
(2000) 08 GAU CK 0004

In the Gauhati High Court

Case No : Criminal Death Reference No. 1 of 2000 and Criminal Appeal No's. 35, 36, 37 and 43 of 2000

State of Assam and Others

APPELLANT

Vs

Dhaneswar Haloi and Others

RESPONDENT

Date of Decision : 03-08-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(2), 354(3)
Penal Code, 1860 (IPC) — Section 148, 149, 302, 324, 325

Citation : (2000) 2 GLT 636

Hon'ble Judges : N.C. Jain, J;D. Biswas, J

Bench : Division Bench

Advocate : J.M. Choudhury, N. Ahmed, P. Katakya, T.S. Deka, P.S. Deka and G.K. Sharma, for the Appellant; K. Deka, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

N.C. Jain, J.—All these Criminal Appeals No. 35/2000, 36/2000, 37/2000 and 43/2000 are being " disposed of together as they have arisen out of one Sessions trial culminating into the judgment of the learned Sessions Judge convicting all the Appellants u/s 302/148/149/458/149, 326/149, 325/149, 325/324, 328/149, 325/149, 395 and 427 of the Indian Penal Code. Accused Dhaneswar Haloi has been sentenced to death whereas the other accused have been sentenced to undergo Rigorous Imprisonment for life u/s 302 of the Indian Penal Code. They have also been sentenced to undergo other terms of imprisonment under various other sections to which we need not make any reference as they are detailed in the judgment of the learned Sessions Judge.

2. The prosecution story as has been unfolded in the First Information Report, Ext. 1 in short is that at 9 P.M. on 23rd of September, 1989 when the informant, who has appeared as P.W. 1, along with other members of the family were about to go to sleep after dinner, seven named accused persons Sri Dhaneswar Haloi A1 Sri Niron Haloi A2 Sri Dinesh Baishya (dead) A3 Sri Rup Kanta Haloi A3, Sri

Ramen Haloi A10 Sri Ratneswar Haloi and Sri Harkanta Haloi A4 along with Ors. armed with deadly sharp weapons as daggers, spears, daos etc. trespassed into the complainant's residence and entered their dwelling houses by breaking open their doors and windows. It is further alleged in the First Information Report that the accused persons at the first instance inflicted grievous injuries upon the informant Monomoti Haloi, PW. 1 and upon her father, Sri Moniram Haloi, Sri Swargaram Haloi, Smti. Dhaneswari Haloi, Smti Purnima Haloi and Sri Manju Haloi by staffing them with daggers and by hacking with daos. It is further alleged that they looted away the cash, articles and staffed her elder brother, Tarun Haloi to death with dagger, dao etc., before leaving their homes.

3. In order to sustainable the allegations made in the First Information Report, the prosecution has produced as many as 17 witnesses out of whom four witnesses i.e. PW. 1, PW. 2, PW. 4 and PW. 5 are the eye-wintesses regarding the occurrence which took place inside the room where Tarun Haloi has been murdered. It would not be out of place to mention at this stage that the father of the informant was killed outside in the verandah whereas Tarun Haloi was killed inside the room where the aforementioned eye-witnesses were present. In short, the evidence of PW. 1 is mat there was a dispute between the complainant party and the accused Dhaneswar culminating into filing of a criminal complaint and out of grudge Dhaneswar along with his brother Niranjan and Ors. entered the house at 9 P.M. Elder sister Purnima, PW. 2 saw two men standing behind their newly built house and she called out to her mother that she should come and see as to who were the men standing. Swargaram Haloi, the elder brother of Moniram came in response to the call of Purnima and went towards the road. At that time the accused persons came with daggers and spears and shouted by saying that they would see as to who would save Tarun on that day. They attempted to break the walls of the dwelling house, but having failed to make their entry into through the walls, four rods affixed with the window were broken and through this passage they entered the house. It has further come in the evidence of PW. 1 that Purnima and the eye-witnesses were there in that room where Dhaneswar, Niranjan, Rup Kanta and Dinesh (who has died during the investigation) entered. Dhaneswar and the other three persons were recognised by the eye-witnesses as a lantern and a lamp were burning inside the room. It has further come in the evidence that having entered the house, the accused persons asked for Tarun who had hid himself in a "Gash Pera" (a very heavy wooden box for keeping valuables). Since the accused persons did not find Tarun, they put the mosquito net on fire. They further told the four eye-witnesses that they would not do any harm to them if Tarun was brought out. Upon this, the four eye-witnesses replied that Tarun was not there. At that moment PW. 1 was hit by Dhaneswar in the face with a rod making her bled from the forehead. Dhaneswar is alleged to have hit the elder sister and mother, on the right hand. It is further stated in the statement of PW. 1 that the back of the mother was trampled with shoes by Dhaneswar upon which she with her hands folded in supplication requested Dhaneswar, but he kicked her in the mouth dislocating

two of her teeth. Dhaneswar is alleged to have beaten the younger sister as well. It was thereafter that the accused persons started pushing at the false ceiling of the house thinking that Tarun was hiding there making the ceiling collapse. Ultimately, they found Tarun in the "Gash Pera" and on finding him there Dhaneswar said, "Bastard" you are hiding here. He is alleged to have given a blow with the dagger when Tarun was still inside the pera. Thereafter he was brought out from the Gash Pera and all the four accused persons gave him beating with rods, daos and daggers. It has further come in the statement of PW 1 that Dhaneswar in the end dismembered the penis of Tarun with a sickle which he was carrying in his waist

4. So far the incident in the room is concerned, the aforementioned story which has come in the statement of PW1 and has by and large been corroborated by other eyewitnesses PW. 2, PW. 4 and PW. 5 as well. As regards the killing of Moniram Haloi, the old man in the varandah, no eye-witness out of the aforementioned four eye-witnesses to the occurrence has stated a word that they had seen the occurrence.

5. After going through the entire evidence Mr. J.M. Choudhury, learned senior counsel, appearing for the Appellants in Crl. Appeal Nos. 35/2000, 36/2000 and 37/2000 has with his usual fairness and frankness submitted that while the learned Sessions Judge has committed an error in holding the accused guilty of the commission of murder of Moniram Haloi, conceded at the same time that the four accused persons Dhaneswar Haloi, Niranj an Haloi, Rup Kanta Haloi and Dinesh (since dead) were guilty of the commission of murder of Tarun Haloi. At the same time Mr. Choudhury, has vehemently submitted that the present case in absence of aggravating circumstances cannot be said to be one of the rarest of the rare cases in which capital punishment is called for. The learned Counsel for the Appellants while pleading for commutation of death sentence to life imprisonment has cited certain judgments. The counsel for the State, Mrs K. Deka with equal vehemence argued that the present in one of the rarest of a rare case calling for imposition of maximum penalty.

6. Both the counsel for the parties, in support or against imposition of death sentence have relied upon the following judgments:

1. Ediga Anamma Vs. State of Andhra Pradesh, 2. Rajendra Prasad Vs. State of Uttar Pradesh, 3. Bishnu Deo Shaw Vs. State of West Bengal, 4. Bachan Singh and Others Vs. State of Punjab, 5. Bachan Singh Vs. State of Punjab, 6. 1981 (1) SCC 574 Ummilal Singh and Ors. v. State of Punjab 7. Machhi Singh and Others Vs. State of Punjab, 8. State of U.P. Vs. M.K. Anthony, 9. Kehar Singh and Others Vs. State (Delhi Administration), 10. Kamta Tiwari Vs. State of M.P., 11. 1999 Crl.LJ. 1836 Nirmal Singh and Anr. v. State of Haryana 12. 1999 Crl.LJ. 3124 State of Tamil Nadu v. Nalini and Ors. 13. Sri Mahendra Nath Das @ Sri Gobinda Das Vs. State of Assam, 14. Jai Kumar Vs. State of M.P.,

7. A Division Bench of this Court in Criminal Appeal No. 120 (J) of 1996 Shri Dina

Bawri v. State of Assam decided on 8.5.2000 after discussing the aforementioned judgments re-enunciated the following principles:

- (i) According to the changed legislative policy as is patent on the face of Section 354(3) of the Code of Criminal Procedure normal punishment for murder is imprisonment for life; whereas death penalty is an exception;
- (ii) The Court is mandatorily required to give special reasons while imposing extreme penalty of law i.e. death;
- (iii) The Court must hear the accused on the question of sentence;
- (iv) Although Section 235(2) of the Code of Criminal Procedure does not contain any specific provision for recording evidence and it only provides for hearing of the accused regarding sentence, yet it is implicit in this provision that in case a request is made either by the prosecution or the accused or by both, the Court should provide the party or parties concerned an opportunity of producing evidence on the point of sentence;
- (v) While providing an opportunity to the parties to lead evidence regarding sentence, the Court will have to take care that hearing on the question of sentence is not turned into an instrument for unduly protracting the proceedings and that the claim of proper hearing should be harmonized with the requirement of expeditious disposal of the case;
- (vi) The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one u/s 302 Penal Code, the Court should not confine its circumstances "principally" or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal;
- (vii) While ascertaining the existence of absence of special reasons" the Court must pay due regard to both the crime and the criminal;
- (viii) What is the relevant weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case;
- (ix) Judges should never be blood thirsty. Hanging of murderers has never been too good for them;
- (x) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- (xi) Before opting for death penalty the circumstances for the "offender" also require to be taken into consideration alongwith the circumstances of the crime;
- (xii) The Court must draw a balance sheet of aggravating and mitigating circumstances and while doing so the mitigating circumstances must be accorded full weightage and a just balance sheet has to be struck between the aggravating and mitigating circumstances before exercising the option between death penalty

and life imprisonment;

(xiii) While exercising the option between the death sentence and life imprisonment the Court shall keep in mind the mitigating circumstances as suggested by Dr. Chitale which have been noticed in Bachan Singh's case (supra);

(xiv) The Court should award death sentence only in rarest of rare case.

8. It is in the light of the aforementioned principles that this Court has to decide whether the present case is one of the rarest of a rare case or not. All the accused persons are alleged to have given blows to the deceased Tarun. The only additional blow attributed to Dhaneswar is that he had given a dagger blow when he was inside the "Gash Pera". This, in our considered view, would be no aggravating circumstance making his case distinguishable with the cases of the other accused persons. The fact that he was leading Ors. in committing the crime can also be not said to be such an aggravating circumstance that he deserves extreme punishment of death. As has been seen above while deducing the guidelines as laid down by the Apex Court, there has to be something uncommon in the commission of the crime before awarding death sentence. The manner in which the crime has been committed in the instant case is common in so many murder cases. Had it been proved by the prosecution that penis of Tarun Haloi was chopped off, it could have been said to be an aggravating circumstance. However, in the instant case it has not been proved by the prosecution that the private part of the deceased was chopped off. The learned Sessions Judge has also found that eyewitnesses have exaggerated on this point. The investigating officer did not find the private part missing at the time of holding the inquest. The doctor performing the post-mortem examinations also has not noticed any such injury. As has been observed above, Dhaneswar could have been held to have acted in a brutal manner if he had been found guilty of chopping the private part of the deceased. In view thereof, we do not find the present case to be one of the rarest of a rare case. It can also not be held on first principle that the sentence of life imprisonment on the facts of the present case would be quite inadequate. This is what is the mandate of law as has been laid down by the Apex Court.

9. Coming to the proof regarding the killing of Moniram Haloi, it would be sufficient to observe that nobody has admittedly seen the occurrence. The dying declaration which is alleged to have been made to the aforesaid eye-witnesses cannot be relied upon even for a moment for inherent contradictions. P.W. 1 at one stage stated that her father told her that "small boys physically assaulted him" and that he could not tell their names. In the next breath she stated that "father named Rup Kanta and Niranjana." P.W. 2 in her statement stated that her father told them that Rameswar, Ratneswar and Har Kanta had attacked him. But at the same time she has stated that he was able to speak a little. P.W. 4 stated that her father named Rama and Padma as two persons who had given him injuries. She also admitted that father's words were not clear and she could not

make out anything.

10. It is clear from the statements of the aforesaid eye-witnesses that only one name of Rameswar is common in the statement of the two eye-witnesses i.e. PW.2 and PW.4. It appears to us that the father was not in a position to speak clearly and that the version as given by PW. 1 in the first instance that small boys had killed him was the correct version and he did not name anyone at all. In any case this Court is not in a position to place any reliance upon the dying declaration. Even the learned Sessions Judge has not placed reliance upon the dying declaration or the statement of any eye-witness. He has convicted Har Kanta Haloi, Santi Ram Das, Kailash Haloi, Padma Ram Talukdar, Harsha Haloi, Prasanna Haloi and Rameswar Haloi presuming that the old man was assaulted by some of the rioters of the same group. The observations of the learned Sessions Judge with which we disagree are reproduced below:

PW. 1 says that when her father made a dying declaration, he named accused Niranjana, Rupkanta as his assailants. But according to PW. 2 he further stated that accused Rameswar, Ratneswar and Harakanta had assaulted him. On the other hand, according to PW. 3 her father only told her without naming anybody of the persons arraigned, that the "young boys" of the group had assaulted him. Therefore, it is difficult to accept the alleged dying declaration of deceased Moniram Haloi identifying his assailants. However, the story of alleged dying declaration that he had been assaulted by the same group of offenders who had ransacked his house on that night can be accepted as true. Besides, deceased Moniram Haloi was injured in the same incident and thereafter it can safely be presumed that he was assaulted by some of the rioters of the same group.

Our basic reason of disagreement with the learned Sessions Judge is that none of the eyewitnesses had seen the act of assault upon Moniram Haloi and none could be recognised by them. That apart, in a criminal case, presumption can not be a substitute of "proof".

11. For the reasons recorded above, the aforementioned Appellants deserve to be acquitted by giving them benefit of doubt.

12. Adverting to the guilt of the four accused persons out of whom one Dinesh had already died during investigation, we have already noticed in the earlier part of the judgment that Mr. JM Choudhury has submitted before us that they were present in the room where the incident of killing had taken place. Apart from his concession, their guilt is otherwise proved by consistent version given by as many as four eye-witnesses who were themselves injured. Discrepancy here and there would certainly not make them unworthy of credence. We, therefore, find them guilty of the charge u/s 302 I.P.C.

13. For the reasons recorded above, we do not confirm the death reference No. 1 of 2000 and commute the sentence of Dhaneswar to life imprisonment (R.I.). Death reference would stand rejected. Criminal Appeal No. 35/2000 is partly allowed and death sentence of Dhaneswar Haloi is commuted to one life

imprisonment (R.I.) with a fine of Rs. 5,000/. In default of payment, he shall undergo further R.I. for a period of six months. The fine if realised be given to the family of Tarun Haloi.

14. Criminal Appeal No. 36/2000 is also partly allowed. Accused Hara Kanta Haloi is acquitted where as the appeal of Rup Kanta Haloi and Niranjana Haloi is rejected and their sentences imposed by the trial court on various counts is affirmed. The Criminal Appeal No. 37/2000 of Santi Ram Das, Kailash Haloi and Padma Ram Talukdar is allowed in toto and the accused persons are acquitted on benefit of doubt.

15. Criminal Appeal No. 43/2000 is also allowed and the Appellants Harsha Haloi, Prasanna Haloi and Rameswar Haloi are also acquitted on benefit of doubt.