

(2012) 03 GAU CK 0072
In the Gauhati High Court
Case No : Criminal Appeal No. 41 of 2003

Smt. Mandira Nandi

APPELLANT

Vs

Dilip Kumar Baruah

RESPONDENT

Date of Decision : 27-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 357
Penal Code, 1860 (IPC) — Section 147, 323, 325, 34, 342

Citation : (2012) CriLJ 2567 : (2012) 3 GLD 462

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : A.M. Mazumdar, M. Saikia, Mrs. A. Baruah, R. Goswami, S.K. Medhi. J. Das. S. Sarma, Mrs. S. Kabita, for the Appellant; R. Phukan, J. Gogoi, for the Respondent

Final Decision : Allowed

Judgement

B.D. Agarwal, J.—This is a case of torture of a detenu in police custody. The opposite party was the Superintendent of Police at Karimganj in the year 2002. The allegations against him are that at his instance, the complainant's younger brother Subash Nandi alias Babul was arrested by the police officers in connection with Karimganj Police Station Case No. 278 of 2000 u/s 147/448/427/506/380 of the IPC on 20.6.2000. Arrest was made on 20.6.2000 and the detenu was released on bail on 21.6.2000 and during this period, the victim was mercilessly beaten by the opposite party and his personal guards under the orders of the opposite party. With the aforesaid allegations, the injured's sister Professor Mandira Nandi lodged a complaint on 22.6.2000 in the Court of learned Chief Judicial Magistrate. Karimganj under Sections 342/323/325/34 IPC. The case was eventually transferred to the Court of learned CJM, Cachar, Silchar, as per the order of the High Court on the prayer of the police officer/accused. On such transfer, the complaint was registered as CR Case No. 105 of 2002 and cognizance of the offence was taken u/s 323 IPC. However, after trial the accused officer was acquitted. Hence, this appeal is by the

complainant against the judgment of acquittal.

1.1 Heard the arguments of learned counsel for both sides. Shri J. Das, learned counsel for the appellant submitted that despite there being over-whelming evidence the learned Magistrate has acquitted the respondent. The learned counsel also submitted his written arguments. Per contra, Smt. Phukan learned counsel for the respondent justified the acquittal on the ground of discrepancy in the injury reports. It was also contended that although the victim had sustained minor injuries at the time of his arrest a case of custodial torture was foisted upon the superior officer, with exaggerated allegations. It was also pleaded that it is not a fit case to interfere in a judgment of acquittal after 12 years.

2. In order to establish the offences, the complainant examined altogether 7(seven) witnesses. PW-1 is the complainant herself. PW-2 is a co-detenu, PW-3 is the injured. PW-4 is an independent witness, PWs 5, 6 and 7 are the medical officers, who had examined PW-3 in different hospitals and on different dates.

3. As could be gathered from the cross-examination of the witnesses, the defense case was that when the police went to apprehend PW-3 in Karimganj Police Station Case No. 278 of 2000, he tried to flee away and, as such, force was utilized to overpower him and as a result, the accused (PW-3) sustained minor injuries. This was also stated in the arrest memo/forwarding report of PW-3 in Karimganj PS Case No. 278 of 2000, which is reproduced below for ready reference:

The accused persons tried to flee away at the time of apprehension and there was a scuffle between the accused persons and police at the time of apprehension and as a result, they got minor injuries in their persons. They were medically treated at KXJ Civil Hospital. They may kindly be treated as jail hajot, if necessary.

4. Only one official witness was examined as DW-1 from the office of CJM, Silchar, Cachar to bring on record the FIR of Karimganj PS Case No. 278 of 2000, forwarding report of PWs-3 and 4 and the bail applications. In other words, neither the accused took any plea that he did not visit Karimganj Police Station on 20.6.2000 nor was involved in the physical torture of the detenus nor ordered his guards and other police constables to assault the detenus. In this way, the case virtually rested upon the complainant's statement and the documentary evidence.

5. Despite one sided evidence, the learned CJM acquitted the accused on the ground of discrepancies in the injury certificates and medical evidence as well as questioning the reliability of the complainant's witnesses. The learned CJM has also observed that although PWs-2 and 3 claimed that PW-3 was beaten for about two hours and sticks had also broken but the injury report (Exhibit-X) does not support such merciless beating. The learned CJM has also disbelieved exhibit - X on the ground that two separate inks were used without any initial thereon. The medical certificate issued from Karimganj Civil Hospital was also not taken

seriously on the ground that the injured person went to the Civil Hospital after his release on bail. The injured report (Exhibit-6) proved through PW-7 has also been rejected on the ground that injuries mentioned therein were not noticed by other doctors (PWs-5 and 6).

6. PW-1 has been disbelieved solely on the ground that she could not say in which case her brother was arrested. She has also been disbelieved on the ground that being a lady of high status in the rank of professor of a reputed girl's college, she ought to have enquired about the names of two Security Guards who had assaulted her brother. In my considered opinion, the testimony of PW-1 has been thrown overboard superficially on assumptions, surmises and virtually arbitrarily. The testimony of PW-1 has also been rejected on the ground that in the bail petition dated 20.6.2000, there was no mention of any assault, whereas, while giving evidence in the Court the witness improved her version by deposing that in both the bail petitions filed on 20th and 21st June, 2000, there was mention of assault by the Superintendent of Police. Had there been no mention of police brutality in both the bail application an adverse view could have been taken. But there is a categorical statement in the Bail Petition dated 21.6.2000 that both the PWs 2 and 3 were mercilessly beaten in the police station. Hence, disbelieving PW-1 on such flimsy ground was also not proper.

7. PWs- 2 and 3 have also been disbelieved on the ground that they did not report about the physical assault by anybody, when produced in the Court. This method of appreciation of evidence is also reprehensible since the arrest memo of the accused persons (PWs-2 and 3) itself indicated physical injuries upon them. The learned CJM also did not put any question to himself whether the judicial Magistrate had made any query as to how the detenus had sustained injuries, despite there being mention of injuries on the persons of PWs-2 and 3. At the same time, conclusion of the learned CJM is also factually wrong inasmuch as in the order dated 20.6.2000 it is recorded in police case that both the accused were allegedly manhandled by the police and the accused persons had shown their injuries. Be that as it may, when the fact of injury was proved in the Court through a series of injury reports and the evidence of doctors, the issue became redundant as to whether PW-2 and 3 themselves reported it to the judicial Magistrate or not.

8. As noted earlier, the admitted facts are that both the PW-s 2 and 3 were arrested in connection with Karimganj Police Station Case No. 278 of 2000 and both of them were taken to the police station at or about the same time. In this way, PW-2, (co-detenu) was the best person to witness the assault and his testimony cannot be rejected summarily being an interested person. In the case of State of Rajasthan Vs. Smt. Kalki and Another, , the Hon"ble Supreme Court has laid down the theory of interested witness in the following words:--

7. As mentioned above the High Court has declined to rely on the evidence of PW1 on two grounds: (1) she was a "highly interested" witness because she "is the wife of the deceased", and (2) there were discrepancies in her evidence. With

respect, in our opinion, both the grounds are invalid. For, in the circumstances of the case, she was the only and most natural witness; she was the only person present in the hut with the deceased at the time of the occurrence, and the only person who saw the occurrence. True, it is, she is the wife of the deceased; but she cannot be called an "interested" witness. She is related to the deceased. "Related" is not equivalent to "interested". A witness may be called "interested" only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye-witness in the circumstances of a case cannot be said to be "interested". In the instant case PW 1 had no interest in protecting the real culprit, and falsely implicating the respondents. (Underlining by me)

8.1 The above apart, it is also the settled principle of law that injured persons are best witnesses and they are less likely to implicate innocent persons. In this case, besides the testimony of injured, the prosecution case has further been corroborated by medical evidence, including medical and jail doctors. Their evidence will be discussed later.

9. The testimony of PW-4 has not been considered as corroborative evidence on the ground that while giving initial statements u/s 202 Cr. P.C. he was silent to speak about the assault by the accused or his security guards. I find that the learned Magistrate has noted in the judgment that PW-4 had heard scream of the injured Subash Nandi (PW-3) while standing in front of the police station. If PW-4 would have stated that he had heard PW-3 shouting that he was being beaten by so and so with a stick and crying for help then PW-4 could have been disbelieved on the ground that it would not have been possible to hear such words clearly from outside etc. In this way, PW-4 has also been disbelieved on flimsy grounds. In his testimony, PW-4 has deposed that when he went to the Court, he saw PW-3 without clothes and in injured condition, the fact which the injured and the complainant herself did not say. It is also not clear as to why PW-4 was so closely following the detenus in the police station as well as in the Court. In this way, PW-4 cannot be said to be wholly reliable, but, at the same time, he cannot be declared as a total liar since nothing has been elicited in the cross-examination that he was a procured witness, except giving wild suggestions. Even for a moment, if the deposition of PW-4 is left out on consideration, the complainant's case is firmly corroborated by the testimony of injured himself, a co-detenu and the medical evidence.

10. PW-5 is a doctor from Karimganj Civil Hospital. On 20.6.2000, he was on emergency duty. This witness has deposed that on that day, he examined Subash Nandi (PW-3) at about 2 p.m. on police requisition and found diffused swelling on the right forearm, multiple bruises over left scapular region, one haematoma on the right temporal region, one diffused swelling on the right loin and one bruise over the left thigh. In this way, as many as five injuries were noticed on the person of PW-3.

11. PW-6 is another medical officer and at the relevant time, he was posted at Karimganj District Jail. This witness proved the injuries upon PW-3 by producing UTP register (Exhibit-Y). As per this register, abrasion on the back, tenderness on the left forearm and haematoma on loin were found on the person of the detenu.

12. PW-7 is another doctor from Karimganj Civil Hospital. She examined PW-3 on 21.6.2000 and found as many as nine injuries in the nature of bruises, haematoma, abrasion and tenderness. It is true that PW-7 did not examine the injured on police requisition but that itself cannot be a ground to disbelieve a doctor of Government Hospital. Similarly, the injuries noticed by all the three doctors are also identical and I also do not find any major discrepancy in the situs of injuries as well. Just because PW-5 recorded 5 injuries, PW-6 recorded only three injuries and PW-7 recorded as many as nine injuries in their records it cannot be a ground to outrightly reject their testimony. Since PW-3 was beaten at random, he must have sustained multiple injuries all over the body and some of the doctors might have only recorded few injuries in their certificates/registers.

13. Needless to say that for convicting a person for an offence of simple hurt voluntarily, it is not necessary for the victim to prove a certain number of injuries. In other words, a single wound is sufficient to establish the offence. In the case before me, even the jail doctor had noticed as many as three wounds.

14. All these apart, the learned CJM failed to take into account the fact that the counter plea taken in the cross-examination of the witness was not acceptable and believable qua the complainant's evidence. PW-1 was given a suggestion in the cross-examination that her brother had sustained injuries while trying to abscond at the time of his arrest by police persons. Similarly, PW-3 was also given a suggestion in the cross-examination that he received injuries in the process of his arrest, when a scuffle took place while he was fleeing away. The injuries on different parts of the body clearly rules out the theory of sustaining it while falling down on the ground. At the same time, inflicting more than half a dozen injuries by a group of police officers to arrest a person (PW-3) in the crowded place is also outrightly unbelievable. Be that as it may, no evidence was given on behalf of the opposite party/accused that force had to be applied to apprehend the accused. No witness was examined in this regard. In this way, defense suggestion was nothing but a cooked-up story in the Court.

15. In the case of Smt. Shakila Abdul Gafar Khan Vs. Vasant Raghunath Dhoble and Another, , the Hon"ble Supreme Court was examining a case of custodial death and has observed as below:

5. The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because the guardians of law destroy the human rights by custodial violence and torture, invariably resulting in death. The vulnerability of human rights assumes a traumatic torture when functionaries of the State whose paramount duty is to protect the citizens and not to commit gruesome offences

against them, in reality perpetrate them. The concern which was shown in Raghbir Singh case more than two decades back seems to have fallen on deaf ears and the situation does not seem to be showing any noticeable change. The anguish expressed in Gauri Shanker Sharma etc. Vs. State of U.P. etc., , Bhagwan Singh and another Vs. State of Punjab, , Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, , Pratul Kumar Sinha v. State of Bihar, Kewal Pati v. State of U.P., (1995 AIR SCW 2236 : 1995 Cri LJ 2920), Kaka Singh Vs. State of Haryana, , State of M.P. v. Shyamsunder Trivedi, (1995) AIR SCW 2793 and by now a celebrated decision in D.K. Basu Vs. State of West Bengal, seems to have caused not even any softening attitude to the inhuman approach in dealing with persons in custody.

6. Rarely, in cases of police torture or custodial death is there direct ocular evidence of the complicity of the police personnel alone who can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that the police personnel prefer to remain silent and more often than not even pervert the truth to save their colleagues -- and the present case is an apt illustration -- as to how one after the other police witnesses feigned ignorance about the whole matter.

7. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system suspect and vulnerable. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach at times of the courts as well because it reinforces the belief in the mind of the police that no harm would come to them if one prisoner dies in the lock-up because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crimes in a civilized society, governed by the rule of law and poses a serious threat to an orderly civilized society. Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/under trial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and civilization itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may tend to gradually lose faith in the efficacy of the system of the

judiciary itself, which if it happens will be a sad day for anyone to reckon with.

34. The courts exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth, and oblivious to the active role to be played for which there is not only ample scope but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice in a case where the role of the prosecuting agency itself is put in issue.

16. In my considered opinion, the case before me is far better than the aforesaid authority of the Apex Court. In the instant case the physical assault upon PW-3 was witnessed by PW-2, who was also beaten in the police station simultaneously, at the same time: Hence, dismissal of complaint by way of superficial appreciation of evidence was not proper.

17. Before concluding the judgment, it is also necessary to look at the background of arrest of PW-3. As could be gathered from admitted documents, Karimganj PS Case No. 278 of 2000 was registered on 15.6.2000 on the basis of an FIR lodged by one Smt. Seema Das. As per the said FIR, the incident took place on 9.6.2000 when a group of 200 people, under the leadership of an ex-MLA, came to the beauty parlour of her landlady Smt. Shyama Roy and vandalized her beauty parlour and destroyed valuable property and also took away a cash amount of Rs. 3000/-. There is no explanation, whatsoever; in the FIR as to why the case was lodged after about a week nor is there any explanation from the police department as to why the FIR dated 15.6.2000 was produced before the learned CJM only on 20.6.2000. It is also not clear as to why the owner of the beauty parlour namely Shyama Roy did not file any FIR herself. It may also be mentioned here that in the bail application dated 21.6.2000, it has been categorically stated that for the same incident one another FIR was lodged earlier by one Rathindra Roy and the said FIR was registered as Karimganj PS Case No. 268 of 2000 u/Ss. 147 / 447 / 448 / 427 / 506 IPC. In this way, the earlier case was registered for bailable offences. Hence, the second FIR must have been obtained from Seema Das after one week, inserting certain non-bailable offences for oblique and ulterior motive. Besides this, forwarding report of PW-3 speaks about a meeting of few leading persons of Karimganj town conspiring to attack the house of Shyama Roy and other persons and accordingly, a procession was taken out and a memorandum was also submitted to the DC, Karimganj and thereafter, the beauty parlour of Smt. Shyama Roy was damaged. The contents of the FIR supports the theory of complainants and her witnesses that the Superintendent of Police himself was involved in the physical assault of the detenu as he was offended for making a demand to the DC to transfer the SP. At the same time, forwarding report is totally silent to indicate that PW-3, Subash Nandi, had taken part in the meeting on 8.6.2000 or that he was directly involved in the riot and looting. I have already noted earlier that two FIRs were

lodged for the same incident and PWs 2 and 3 were arrested on the basis of the 2nd FIR after 10 days of the incident. In this way, the record and evidence proves that the conspiracy was hatched by the accused of this case, i.e. SP, Karimganj to apprehend PW-3 and other persons, who were demanding his transfer. Accordingly, PWs 2 and 3 were apprehended and taken to the police station and they were mercilessly beaten. Somehow, the sister of PW-3 mustered courage to lodge the complaint of torture upon her brother but the PW-2 and his family members could not take any such action.

18. For the reasons, assigned herein above, I hold that the complainant has adduced sufficient corroborative evidence to prove the allegation of causing simple hurt upon PW-3. Consequently, the impugned judgment is hereby set aside. The accused/opposite party is convicted u/s 323 IPC.

19. With regard to the quantum of sentence, I am taking a lenient view and not awarding prison sentence after a gap of nearly 12 years of the incident. Besides this, the accused has also crossed the age of 60 years. At the same time, considering the brutality inflicted upon an innocent person, in the police custody, the opposite party also cannot be let off with a warning or admonition and there is no scope of commuting the sentence by way of allowing the accused to go on probation after 12 years of the incidence. If prison sentence is not awarded u/S. 323 IPC, the only way is to impose a fine of Rs. 1,000/- (one thousand). However, keeping in mind the brutality inflicted upon PW-3 in police custody, the victim also deserves to be compensated suitably. Accordingly, in addition to Rs. 1,000/- as fine, the accused/opposite party is further directed to pay a compensation of Rs. 1,00,000/- (one lakh) to the injured, as provided u/S. 357 Cr. P.C.

20. In the result, the appeal stands allowed. The opposite party namely, Dilip Kumar Baruah is convicted u/s 323 IPC. He is sentenced to pay fine of Rs. 1,000/-(one thousand) and compensation of Rs. one lakh only. The opposite party is given 2 (two) months time to deposit fine amount in the Court of learned CJM, Karimganj, Assam, failing which the opposite party shall undergo simple imprisonment for 6(six) months. If the compensation amount is deposited in the Court, the same shall be paid either to the informant or to the injured, as compensation u/s 357 of the Cr. P.C. Registry is directed to return the LCR records with a copy of this judgment.