
(1993) 03 GAU CK 0014
In the Gauhati High Court
Case No : Criminal Appeal No. 6 of 1993

Sri Kajal Sarkar and Another	Vs	APPELLANT
State of Assam and Others		RESPONDENT

Date of Decision : 27-03-1993

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34, 393, 394, 398

Citation : (1993) CriLJ 3869

Hon'ble Judges : S.N. Phukan, J;S.B. Roy, J

Bench : Division Bench

Advocate : J.M. Choudhury, A. Roy and T. Sen, for the Appellant; K. Deka, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

1. This appeal is against the judgment and order dated 3-12-92 passed by the learned Sessions Judge, Tinsukia in Sessions Case No. 86(T)/ 88. By the impugned judgment, the learned Sessions Judge found both the accused-appellants Naru Malakar and Kajal Sarkar guilty u/s 302/34, I.P.C. and convicted them accordingly and sentenced them to rigorous imprisonment for life and fine of Rs. 1,000/- each. Both of them were also found guilty u/s 393, I.P.C. and sentence of 3 years rigorous imprisonment and fine of Rs. 1,000/- each were imposed. The learned Sessions Judge also found them guilty u/s 394, I.P.C. and accordingly convicted them and sentenced them to 10 years rigorous imprisonment and fine of Rs. 5,000/-. The sentences were to run concurrently.

2. On 6-1-84 Hemraj Agarwalla (P.W. 4) lodged the FIR before the Officer-in-charge, Tinsukia Police Station informing that on that day at about 9 p.m. on hearing Halla near the house of his brother deceased Muralidhar Agarwalla, he went there and found his brother with several injuries on his body with blood coming out. On being asked he was informed by the deceased that 4 persons stabbed him and also gave dao blows and he could recognise Kajal Sarkar and Naru Malakar. According to FIR (Ext. 11) the occurrence took place in front of

the house of Rahitram Agarwalla (P.W. 3) when his deceased brother went there on hearing Halla. In the FIR it was mentioned that "it learnt that the same group of persons went to Rahitram Agarwalla's house to commit robbery and they cut the telephone connection and also stabbed and gave blow on his body." By this FIR Ext. 1 Police was also informed that both the injured persons were in very serious condition. Police after investigation submitted charge-sheet. It may be stated that one accused person Arabinda was declared absconder. The learned trial court framed charge under 4 heads against both the accused-appellants Kajal and Naru u/s 302/ 34, IPC, 394, IPC and Section 393 read with Section 398, IPC. During trial prosecution examined 11 witnesses including 2 doctors and 2 police officers. Accused persons pleaded not guilty and no witness was examined.

3. We have heard Mr. J. M. Choudhuary, learned counsel for the accused-appellants and Mrs. K. Deka, learned Public Prosecutor at length.

4. We may now extract relevant portion of the evidence of the witnesses for the prosecution. In this connection, it may be stated that the deceased was brought to the house in the night in injured condition. Thereafter he was taken to the house of one Dr. Kirti Dey and as no doctor was available he was shifted to Saint Luki's hospital where he succumbed on the next day.

5. P.W. 1 was the doctor of the said hospital who attended the injured along with the surgeon. In cross-examination he has stated that deceased Muralidhar was brought to the hospital in a state of complete unconsciousness. This witness has further stated that he could not remember whether deceased Muralidhar regained consciousness after operation. He has made a categorical statement that as the deceased was unconscious he did not speak to him.

6. P.W. 2 Ratan Kumar Agarwalla is an advocate and he resides about 1-1 / 2 Km away from the house of deceased Muralidhar. At about 8-30 p.m. on the date of the occurrence he was informed over phone that some miscreants had seriously injured deceased Muralidhar and Rohitram (P.W. 3) and he went to the house of the deceased on a scooter. There he came to know that both the injured viz deceased and Rohitram were taken to the hospital. He came to know this fact from the persons present in the house of the deceased. After staying there for 10 minutes he went to the hospital and he was with the deceased and found him in semiconscious state and the deceased was not in a position to speak clearly. Deceased was taken to the operation room. This witness has further stated that he was with the deceased at a stretch for about 24 hours and next day in the morning at about 10 a.m. deceased regained "a little consciousness" after the operation. This witness has made a statement that after deceased came to senses he first said "how all these could happen"? P.W. 2 disclosed his identity and tried to know from the injured as to who caused the injuries. According to P.W. 2 the injured "slowly with pauses" said "Kajal" and "Naru" retaliate, do not forget". P.W. 2 has made a specific statement that the deceased could not speak more and he succumbed to the injuries in the night at about 11 p.m. In cross-

examination, this witness has said that police did not record his statement. He has also stated that he did not ask the doctor of the hospital to record the above dying declaration of the deceased as the deceased was not capable of giving a clear statement in that condition of his health though doctor was regularly visiting the deceased. He has further stated that deceased was in a semi-conscious state. A specific reply was given by this witness in cross-examination that deceased uttered two words "Kajal" and "Naru" only once before him and he tried to know full names of Kajal and Naru, but deceased could not speak. According to this witness, he did not mention the names of! Kajal and Naru to police as police did not record his statement.

7. Rahitram Agarwalla, P.W. 3 has stated that on the night of the occurrence his wife heard a sound and told him that 3 persons were coming. He went down-stairs and saw 3 persons with knives in their hands and they asked for money from him. According to him one of them hit on his back with a knife and also on the stomach. This witness has made a categorical statement that the faces of all the 3 persons were covered with cloth and as such he could not recognise them. He was unconscious for 3 days and the house of the deceased was situated on the Southern side.

8. P.W. 4 Hemraj Agarwalla was the informant. At about 8-30 p.m. he heard hue and cry from the house of P.W. 3 and thereafter he heard cries from the house of the deceased and he went there. He found deceased with injuries on his head and stomach and on being asked deceased told him that "Kajal" and "Naru" caused the injuries. This witness identified both the above 2 accused persons for the first time in the court. According to this witness deceased also told him that on hearing hue and cry from the house of Rahitram he had gone there and found both the accused persons there, adding that he could not identify other persons who were with the accused persons. This witness called one Moona (not examined) over phone and thereafter deceased was taken to hospital. He has proved the FIR. He has mentioned in cross-examination about! selling of land to the father of the accused persons. In cross-examination he has stated that when he first saw the deceased he was conscious and could speak and could reply questions if asked. He has made another statement that besides the deceased one Bed Prakash Agarwalla (not examined) told him about Kajal and Naru.

9. P.W. 5 Smt. Geeta Devi, the wife of the deceased stated that on hearing hue and cry her husband the deceased had gone to the. house of Rahitram Agarwalla and thereafter Barna Dey (not examined) had brought the deceased to the gate of their house in an injured condition and she brought him inside the house. Thereafter, the injured was taken to the hospital. In examination-in-chief she has also stated that her deceased husband told her that Kajal and a Naru had assaulted him. But in cross-examination she has stated that next morning at about 1- a.m. she could talk to her husband for the first time as he was unconscious before that. She has further stated that on being asked her husband pronounced only two words "Kajal" and "Nadu". She has made a categorical

statement that her husband did not talk to anybody before he was taken to the hospital.

10. It is not necessary to discuss the evidence of P.W. 6 Mintu Agarwalla.

11. P.W. 7 Dr. Sonowal conducted the autopsy. It is not necessary to quote the injuries found by the doctor as there is no dispute that the deceased succumbed to the injuries caused on his body. According to him the injury on the head was fatal and was sufficient to cause instantaneous death of a person. P.W. 8 Budhin Bora was S.I. of Police at the relevant time at Tinsukia. He started investigation. Thereafter he was transferred. P.W. 9 Tanu Hazarika was also S.I. of Police posted at Tinsukia at the relevant time and he arrested the accused persons, prepared sketch map, examined witnesses and also seized articles.

12. From the evidence so extracted it is clear that the conviction was based only on the dying declaration of the deceased. Dying declaration by itself is not sufficient to convict a person unless said dying declaration is absolutely clear and there cannot be any doubt about the dying declaration. We may state that from the above evidence it is clear that the dying declaration was not recorded by any doctor though deceased was in the hospital for about 8 hours.

13. In this case, we do not find from the oral evidence, the place where exactly the occurrence took place. Considering the state of health of the deceased we have to be very careful about the identification. No evidence has been lead by the prosecution to show that there was sufficient light for recognition. Recognition being most important in the case in hand it creates a doubt in absence of clear evidence of light, for identification of both the accused-appellants by the deceased K. Ramachandra Reddy and Another Vs. The Public Prosecutor,

14. We find from the evidence of P.W. 1, the doctor, that deceased was brought to the hospital in a state of complete unconsciousness. We have no reason to disbelieve this witness. P.W. 2 has not stated that on his arrival at the house of the deceased anybody informed him that the deceased before taking him to the hospital mentioned the names of the present accused-appellants. Although P.W. 3, the informant has made a statement that after hearing hue and cry when he arrived at the house of the deceased, the deceased told him that present accused-appellants caused his injury, we find it difficult to believe this witness on this point as otherwise, people who were left behind in the house of the deceased would have known this fact and would have reported to P.W. 2. P.W. 2 has specifically stated that after operation deceased was in semiconscious state and he uttered with great difficulty two words "Kajal" and "Nadu" only once. This witness has further stated that though he tried to get the complete names of the two persons he could not get it from the deceased. We find him truthful and accepting his evidence we find that before death deceased uttered only two words "Kajal" and "Nam".

15. Although P.W. 4 is trying to make a new case that immediately on arrival and

before taking the injured to hospital he gave out these 2 names and, we are finding it difficult to believe in view of the evidence of P.W. 2. That apart, in the FIR lodged by this witness he did not mention the names of the present accused-appellants. Moreover, the wife of the deceased, P.W. 5 has stated in cross-examination that next morning for the first time she could talk to her deceased husband as earlier he was unconscious. She has also stated that deceased uttered 2 words viz. "Kajal" and "Naru". She has also stated in cross-examination that before taking to hospital her husband did not talk to any one while he was brought to the house in an injured condition. This goes contrary to the evidence of P.W. 4.

16. Therefore, on going through the oral evidence, we find that the occurrence took place at night around 9 p.m., and deceased was hospitalised and thereafter he was operated upon. Next morning at about 10 a.m. on being asked he uttered two words viz. "Kajal" and "Naru". We again repeat that P.W. 2 could not get full names of the above 2 persons from the deceased. From the evidence of P.W. 3 to whose house according to prosecution all the miscreants came first has categorically stated that the faces of all the miscreants were covered with cloth. On the top of that as stated before there is no evidence to show that there was sufficient light. Therefore, we have got doubt as to whether deceased could recognise the two persons. At the most he might have recognised the voices. But recognition by voice is a very weak piece of evidence.

17. Law is well settled that a dying declaration is not complete unless complete names and addresses of the person are given in the dying declaration Gopalsingh and Another Vs. State of Madhya Pradesh and Another, Therefore, only because deceased before his death uttered two names viz "Kajal" and "Naru" we are unable to accept the prosecution version of the story that present accused-appellants were the culprits who caused injury to the deceased or to any other person as alleged by the prosecution. We, therefore, hold that the prosecution has failed to prove the case against the accused-appellants beyond reasonable doubt.

18. For the reasons stated above, the appeal is allowed by setting aside the impugned judgment and order dated 3-12-92. We direct that the accused-appellants Naru Malakan and Kajal Sarkar who are in custody shall be released forthwith.