducted from the previous day, evening by the villagers, including PW-4, Benu Gogoi, PW-5, Ritu Gogoi, PW-9, Tulan Lahon, PW-11, Madhujya Gogoi, PW-14, Bipul Gogoi and PW-12, Lutfur Rahman, the Gaon Burah of Raidingia Nakacharigaon. Therefore, we find the circumstance of last seen together has relevancy to the instant case positively indicating that PWs 6 and 10 saw the deceased and the appellants with a dao and stick on the previous day, evening, together and then recovery of the dead body of Biren, on the following day, morning, ruling out the possibility of any other person other than the appellants behind murdering him beyond all reasonable doubt. This incriminating last seen together of the appellants and the deceased on the previous day, evening, to the recovery of his dead body, in our opinion, establishes the unerring link of a material circumstantial evidence to his gruesome murder.

21. The weapon of offence, one a dao (Kalam Katari) vide M. Ext.-2, was seized out of the possession of the appellant Sagar Mura vide Ext. 2, the seizure memo, dated 18.06.2013, and one bamboo stick vide M.Ext. 1 was handed-over by the villagers of Dulakharia Habigaon, on 16.06.2013, vide Ext.4, the seizure Memo, dated 16.06.2013, after having found from near the place, where the dead body was found.

22. PW-12, Lutfur Rahman, PW-13, Dusmanta Khaklari and PW-14, Bipul Gogoi testified to the recovery of the a dao, M.Ext. 2, out of the possession of the appellant Sagar Murah, based on his disclosure in police custody and they identified the said weapon during the trial. On the other hand, PW-4, Benu Bogoi, PW-5, Ritu Gogoi and PW-9, Tulan Lahan testified to seizure of the bamboo stick vide M.Ext. 1 from under a bamboo grove belonged to one Shiva Gogoi, who was, of course, not examined in the case. Non-examination of Shiva Gogoi is not a material lapse in the case, when considered from the sequence of proved circumstances from the previous day, evening of recovery of deadbody of Biren. PW-15, ASI Prodip Saikia, the 1st investigating officer, corroborated the testimony of PWs-4, 5 and

9 regarding the seizure of the stick vide M.Ext. 1 by the seizure memo, vide Ext.-4 and PW-16, SI Umesh Chandra Borah, the 2nd investigating officer, corroborated the evidence of PWs-12, 13 and 14 regarding seizure of the stick vide M.Ext. 2 by the seizure memo vide Ext.7. The appellants simply denied such recovery of weapons allegedly used in the commission of the offence of murder of Biren, but kept themselves away from tendering evidence on oath under Section 315 of the Cr.P.C., so as to enable the prosecution to cross-examine them to impeach on their plea of innocence. The prosecution appears to have not sent the seized weapons to the Forensic Science Laboratory (FSL) for serological test, but in our considered view the aforesaid omission does not stand in the way of prosecution case as the other vital incriminating circumstances pointing to the guilt of the appellants, such as the nature of injuries sustained by the deceased vide Ext. 1, the post-mortem report and the eye account of the occurrence tendered by the natural witnesses P.Ws 6 and 10, who withstood the tests of cross-examination in material particulars are proved in the case and therefore, their evidence cannot be rejected for want of motive being proved in the case. There is also no scope on evidence to suspect the presence of P.W. 6 at her home at the relevant time, when the appellants chased the deceased to assault him.

23. We, therefore, see no legally sustainable reason to interfere in the impugned judgment and order.

24. Consequently, the appeals stand dismissed.

25. Send back the LCR along with a copy on this judgment and order.

26. This Court records its appreciation for the assistance rendered by both the learned Amicus Curiae. Learned Amicus Curiae shall be paid an amount of Rs.7,500/- each as remuneration.