
(1989) 08 GAU CK 0027

In the Gauhati High Court

Case No : Criminal Appeal No. 3 of 1982

Shri Basanta Dutta @ Basanta Kumar Dutta and Another

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 01-08-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 360
Penal Code, 1860 (IPC) — Section 302, 304, 307, 323, 34

Citation : (1990) 1 GLR 196

Hon'ble Judges : B.P. Saraf, J

Bench : Single Bench

Advocate : N.M. Lahiri, P.K. Baruah and A. Dasgupta, for the Appellant; A.C. Bora, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Saraf, J.—This appeal is directed against the judgment and order dated 3.12.81 passed by the Sessions Judge, North Lakhimpur in Sessions Case No. 227(N.L.)77. The Appellant No. 1, Basanta Dutta, was convicted u/s 304 I.P.C and sentenced to rigorous imprisonment for five years and to pay a fine of Rs. 2000/-, in default, rigorous imprisonment for another six months. Appellant No. 2, Aditya Datta was convicted u/s 323 I.P.C and sentenced to simple imprisonment for two months and to pay a fine of Rs. 100/-, in default, simple imprisonment for another 15 days.

2. The prosecution case, in brief, is that on 3.6.76 the cattle belonging to the accused persons damaged the paddy field belonging to one Lakhan Chandra Phukan. A cow boy, Durga Sarkar ousted the cattle from the paddy field. Then accused-Appellant Basanta Dutta appeared and scolded the cow boy, Durga Sarkar, and also caned him. Durga Sarkar, who was a little boy of 8/9 years at the relevant time, started weeping. At that point of time one of the sons of Lakhan Chandra Phukan, namely, Duldul Phukan, who was (sic) from his school saw Durga weeping and on being asked he was reported of the occurrence by

Durga. Duldul went home and reported the matter to his elder brothers Mintu Phukan and Mridul Phukan, who thereafter came to the place of occurrence on a bi-cycle. Mintu charged the accused persons as to why they had assaulted their cow-boy Darga Sarkar and an altercation started. In the midst of that altercation accused Basanta Dutta assaulted Mintu on his head by the blunt side of a hoe and then the other accused Aditya Dutta also assaulted him with a lathi. As a result Mintu fell down with bleeding injuries on his head. Mridul and the cow-boy Durga tried to come to the place of occurrence but they were chased away by the accused persons. When Mintu fell down the accused persons filed away to their house. Thereafter persons from nearby place assembled there and some of them saw the Accused persons going to their house with weapons in their hands. The incident occurred on the main road just in front of the gate way of the accused persons. Mridul was taken to hospital where he died after two days.

3. An F.I.R. was filed on the night of the occurrence itself by the father of the deceased, Shri Lakhan Chandra Phukan. On the basis of the F.I.R. a case was registered against the accused persons who were later charge-sheeted under Sections 302/34 I.P.C.

4. The prosecution examined as many as 12-witnesses including the Doctor, Dr. Amiruddin Ahmed (P.W. 7). There were three eye witnesses, P. Ws 4, 5 and 9. P.W. 4-Mridul Phukan is the younger brother of the deceased who accompanied the deceased on the bi-cycle to the place of occurrence. He was an eye witness to the whole incident. He saw the Appellant No. 1, Basanta, giving a hoe blow to the deceased Mintu as a result of which he fell down from the bi-cycle. He also saw the other accused Aditya giving two blows with a lathi on the deceased Mintu. In his evidence he also narrated the entire story which corroborated the prosecution case. P.W. 5-Durga Sarkar, was also an eye witness and he also categorically stated that the accused Basanta gave blow on the back of the head of the deceased Mintu by a hoe as a result of which he fell down from his cycle. After his falling down the other accused Aditya gave two blows on him by a rod. P.W. 9-Sailen Baruah, is a school student who happened to pass through the place of occurrence on way back from his school. He also saw the accused persons giving blow to the deceased with hoe and lathi. He categorically stated that accused Basanta was armed with hoe and Aditya with a lathi. P.W. 8, Ponai Saikia is also witness. Though P.W.8. in his statement before the police stated that he saw the accused Basanta assaulting the deceased with hoe and Aditya giving him blows with a lathi, in his deposition in Court he denied having seen the occurrence. He was therefore declared hostile by the prosecution. There are other witnesses also who corroborated the prosecution case.

5. P.W. 7, Dr. Amiruddin (sic), who conducted the postmortem examination on the dead body of Mintu, found the following external injuries:

(1) One stitched wound (nylon sutur 4 nos) over the parietal region of 3" in length obliquely over swelling of about 4" diameter.

(2) Bruises of 4 nos over the dorsum of right hand of varying sizes 1/2" x 1/4" in diameter.

(3) On further incision of the skull extensive (sic) blood with firm blood clots are found underneath the skull on left temporal parietal & frontal region.

(4) A depressed fracture of skull on left temporal bone of 4" x 1/6" & membrane deep. Direction of the live of fracture from above downwards and forwards with clotted blood.

(5) On further dissection & removal of the vault of the skull. (3) extensive subdural haemorrhage with firm blood clots seen spread over left temporal region.

(6) On removal of the membrane, temporal & left parietal half of brain lacerated underneath the fractured line with extensive haemorrhage with dark liquid blood & with firm blood clots.

The Doctor stated that the injury must have been caused by the blunt & heavy weapon. He was shown the hoe produced in the Court and he confirmed that the injury could have been caused by the blunt side of the said hoe.

6. On consideration of the materials on record the learned Sessions Judge came to a conclusion that the prosecution had been able to establish that the accused-Appellant Basanta gave the vital blow on the deceased and after he fell down on the ground he was assaulted by the other accused Aditya with a lathi. The Court also arrived at a finding that although the (sic) was given on the vital part of the body of the deceased still it could not be said that the blow was given intentionally to kill Mintu (the deceased) and as such found that the case falls u/s 304 I.P.C. and not u/s 302 I.P.C. The learned Sessions Judge, therefore, held the accused Appellant, Basanta guilty u/s 304 I.P.C. and accused-Appellant Aditya u/s 323 I.P.C. and convicted them accordingly. The learned Sessions Judge also considered the submission on behalf of the accused-Appellants in regard to sentence and considering the facts and circumstances of the case sentenced the accused-Appellant, Basanta Dutta, to rigorous imprisonment for five years and to pay a fine of Rs. 2000/-, in default, to suffer rigorous imprisonment for another six months; and accused-Appellant Aditya Dutta simple imprisonment for two months and to pay a fine of Rs. 100/, in default to suffer simple imprisonment for another 15 days. The present appeal has been tiled challenging the aforesaid judgment and order of the learned Sessions Judge.

7. Heard the learned Counsel for the Appellants Mr. P.K. Baruah at length. Mr. Barua pointed out certain discrepancies in the evidence of the eye witnesses. He pointed out to the evidence of P.W. 4 wherein he stated that accused Aditya gave two blows with a "lathi" whereas P.W. 5 stated that Aditya gave two blows by a "rod" and submitted that on account of the aforesaid discrepancy in regard to the weapon used by accused Aditya in the evidence of two eye witnesses the entire evidence of these two witnesses should be discarded as unreliable. Mr. Baruah also drew the attention to the F.I.R. and the deposition of P.W. 1 wherein

he had stated that he was informed that the deceased was hit by Aditya with a "lathi and rod". The learned Counsel also pointed out to an inconsistency in the statement of P.W. 4 and the medical evidence of P.W. 7 as well as the post mortem report. It was submitted that P.W. 5 stated in his evidence that the accused Basanta gave a blow on the back of the head by a hoe whereas P.W. 7 the Doctor in his evidence while describing the external injury did not specifically state about any injury on the back side of the head. The learned Counsel also submitted that the weapon, namely, the hoe used as a (sic) was not chemically examined. According to the learned Counsel the inconsistencies and discrepancies pointed out above are very material and they are sufficient to justify rejection of the entire evidence of the eye witnesses.

8. Mr. Baruah also made submission on the question of sentence, It was submitted that the accused-Appellant No. 1 at the relevant time was of 16 years of age and accused-Appellant No. 2 was 14 years of age and the incident took place in the year 1976. More than 12 years have passed, Keeping in view these factors the learned Counsel submits that even if the conviction of the accused-Appellants is held to be justified they should be released on probation u/s 360 of the Code of Criminal Procedure.

9. I have also heard Mr. A.C. Bora, the learned Public Prosecutor. Mr. Bora strenuously urged that the prosecution had proved the case beyond all reasonable doubt against both the accused persons by adducing sufficient evidence. He placed the evidence of the eye witnesses as well as other witnesses and submitted that there was no inconsistency in the evidence of any of the witnesses on any material particular to justify rejection of the same. Mr. Bora has also pointed out to the evidence of the Doctor (P.W. 7) wherein describing the injury it was stated that there was a wound over the "parietal region" which means "on the surface of the head". It was submitted that from whichever side one may hit on the head the injury shall be on the surface of the head and, as such, there is no discrepancy between the evidence of the witnesses and medical evidence. Mr Bora further submits that the description of the weapon used by Aditya by one of the witnesses as "rod" does not affect the reliability of the testimony of the witnesses in the instant case.

10. I have considered the submission of the learned Counsel for the Appellant. I am not impressed by the argument that the inconsistencies or discrepancies pointed out by the learned Counsel justify rejection of the testimony of the eye witnesses. The discrepancies are very minor in nature. The said discrepancies are due to normal errors of perception or observation and cannot be given undue importance.

11. The Supreme Court had occasion to consider this aspect of the matter in *Bharat Singh Vs. State of U.P.*, where One of the witnesses stated that the accused was carrying a weapon like a hockey stick another witness stated that the accused was armed with a pistol. On the basis of the aforesaid discrepancies in the statements of the two witnesses it was urged before the Supreme Court

that the aforesaid contradiction was serious in nature and that the High Court failed to consider the same. The Supreme Court rejected the said argument and observed:

It is common experience that in the confusion of the moment witnesses are prone to make such errors especially if seized by sudden fear.

In *State (Delhi Administration) Vs. Laxman Kumar and Others*, the Supreme Court observed:

Different persons seeing an event give varying account of the same. That is because the perceptiveness varies and a recount of the same incident is usually at variance to a considerable extent. Ordinarily, if several persons give the same account of an event, even with reference to minor details, the evidence is branded as parrot-like and is considered to be the outcome of tutoring. The evidence of the witnesses in the present case appears to have the touch of intrinsic truth and the variations are within reasonable limits and the variations instead of proving the ground for rejection, add to the quality of being near to truth.

In *Appabhai and Anr. v. State of Gujarat*, 1988 (Supp) SCC 241, the Supreme Court observed:

The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

12. The aforesaid decisions of the Supreme Court are clear authority for the proposition that minor discrepancies in the version of a witness would not justify rejection of his testimony. Different persons who had seen an event might give varying accounts of the same. That by itself might not go to show that any of them was making a false statement. Difference in the description of the event does occur because of variance in the perceptiveness of every individual. A recount of the same incident is usually at variance to a considerable extent. That does not provide a ground for rejection of the evidence. On the other hand, in some cases such variation, if within reasonable limits, may add to the quality of the evidence of being nearer the truth.

13. I have carefully gone through the entire evidence and materials on record. I do not find any such discrepancy in the evidence of the witnesses which might justify rejection or the testimony of the various witnesses. The fact that one of the witnesses described the weapon used by Aditya as a "rod" whereas it was a "lathi", is not material on the face of the entire evidence on record. It is so trivial in nature to be taken notice of. It is in fact a natural variation in the version of the occurrence and should not be considered a discrepancy as such to justify rejection of the testimony of the eye witnesses which is otherwise trustworthy. Equally, the statement of P.W. 5 that the accused-Appellant Basanta gave a blow on the back of the head of the deceased by a hoe, is not inconsistent with the medical evidence, wherein it is clearly stated that there was a wound over the parietal region of 3" in length obliquely over a swelling of about 4" diameter. Other injuries were also found on the skull of the deceased. The medical evidence is therefore not in conflict with the statement of the witnesses that Appellant Basanta gave blow on the head of the deceased by a hoe. The fact that the hoe was not chemically examined is also not material in the facts and circumstances of the case.

14. The learned Counsel for the Appellants submits that on the facts and circumstances of the instant case the Appellants are entitled to get the benefit of doubt. In support of the aforesaid contention the learned Counsel refers to the well recognised rule of criminal jurisprudence that in case of any doubt regarding the guilt of the accused, the accused must have the benefit of doubt. I have considered the submission. There is no dispute about the legal proposition that unless the evidence adduced in a case is consistent only with the hypothesis of the guilt of the accused and is inconsistent with that of his innocence, the accused should get the benefit of doubt. But the court has also to keep in mind the equally well-settled rule of law that although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on the grounds which are fanciful or in the nature of conjectures. The doubt must be "reasonable". As observed by the Supreme Court in *Kali Ram Vs. State of Himachal Pradesh*, "The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful consideration".

15. In the instant case, as discussed above, there is enough evidence on record to prove the guilt of the accused which is ex facie trustworthy. There is no material or basis for any reasonable doubt and as such the principle of benefit of doubt-pressed in service by the learned Counsel does not apply to the facts of the instant case.

16. I have carefully considered the judgment of the learned Sessions Judge. The learned Sessions Judge has considered the entire evidence and given cogent reasons for acting upon the testimony of the eye-witnesses while holding the Appellant guilty of commission of offence with which they were charged. I have also myself gone through the entire evidence and I am of the opinion that the

guilt of the two Appellants has been established by the prosecution beyond reasonable doubt. I, therefore, hold that the Appellants were rightly convicted by the learned Sessions Judge.

17. The next submission of the learned Counsel for the Appellant in regard to the sentences may now be dealt with. The submission was that the incident occurred in the year 1976. At the relevant time the accused-Appellant No. 1-Basanta was 16 years of age and accused-Appellant No. 2-Aditya was 14 years of age. Both the Appellants were on bail all throughout. Therefore, no fruitful purpose would be served by sending them to jail now after such long lapse of time and as such the Appellants should be released on probation. Mr. A.C. Bora, the learned Public Prosecutor pointed out that the statement regarding the age of the Appellant is not correct. Mr. Bora pointed out to the statements of the accused-Appellants u/s 313 Code of Criminal Procedure, made in the year 1981 wherein Appellant Basanta gave his age as 30 years and accused-Appellant Aditya gave his age as 34 years. The learned Public Prosecutor, therefore, submits that on the date of occurrence Appellant Basanta was aged 25 years and accused-Appellant Aditya was aged 19 years. The learned Public prosecutor submits that it is not a fit case where the accused-Appellants should be released on probation. I have considered the submissions of the learned Counsel for the Appellants as well as the learned Public Prosecutor on the question of sentence. I find that the learned Sessions Judge considering similar submissions made before him and keeping in view the facts and circumstances of the case sentenced the Appellants, as stated above. The fact that the Appellants were on bail during the pendency of the appeal before the Sessions Judge is not a ground for releasing the Appellants on probation, particularly accused-Appellant No. 1, who has been convicted u/s 304 I.P.C. and sentenced to rigorous imprisonment for five years and a fine of Rs. 2,000/-, by interfering with the order of sentence passed by the learned Sessions Judge. It must be remembered that it is the duty of the Court to impose a proper punishment. To quote from the Supreme Court in *State of Haryana v. Prabhu*, 1987 (Supp) SCC 177 the Courts should appreciate the desirability of imposing a proper punishment as a measure of social necessity as a means of deterring other potential offenders. Drastic reduction in sentence in serious cases like murder cases would be repugnant to the basic concept of criminal justice.

18. In dealing with a sentence which has been made the subject of an appeal, the court should interfere with a sentence only where it is erroneous in principle or it is harsh and vindictive being not commensurate with the gravity of the offence. To allow persons convicted of serious offences to escape with a fine may deprive the law of its effectiveness and result in travesty of justice. See *State of Haryana v. Prabhu*, supra.

19. In *Sadha Singh v. State of Punjab* (1935) 3 SCC 225, the Supreme Court interfered with an order of the High Court by which the High Court reduced the substantive sentence of there years" rigorous imprisonment and fine imposed by the trial Court for an offence u/s 307 of the Indian Penal Code to a periods of 3

months of imprisonment already undergone by enhancing the fine and held that reduction of sentence was not justified. The Supreme Court set aside the sentence imposed by the High Court and restored the sentence imposed by the Sessions Judge. Dealing with the observation of the High Court that no fruitful purpose will be served by sending the Appellants to prison again to undergo the unexpired period of their sentence, the Supreme Court observed:

We repeatedly asked way this indulgence and waited for answer in vain. If someone is enlarged on bail during the pendency of appeal and when the appeal is dismissed sending him back to jail is going to raise qualms of conscience in the Judge, granting of bail pending appeal would be counter-productive. One can pre-empt or forestall the decision by obtaining an order of bail.

20. Applying the aforesaid principles to the facts of the instant case, I don't find any justification to interfere with the order of sentence passed by the learned Sessions Judge in respect of Appellant No. 1--Basanta Dutta. The same is, therefore, confirmed. So far as Appellant No. 2, Aditya is concerned, he was convicted u/s 323 I.P.C. and sentenced to undergo simple imprisonment for two months and to pay a fine of Rs. 100/- He was 19 years of age at the time of occurrence. Keeping in view the facts and circumstances of the case, in my opinion, it will meet the ends of justice if the sentence of Appellant Aditya is altered to a fine of Rs. 500/-(Rupees five hundred) only, in default to simple imprisonment for one month.

21. In the result, the appeal of Appellant Basanta Dutta is dismissed. He is on bail. He should surrender forthwith to serve out his sentence. The appeal of Aditya Dutta is partly allowed.