
(2012) 07 GAU CK 0085
In the Gauhati High Court
Case No : Criminal Appeal No. 114 (J) of 2009

Sri Sajal Sarkar @ Sajal Malakar

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 19-07-2012

Acts Referred:

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

Citation : (2012) 07 GAU CK 0085

Hon'ble Judges : Anima Hazarika, J; Amitava Roy, J

Bench : Division Bench

Advocate : Bibekananda Gogoi, Amicus Curie, for the Appellant; D. Das, Assistant Public Prosecutor, Assam, for the Respondent

Final Decision : Allowed

Judgement

Amitava Roy, J.—Being aggrieved by his conviction u/s 302 of the Indian Penal Code (for short hereafter referred to as the IPC) by the judgment and order dated 03.09.2009, passed by the learned Sessions Judge, Hailakandi in Sessions Case No. 22/2008, thereby, sentencing him to undergo imprisonment for life and also to pay a fine of Rs. 5,000/-, in default, to suffer rigorous imprisonment for further two months, the accused-appellant seeks the intervention of this Court for redress. We have heard Mr. Bibekananda Gogoi, learned Amicus Curiae for the accused-appellant and Mr. D. Das, learned Addl. Public Prosecutor, Assam.

2. The prosecution case is traceable from the FIR lodged on 25.08.2004 by one Shri Uttam Debnath, the son of the deceased with the Officer-in-Charge Lala Police Station, Hailakandi with the allegation that at about 10.030 a.m., on the very same date, there was an altercation between the accused-appellant and his wife on one hand and the deceased on the issue of falling of a betel nut leaf on the roof of his (accused-appellant) house. The FIR further disclosed that an exchange of obscene words followed, whereafter, the accused-appellant felled deceased on the ground and hacked him on the head with an axe in order to kill

him. Though, the injured was rushed to the Lala Hospital, he died on the way. On the FIR, Lala P.S. Case No. 147/2004 was registered u/s 302/34 of the IPC, following which, charge sheet was, however, laid only against the accused-appellant. He having denied the charge, at the trial, the prosecution examined nine witnesses, including the Investigating Officer as well as the Doctor, who had performed the post mortem examination.

3. The accused-appellant in his statement u/s 313 Cr.P.C. denied the charge and took a plea that on the date of the incident, the deceased, following a quarrel, visited his (accused-appellant) house with a dao to assault him on which he (accused-appellant) came out with a firewood in his self defence. The accused-appellant further contended that on seeing him, the deceased started running and he (accused-appellant) chased him and that in the process, the deceased collided with the branch of a tree and fell down on the root of a tree and sustained serious head injuries to which he, eventually, succumbed. The son of the accused-appellant was also examined in defence as DW 1, who reiterated the same version. By the impugned judgment and order, however, the accused-appellant was convicted and sentenced as above

4. The learned Amicus Curiae has argued that the prosecution having totally failed to prove the charge against the accused-appellant, the learned trial Court felled in gross error in convicting and sentencing him. According to Mr. Gogoi, the evidence of PW 2, Smt. Bina Debnath, the wife of the deceased, which has been projected as the only eye witness of the incident by the prosecution, is wholly unreliable and, therefore, the learned court below ought to have acquitted the accused-appellant. Apart from contending that there was a standing land dispute between the parties, on which there was a quarrel between them on the date of the incident, following which, the deceased, as the aggressor, wanted to attack the accused-appellant with a dao in hand and that on being resisted by him (accused-appellant), he (deceased) fell on a root of a tree and sustained injuries, the learned Amicus Curiae has further urged that the learned trial Court left out of consideration for no reason whatsoever the defence evidence and that this having vitiated the impugned judgment and order, the same is liable to be interfered with. Mr. Gogoi, has argued with reference to the post mortem report, on one hand, the prosecution's version, as ought to be proved, was wholly unacceptable and on the other, the defence story was more credit worthy and, thus, the conviction and sentence accorded against the accused-appellant is unsustainable in law and on facts. The learned Amicus Curiae argued that from the disclosures in the post mortem examination, it is evident as well that at the relevant point of time, the deceased was intoxicated. The defence version, as offered, being consistent in all material particulars and conquer to that of prosecution, the impugned judgment and order ought to be interfered with, he urged.

5. Mr. Das, as against this, has argued that on a plain reading of the evidence of PW 2, Smti. Bina Debnath, the charge against the accused-appellant stands

proved to the hilt and, thus, the defence version, as sought to be made out, is wholly insignificant pointing out that the accused-appellant, after the incident, have remained absconding for long four years evading the arrest and that because of his long absence, amongst others, the weapon of assault could not be seized. The learned Addl. Public Prosecutor, Assam has argued that having regard to the conduct of his (accused-appellant), no benefit of doubt can be extended to him. According to Mr. Das, the prosecution has been able to prove the charge beyond all reasonable doubt and, therefore, no interference with the conviction and sentence is warranted.

6. For fully appreciate the rival submissions advanced, it would be appropriate to briefly deal with the evidence on record.

7. P W 1, Sri Uttam Debnath, the son of the deceased, deposed that on the date of the occurrence at about 10.30 a.m. a quarrel erupted between the two families and was pacified by him through his intervention. According to this witness, he thereafter went to the market, whereupon, he received one telephonic call from one Shymal Debnath that the accused-appellant had killed his father with the help of a spade. The witness stated that on receiving the information he rushed for home and found his father in the injured condition, whereupon, he removed him (deceased) in an auto rickshaw for medical treatment. The witness was categorical in stating that at that state the injured was not in a position to speak. According to this witness, he, thereafter, lodged the FIR, Ext. 1 and then, went to the Lala Primary Health Centre, where his father had been taken for treatment. He proved the inquest on the dead body vide Ext. 2. According to this witness, his mother, Smti. Bina Debnath, had witnessed the assault on the deceased by the accused-appellant. He clarified, however, that none else had seen the occurrence.

8. In cross-examination, this witness further clarified that in the morning of the day of occurrence, there was a quarrel between the wife of the accused-appellant and his father relating to the boundary of their lands. The witness referred to a written agreement between the parties in connection with such dispute. He admitted of not having seen the actual assault by himself.

9. PW 2, Smti. Bina Debnath, stated on oath that on the date of the occurrence when her husband (deceased) had gone for bath in a nearby pond the accused-appellant gave a blow on his head with a spade and, thereafter, fled from the scene. The witness also referred to a quarrel between the accused-appellant and the deceased in the morning on the date of the occurrence regarding falling of one betel nut leaf on the dwelling house on his (accused-appellant) roof. In cross-examination, she further stated that the pond was located outside their homestead. According to her, she came out after hearing the hue and cry and ran towards the pond and became senseless on seeing her injured husband. She denied the suggestion made on behalf of the defence that on the date of the occurrence her husband were armed with a dao and tried to assault the accused-appellant, who resisted, following which, the deceased ran away and dashed

against a branch of a tree and sustained injuries on his head.

10. PW 3, Shri Apu Das is a neighbour, who at the relevant point of time was ploughing his field nearby and deposed that on hearing hue and cry he rushed to the place of occurrence and saw the deceased lying nearby the pond with severe head injuries on his person. The witness stated that the people assembled there informed him that the accused-appellant had assaulted Kamal Debnath (deceased) and had fled away from the place of occurrence. This witness in his cross-examination, amongst others, also referred to a quarrel between the deceased and the accused-appellant on the very same date.

11. PW 4, Sri Nikhil Ch. Das, a neighbour was declared hostile by the prosecution and was confronted by his statement made before the police to the effect that on the date of the occurrence, the accused-appellant and the deceased had picked up a quarrel regarding falling of one leaf of betel nut tree on his (accused-appellant) dwelling house and then, he (accused-appellant) gave a spade blow on the head of the deceased for which he fell on the ground and raised alarm. In cross-examination, this witness, however, admitted that the accused-appellant and the deceased were neighbours and had a long standing quarrel relating to the boundary of their lands.

12. The evidence of PW 5, Gauranga Deb, PW 6, Harilal Bowmik and PW 7, Samsuddin Barbhuiya is not of much relevance as the same relate, in particular, to the conduct of inquest on the dead body.

13. PW 8, Sri K.Z. Choudhury, is the Doctor, who had performed the autopsy on the dead body. He stated on oath to have found the following injury:-

One incised wound of size 9.3 cm x 5.4 cm x 5.8. cm is seen running entero-posteriorly over the right parietal region of the head. Blot blood clots are seen over the wound and on the margin of the wound and over the skin of the scalp neighbouring to wound. He found as well in the bladder of the deceased 60 ml of straw colour urine.

According to this witness, the wound on the right side of the head must have been caused by striking the skull with a heavy sharp edged object with great force. In his opinion the death was due to massive intracranial haemorrhage and injury to the right cerebral hemisphere of the brain following a grievous head injury caused by a heavy sharp edged object striking the head with great force. In cross-examination, he stated that such injuries can be caused by striking with a sharp object and if a person run with a high speed and strike on an object such injuries may be caused and if such injury is associated with internal haemorrhage, death may follow.

14. PW 9, Lokman Choudhury, the Investigating Officer drew the FIR, Ext. 1, inquest report, Ext. 2 and the charge sheet, Ext. 1. With reference to the case diary, he stated that the PW 4, Sri Nikhil Ch. Das had stated before him that the accused-appellant and the deceased had picked up a quarrel about on the falling

of a betel nut leaf on his (accused-appellant) dwelling house and then he (accused-appellant) gave spade blow on the deceased for which the latter fell down on the ground and raised alarm.

15. It is obvious from the evidence on record both oral and documentary that except PW 2, Smti. Bina Debnath, the wife of the deceased, there is no eye-witness. Though, PW 1, Sri Uttam Debnath, the informant stated about a quarrel between the accused-appellant and the deceased in the morning prior to the incident, he was, admittedly not present when the alleged assault was caused on the deceased.

16. Noticeably, in the First Information Report, Ext. 1, lodged by the PW 1, Sri Uttam Debnath, it was alleged that at about 10.30 a.m. on 25.08.2004 i.e. the date of the incident following an altercation between the accused appellant and his wife and the deceased over falling of a betel nut leave on his (accused-appellant) house, there was a quarrel followed by hit and exchanges, whereafter, the accused-appellant felled the deceased on the ground by hacking him on the head with an axe in order to kill him. The narration in the FIR, apparently, suggests a continuation in the sequence of events with no time lag in between. Moreover, the informant referred to an axe as the weapon of assault and not of a spade as referred to by the PW 2, Smti. Bina Debnath. The testimony of PW 2 is apparently in departure from the projection of facts appearing from the FIR. According to her, after the quarrel between the accused-appellant and the deceased, when latter had gone for bath to a nearby pond outside their compound and was in the process, he (deceased) was attacked by the accused-appellant with a spade on the head and the back, whereafter, he (accused-appellant) fled from the sight. This witness, in cross-examination, inter alia, stated that at the time of the incident, she was in her dwelling house and that after hearing the hue and cry she came out therefrom and rushed towards the pond to meet the number of persons, who had already assembled thereat. This assumes significance in view of the deposition of PW 1, Sri Uttam Debnath, who stated that, except, his mother, PW 2, there was no eye-witness to the incident. Noticeably, when PW 1, Sri Uttam Debnath returned home on receiving the information of the assault of his father, though, was not dead, was not in a position to speak. There is, thus, on behalf of the prosecution no evidence whatsoever, except the testimony of PW 2 to establish the culpability of the accused-appellant in the offence with which he was charged.

17. To reiterate, PW 2, Smti. Bina Debnath, the wife of the deceased was offered a suggestion that on the date of the incident, the deceased had come out with armed a dao and had tried to assault the accused-appellant, who resisted the same, whereafter, the deceased ran and dashed against a branch of tree and sustained injuries on his head. This suggestion, understandably, was denied by PW 2, we, however find that this version was reiterated by the accused-appellant in his statement u/s 313 Cr.P.C. and was affirmed by his son, DW 1 on oath. There is a visible consistency in the defence plea in this regard in

contradistinction to the anomalous state of evidence of the prosecution witness, PW 2 when placed in a comparison to the accusations made in the FIR.

18. Not only, the weapon of alleged assault, the spade, had been seized, more importantly, the medical opinion that the injuries sustained by the deceased was possible by a fall on a hard substance with great impact, a proposition which is compatible with the defence case on all force. Though, per se, the post mortem report does not indicate presence of alcohol in the bladder, there is no explanation, as well, for the omission on the part of the prosecution to examine Sri Shymal Debnath, who had informed PW 1, the son of the deceased about the incident and the involvement of the accused-appellant in it as the assailant.

19. On a totality of the facts and circumstances narrated hereinabove, we are of the opinion that the prosecution had failed to prove the charge against the accused-appellant beyond all reasonable doubt as contemplated in law. The evidence as a whole, in our considered opinion, fails to inspire the confidence to record the conviction and sentenced against the accused-appellant without any manner of doubt. In this facts and circumstances, we are constrained to extend the benefit of doubt to the accused-appellant and consequently, interfere with the impugned judgment and order. Ordered accordingly. In the result, the appeal succeeds. The impugned judgment and order is set aside. The accused-appellant would be set at liberty forthwith, if not warranted in any other case. Before we part, we wish to record our appreciation for the assistance rendered by Mr. Bibekananda Gogoi, as the learned Amicus Curiae in the adjudication of the appeal and as a token thereof, direct payment of his professional fee, which we quantify of Rs. 5,000/- (Rupees five thousand) to be paid by the State Government at the earliest.