

(2012) 09 GAU CK 0031
In the Gauhati High Court
Case No : Criminal Appeal No. 51 of 2009

Sri Manuj Chutia

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 04-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 302, 304, 304I, 304II, 341
Probation of Offenders Act, 1958 — Section 4, 5

Citation : (2013) 1 GLD 561 : (2012) 5 GLT 707

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

Bench : Single Bench

Advocate : B.D. Konwar, for the Appellant; B.B. Gogoi, learned Addl. P.P., for the Respondent

Judgement

B.D. Agarwal, J

1. The appellant herein has been convicted u/s 304 Part-I of the Indian Penal Code, vide impugned judgment dated 27.8.2008, passed by the learned Sessions Judge, Dhemaji in Sessions Case No. 20(DH) of 2007. After his conviction, the appellant has been sentenced to undergo rigorous imprisonment for 7(seven) years with fine of Rs. 2000/- and in default of payment of fine, the appellant has been directed to undergo simple imprisonment for 2(two) months. Being aggrieved with the conviction and sentence, the convict has preferred this appeal.

2. Heard Mr. BD Konwar, learned counsel for the appellant and Mr. BB Das, learned Additional Public Prosecutor for the State. I have also gone through the impugned judgment and the evidence tendered by the prosecution as well the accused in the trial court.

3. As could be gathered from the record, both the accused and the injured are from the same village. The record further reveals that the incident had taken place after an altercation between the accused and the deceased over alleged damage of crops of the informant by pigs of the accused.

4. The incident took place on 10.10.2006 at about 9 am. At the relevant time, the accused met the deceased on public road and in the midst of altercation/ argument, the accused kicked the deceased and, as a result, the deceased fell down on the road and sustained injuries on his head. Thereafter, the deceased was taken to a nearby Public Health Center and thereafter to Dhemaji Civil Hospital where he died at about 8 p.m.

5. The FIR was lodged by the father of the deceased. It was registered as Silapathar Police Station Case No. 169 of 2006 u/s 341/302 IPC and after charge sheet was submitted, the accused was tried only for the offence of murder and after the trial he has been convicted u/s 302 Part-I of the IPC.

6. To establish the offence of culpable homicide, the prosecution examined altogether ten witnesses. PW-1 is the father of the informant; PWs- 2, 3, 4, 5, 6, 7 and 8 are the co-villagers and independent witnesses; PW-9 is the autopsy doctor and PW-10 is the I.O. It may be also mentioned here that during the investigation, statements of PWs- 2 and 3 were also obtained u/s 164 of the Code of Criminal Procedure.

7. The defence case was that the deceased had accidentally fell on the ground, while driving his scooter, and sustained injuries on his fall on hard substances. To establish his defence the accused also examined himself as DW-1.

8. During the post-mortem examination, doctor had noticed multiple abrasions on the body and haematoma over the scalp and lacerated wound on the occipital region. Right side of the parietal region was found swollen and in the opinion of the doctor the death was caused due to traumatic head injury with subdural haematoma. In the cross-examination, doctor has admitted defence suggestion that the injuries found on the person of the deceased can also be caused while falling on hard object like stone.

9. Despite the admission of the doctor in the cross-examination that injuries can be caused due to fall on hard substance PWs 2 and 3 have categorically rejected this story. According to PW-2, at the relevant time, he was walking with the accused and at one place the deceased arrived near them and stopped his scooter. Thereafter, he saw the accused conversing with the deceased Durlov. For a while, PW-2 proceeded further and within a short time, he heard the shouting of the deceased and thereafter, the witness turned back and saw the deceased lying on the ground with bleeding injuries on his head. In this way, PW-2 has totally rejected the defence theory that the deceased had accidentally fell down on the road.

10. PW-3 is another eye-witness of the incident. At the relevant time, he was going to drop his children to the school. On the way, he saw the accused assaulting the deceased by hitting him with a stone. In the cross-examination, PW-3 has, however, stated that the accused had also given kick blows upon the deceased. In fact, while giving statement u/s 164 Cr.P.C. PW-3 confined himself to state that he saw the accused kicking Durlov (deceased) and he was silent to

speaking about assaulting the deceased with a stone.

11. In view of conflicting testimony of PW-3 in the court and in his statement u/s 164 Cr.P.C., it is difficult to take a definite view that the deceased was actually assaulted with a stone. It is true that after the incident a stone was seized from the place of occurrence but the same was not sent to FSL to ascertain whether the stone was used in the assault. On the other hand, from the testimony of PW-4, it is apparent that there was a heap of stones by the side of the road where the incident had taken place. Hence, the possibility of falling of the deceased on the heap of stones, while being kicked by the accused, cannot be totally ruled out.

12. Though considering the nature of the injuries sustained by the victim and the weapon used by the accused in the offence the learned Sessions Judge has held that the culpable homicide does not amount to murder. However, while convicting the appellant u/s 304 -I, the learned Sessions Judge did not distinguish the ingredients of Section 304 Part-I and Section 304 Part-II of the IPC.

13. To maintain a conviction u/s 304 Part-I, it has to be established that the accused had definite intention of causing death or causing such bodily injury as is likely to cause death. In the case at hand, there was no external injury wherefrom it can be held that the appellant had the intention to cause death or that the death was inevitable from the nature of injuries. Basically, the person died nearly after 12 hours due to subdural haematoma, which may also be possible due to fall on the hard substance. Hence, the offence is converted u/s 304 Part-II of the IPC.

14. With regard to the involvement of the deceased in the offence, I have already discussed the ocular testimonies of PWs-2 and 3. The accused did not take any plea that he was not involved in the incident at all. The defence theory of accidental fall has already been rejected by me. Besides this, the accused has himself admitted that he had a talk with the deceased at the place of occurrence and soon after the incident he surrendered himself before a police officer and from this conduct also it can be held that the appellant was guilty for committing the offence.

15. With regard to the quantum of sentence, the learned counsel submitted that the appellant should be released on probation of good conduct. The learned counsel submitted that at the relevant time, the appellant was serving in BSF and the incident must have taken place when the deceased was pushed by the appellant, while the deceased was sitting on his scooter and there was no mens rea to commit culpable homicide on the part of the appellant.

16. u/s 304 Pt-II of the IPC, a person can be sentenced to undergo imprisonment upto 10 years or with fine or with both. In the case before me, the accused is in custody since last more than 4 years. Considering the circumstances, in which the offence was committed, the sentence is reduced to the period of imprisonment already undergone by the appellant in jail.

17. In the case of Shri Dandi Nath Vs. The State of Assam, , this court has held that there is no bar to invoke provisions of the Probation of Offenders Act, 1958 even if the accused is more than 21 years. In this case, the accused was a teacher by profession and he was convicted u/s 352 of the IPC. While releasing the accused on probation, this Court further observed that the conviction shall not affect his service. In the case of Ramesh Bora -vs- State of Assam : (1996) 3 GLR 5, a Division Bench of this Court allowed an accused of 21 years to go on probation of good conduct despite affirming his conviction u/s 304 -II IPC. In this later case the accused was a student.

18. In view of the aforesaid authorities by this Court, I hold that in this case also the appellant can be given the benefit of section 4 of the Probation of Offenders Act inasmuch as there are no materials on record to show that the appellant had any bad antecedent in the past. On the other hand, the appellant was serving in BSF. Accordingly, the appellant shall be released from prison on executing a bond of good conduct for 1(one) year. The concerned authority may also consider reinstating the appellant in service, provided he is otherwise eligible.

19. Section 5 of the Probation of Offenders Act, 1958 also provides payment of compensation by an offender to the victim. In the present case, the deceased was aged about 28 years and he is survived by his family members. Hence, I hereby order that the appellant shall pay compensation of Rs. 1,00,000/- (One Lakh) to the informant within 3(three) months from the date of his release from jail. The Registry is directed to return the LCR with a copy of this judgment.