
(2008) 11 GAU CK 0032

In the Gauhati High Court

Case No : Criminal Appeal No. 162 (J) of 2007 and Cr. H. No. 163 (J) of 2007

Shri Joy Prakash Tanti

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 24-11-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2009) 1 GLD 118 : (2009) 2 GLT 112

Hon'ble Judges : H. Baruah, J;Aftab H. Saikia, J

Bench : Division Bench

Advocate : C. Sarma and Amicus Curiae, for the Appellant; K.C. Mahanta, PP, for the Respondent

Final Decision : Allowed

Judgement

H. Barua, J.—Heard Ms. C. Sarma, learned Amicus Curiae for the Appellants and Mr. K.C. Mahanta, learned Public Prosecutor, Assam.

2. Both the appeals above have been cropped up out of a common Judgment dated 16.8.2007 passed by the learned Addl. Sessions Judge No. 1, Tinsukia in Sessions Case No. 90 (T)/2005 by which both the Appellants were convicted and sentenced to suffer life imprisonment and fine of Rs. 5000.00 each in default to undergo further imprisonment for a period of 6 months u/s 302/34 IPC. Feeling aggrieved thereby the Appellants have preferred the appeals from jail challenging the legality and correctness of the Judgment dated 16.8.2007 passed by the learned Addl. Sessions Judge No. 1, Tinsukia.

3. Since both the cases pertain to similar question of fact and law are taken up together for hearing and disposal by a common judgment and order.

4. The facts involved in the appeals are as follows:

The deceased Kartik Gowala was the son of the informant Shri Biralal Goala, PW 1 while PW 2 Smti Astara Gowala is the wife of the deceased Kartik Gowala. On

24.4.1997 at around 9.10 p.m. while the deceased and his wife PW 2, Smti Astara Goala were sitting at home after taking their dinner at that time Shri Amiya Kumar, Barun Kumar, Bint Kumar, Arun Kumar, Madan Tanti, Arjun Nayak, along with Palwan Das and Joy Prakash Tanti and several others had been to the house of the deceased and called him out. As soon as the deceased Kartik Gowala came out of his residence, the above named persons assaulted him with deadly weapon and as a result he sustained multiple injuries. Deceased Kartik Gaola and as a result of sustention of multiple injuries succumbed to it. Bimal Gowala, PW 1 on the next morning at about 9.30 a.m. lodged an FIR, Exhibit-1 with Tinsukia Police Station which had been registered as Tinsukia PS Case No. 221/97 u/s 302/34 IPC, during the course of the investigation, Shri Prafulla Kataki, PW 8, the then ASI of Police, conducted an inquest on the dead body of the deceased and sent the same to Assam Medical College and Hospital, Dibrugarh for post mortem examination where autopsy was conducted by Dr. R.K. Gogoi, PW 6. Shri Prafulla Kataki, PW 8 further during the investigation seized the blood stained clothes found wearing by the deceased vide Exhibit 3. The seizure Memo Exhibit-3 prepared was in presence of the witnesses. He also recorded the statement of the witnesses u/s 161 Code of Criminal Procedure and prepared a sketch map of the place of occurrence. After completion of the preliminary investigation of the occurrence alleged, he handed over the case diary to the Officer-in-Charge of the Tinsukia Police Station, which was later on handed over to PW 7, Shri Kamini Kr. Singh, Sub Inspector of Police, Tinsukia Police Station. He arrested, having been entrusted with the investigation, the accused Amit Kumar alias Amiya Kumar, Arun Kumar and Madan Barua. Vide Exhibit 4 he also seized a "Khukri" as shown by the accused Amit Kumar in presence of the witnesses. The accused Amit Kumar and Arun Kumar were forwarded to the Court for recording their statements. In the meantime, he was transferred and accordingly he handed over the case diary to the Officer in Charge. The investigating agency after completion of the investigation submitted Charge Sheet against the present Appellants and six others namely, Borun Kumar, Arun Kumar, Biru Kumar, Arjun Tanti alias Amit Kumar, Amit Kumar and another Madan Kumar u/s 302/34 IPC.

5. Before the committal Court, the Appellants Shri Joy Prakash Tanti and Palwan Das made their presence available while other six accused absconded and they were declared absconder by the Court. The offence u/s 302 having been found triable by the Court of Sessions, the case was committed to the Court of Sessions, Tinsukia which was later made over to the Court of learned Addl. Sessions Judge No. 1, Tinsukia for disposal.

6. The learned Additional Sessions Judge No. 1, Tinsukia having found sufficient materials framed charges against both the Appellants u/s 302/34 IPC and after due trial convicted the Appellants as above.

Ms. C. Sarma, learned Amicus Curiae at the very outset of her arguments has submitted that the impugned Judgment and order of conviction and sentence

cannot sustain in the eye of law since it has suffered from several material particulars. While arguing, she has contended that the entire prosecution case mainly hinges on the evidence of PW 2, Smt. Astara Gowala, the wife of the deceased, who claimed to have witnessed the occurrence and recognised the assailants. But her testimony, if taken as a whole, cannot be relied since there appears conflicting statements therein. According to her, having regard to the examination-in-chief that 30-35 people came to her house armed with dao and called her husband, the deceased out. As soon as her husband Kartik Gowala, came out of the house, all the people who were there started assaulting him with dao. After the assault the people left the place of occurrence. Her husband died instantaneously. She has also stated that among those people, Palwan Das and Joy Prakash Tanti were there. But this witness in her cross examination blew hot and cold in the same breath regarding the number of the assailants who had been to their residence. She categorically stated in her cross examination that about 15-16 persons came and they dragged away the deceased Kartik Gowala to the Courtyard of the Binod Majhi situated some 30 ft. away from their Courtyard. She also stated in her cross examination that night was dark and there was no electric light in their residence. She further stated that she could recognize the assailants from their voice that they were Barun Kumar, Arun Kumar, Amit Kumar, Kesu Kumar alias Biru, Arjun Nayak, Madan Kumar, Mahim Mamu, Jogesh Kumar and several others who were involved in the murder of her husband late Kartik Gowala. Therefore, the claim of this particular witness that she had witnessed the actual assault of her husband and that too in the Courtyard of one Binod Majhi which is situated 30 ft. away from their Courtyard cannot be taken into consideration. From her cross examination it appears that when the assailants took her husband out of their residence she did not follow him. Further, she had admitted that noticing taking of her husband by the assailants she immediately went to the house of her neighbour, Budhni Gowala and sought for help from the villagers but no one came out except Budhni who had been to her house along with her. Just before their arrival they assailants assaulted her husband and had left the place.

7. In view of the evidence appearing in the cross examination of this particular witness, her claim that she had witnessed the assault on her deceased husband and recognized the assailants cannot be believed and accepted in view of her leaving to the house of Budhni for help in particular.

8. From her evidence it also appears that several assailants came and they took her husband to the Courtyard of Binod Majhi situated 30 ft. away from her Courtyard where he had been assaulted and who was later taken by her and Budhni Gowala unto her house. Her evidence is found silent about those assailants who did actually take part in the assault of her husband. The claim of witnessing the assault and recognition of the assailants has been belied by herself by admitting in her cross examination that before her and Budhni's arrival the assailants had left the place. In that situation, there is no scope apparently on the part of this witness to witness the actual occurrence and also

with regard to the recognition of the assailants.

9. Ms. C. Sarma, learned Amicus Curiae while arguing has rightly pointed out that aspects recognition and commission of the offence by the Appellants is beyond the scope of acceptance. We do not find any logical and affordable ground appearing in the face of the records to accept the evidence of PW 2, Astara Gowala, wife of the deceased Kartik Gowala as truthful and unblemished.

10. There is no dispute as to the death of Kartik Gowala on the relevant night as a result of injury sustained. Dr. R.K. Gogoi, PW 6 who conducted the autopsy on the dead body of Kartik Gowala discovered seven Nos of injuries. The injury Nos. 1, 3, 4 and 7 were of incised wound, injury No. 2 and 6 were found to be stab wound while injury No. 5 was of multiple linear abrasion. PW 6 Dr. Gogoi while offering his opinion as to the cause of death stated that the death was due to shock and hemorrhage resulting from injuries sustained. All the injuries were ante mortem and homicidal in nature. The incised wounds were caused by heavy sharp cutting weapon, the stab wounds were caused by sharp pointed weapon and abrasions were caused by blunt force impact. Approx. time since death is 12-14 hours. He also opined that injury Nos. 1, 3, 4 and 6 individually sufficient in the ordinary course of nature to cause the death of a person.

11. There is no denial that the deceased did not receive any injury. The fact to be decided herein is who caused those injuries as discovered by PW 6 while conducting the autopsy of the dead body of Kartik Gowala.

12. In order to rope both the Appellants, the evidence appearing on the fact of the records must be cogent and sufficient to show their complicity. It is stated by the witnesses, more particularly PW 2, that 30-35 people came together to their house and among them two Appellants were there. There is no specific evidence appearing that both the Appellants who allegedly took part in the assault did actually took part in the assault on Kartik and the same was witnessed by some one. Recognition of both the Appellants and others by PW 2 appears to be doubtful in view of the fact appearing in her cross-examination that night was dark on the day the assault was committed in the Courtyard of Binod Majhi situated 30 ft. away from her Courtyard. When her deceased husband was taken away by the assailants she had been to the house of Budhni Goala for help but no body came except Budhni and before her arrival the assailants had left the place of occurrence. The facts divulged in cross examination of PW 2, apparently do not render any scope to accept the prosecution version that Appellants too inflicted injuries to the deceased.

13. The reasons offered by the learned Trial Judge in the context of involvement of both the Appellants cannot receive attention from us since the evidence on record are affected by some material defects appearing therein. The learned Trial Court accepted the evidence of PW 2 in particular and found that her evidence cannot be disbelieved in view of the facts and circumstances appearing on the face of the records. But the learned Trial Court failed to pursue the evidence of

PW 2 appearing in her cross examination in the context of recognition of the assailants and actual assault on her deceased husband. The learned Trial Court roped both the Appellants with the aid of Section 34 of the IPC. But we are of the opinion that the finding of learned Trial Judge in respect of application of Section 34 IPC is erroneous. For application of Section 34 IPC against offenders, some overt acts are required to be done by each of the offenders towards commission of offence. Nowhere in the evidence it has come out that out of 30-35 people who came to the house of the PW 2 and took away the deceased, Appellants Joy Kumar Tanti and Palwan Das had resorted to some overt acts towards the assault of the deceased or they resorted to assault. PW 2 who claimed to have witnessed the assault on her husband Late Kartik Goala, did not reveal in her evidence about the overt act that resorted to by both the Appellants. So in view of the evidence appearing on record that both the Appellants along with other assaulted the deceased resulting his death cannot be taken as factually correct. The learned Trial Court failed to assess the evidence on record, more particularly PW 2, in the context of involvement of both the Appellants. The judgment rendered by the learned Trial Court, therefore, appears to be erroneous in view of the facts and evidence on record.

14. We are, therefore, of the consensus view that the impugned Judgment of conviction and sentence rendered by the learned Trial Judge cannot be sustained in law. According the Judgment and order of conviction and sentence dated 16.8.2007 passed by the learned Addl. Sessions Judge No. 2, Tinsukia in Sessions Case No. 90 (t)/2005 GR Case No. 573/97 u/s 302/34 IPC are set aside and quashed. Both the Appellants are acquitted and set at liberty forthwith if they are not wanted in any other case.

15. Both the criminal appeals stand allowed.

16. For rendering valuable assistance to the Court by Ms. C. Sarma, learned Amicus Curiae, we direct the State Govt. to pay Rs. 5000.00 as fee to her.