

(2013) 08 GAU CK 0047

In the Gauhati High Court

Case No : Death Reference No. 01 of 2013, Criminal Application 13 (J) , 14 (J) , 15 (J) , 16 (J) , 17 (J) and 87 of 2013

State of Assam and Others

APPELLANT

Vs

Salim Uddin and Others

RESPONDENT

Date of Decision : 07-08-2013

Acts Referred:

Citation : (2014) 1 GLD 209 : (2013) 4 GLT 1023

Hon'ble Judges : Indira Shah, J;I.A. Ansari, J

Bench : Division Bench

Advocate : P. Katakya, Mrs. R.B. Bora, Mr. K. Lahkar, Ms. M. Malik, Ms. B. Sharma, Ms. R.D. Mazumdar and Mr. S.C. Biswas, Amicus Curiae, for the Appellant; D. Das, Addl. P.P., for the Respondent

Judgement

I.A. Ansari, J.—These appeals and death references are directed against the judgment and order, dated 07.01.2013, passed, in Sessions Case No. 75 of 2012, by the learned Sessions Judge, Karimganj, whereby the present six appellants have been convicted under various penal provisions and sentenced to suffer accordingly different sentences as mentioned below.

(i) By the impugned judgment and order, accused Hafijur Rahman and Salimuddin stand convicted u/s 302 read with Section 34 IPC and each one of them has been sentenced to death besides paying fine of Rs. 15,000/-. The accused Hafijur Rahman and Salimuddin have also been convicted u/s 365 read with Section 34 IPC and each one of them stands sentenced to undergo rigorous imprisonment for 7 (seven) years and pay fine of Rs. 5,000/- and, in default of payment of fine, suffer rigorous imprisonment for a period of 6 (six) months. These two accused have been further convicted u/s 25(1-B)(a) of the Arms Act, 1959, and sentenced to undergo rigorous imprisonment for 3 (three) years each with fine of Rs. 5,000/- and, in default of payment of fine, undergo rigorous imprisonment for 6 (six) months.

(ii) So far as appellant, Hafijur Rahman, is concerned, he has been convicted u/s

27(1) of the Arms Act, 1959, too, and sentenced to pay fine of Rs. 5,000/- and, in default of payment of fine, suffer rigorous imprisonment for 6 (six) months.

(iii) The accused-appellant, Rajani Talukdar, has been convicted u/s 365 read with Section 34 IPC and sentenced to undergo rigorous imprisonment for 7 (seven) years with fine of Rs. 5,000/- and, in default of payment of fine, undergo rigorous imprisonment for 6 (six) months.

(iv) The accused-appellant, Sultanuddin, has been convicted u/s 365 read with Section 34 IPC and sentenced to undergo rigorous imprisonment for 10 (ten) years with fine of Rs. 15,000/- and, in default of payment of fine, undergo rigorous imprisonment for 12 (twelve) months.

(v) The accused-appellant, Hussain Ahmed, has been convicted u/s 365 read with Section 34 IPC and sentenced to undergo rigorous imprisonment for 7 (seven) years with fine of Rs. 5,000/- and, in default of payment of fine, undergo rigorous imprisonment for a further period of 6 (six) months.

(vi) The accused-appellant, Raju Ahmed and Hussain Ahmed, stand convicted u/s 302 read with Section 34 IPC and they have been sentenced to undergo imprisonment for life with fine of Rs. 15,000/- and, in default of payment of fine, undergo rigorous imprisonment for a further period of 12 (twelve) months.

2. Because of the sentences of death, which have been passed by the learned trial Court, against two of the accused-appellants, the proceedings of the trial have been submitted, u/s 366 Cr.P.C., to this Court by the learned trial Court for confirmation of the sentences of death.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be described as under:

(i) Abrar Ahmed @ Naj (since deceased) was a student of B.Sc. 3rd year. On 19.11.2011, at about 06.30 p.m., he went, on his motor cycle, to Bhangabazar and never returned home. On the following day, on 20.11.2011, in the morning, at about 07.00 a.m., accused Rajani Talukdar informed the family of Naj that the abandoned motor cycle of Naj was seen lying near a petrol pump. On receiving the information, so given by accused Rajani Talukdar, Tufail Ahmed (P.W. 1), father of Abrar Ahmed @ Naj, lodged an Ejahar, in writing, at Badarpur Police Station, stating therein to the effect that his son, Abrar @ Naj, might have been abducted. In the Ejahar, so lodged, the informant expressed the opinion that Rajani Talukdar might be involved in the abduction of Naj. Based on the said Ejahar, Badarpur Police Station Case No. 181 of 2011, u/s 365 IPC, was registered.

(ii) In course of time, when the villagers questioned Rajani, the latter made an extra-judicial confession to the effect that he had joined a conspiracy, hatched by accused Salim Uddin and two others to kidnap Naj. By his extra-judicial confession, accused Rajani also disclosed that he (Rajani) had been offered Rs. 2,00,000/- to bring Naj and accused Salim Uddin gave a motorcycle and a bottle

of Corex mixed with sleeping tablets and, accordingly, accused Rajani met Naj and requested Naj to accompany him to Badarpur for purchasing clothes and, thereafter, they had their dinner in a restaurant and, having consumed Corex mixed with intoxicants, Naj fell down and, then, Salim Uddin, Hafijur Rahman, Rehnauddin, Munna, Kamal Hussain and others came and carried Naj, in a maruti car, towards Banga. Based on this statement of accused Rajani, Naj's motorcycle was recovered, on 20.11.2011 itself by the police and accused Rajani was taken into custody.

(iii) Thereafter, on the same day, late in the evening, Tufail Ahmed (P.W. 1) received a phone call informing him that his son, Naj, had been abducted and if he (Jufail) were to save Naj, he (P.W. 1) shall pay a ransom of Rs. 50,00,000/-. However, upon some bargaining, the miscreants agreed to return Naj on payment of Rs. 12,00,000/-. In order to secure the safe release of his son, Naj, P.W. 1 (Tufail Ahmed) paid a ransom of Rs. 12,00,000/- on 22.11.2011, but Naj was not returned.

(iv) On 22.11.2011, the informant, P.W. 1 came, again, to Badarpur Police Station and informed the police there that the miscreants had telephoned him and had initially demanded Rs. 50,00,000/- for release of his son, Naj, and, upon bargaining, the miscreants had agreed to release Naj on payment of Rs. 12,00,000/- and, in order to secure safe release of his son, Naj, he (P.W. 1) had paid the amount of Rs. 12,00,000/- to the miscreants, but despite receipt of the ransom, the victim was not released. This information was recorded, at Badarpur police station, in the General Diary.

(v) During the course of investigation, it came to light that after his abduction, Naj had been killed by the miscreants and his dead body had been kept buried. While a mobile handset of Naj was recovered from Rajani, the dead body was recovered, on 25.11.2011, at the instance of Manwara Bibi, wife of accused Bulbul Ali.

(vi) Coupled with the above, accused Sultan Uddin was apprehended with the help of Meghalaya police and a bag, containing money amounting to Rs. 6,88,500/-, was recovered from his possession. This apart, according to what Sultan Uddin had disclosed before the police, the said money was kept with accused Sultan Uddin by his brother, accused Salim Uddin. Sultan Uddin also disclosed that the said money was the ransom amount paid by father of Naj and that the victim had been killed. Accused Salim Uddin was, then, arrested from Bilonia, which falls on the border of Tripura. Thereafter, an amount of Rs. 97,000/- was recovered from the possession of accused Salim Uddin.

(vii) At the instance of accused Bulbul Ali and, on the disclosure made by him, Naj's trouser (pant) was recovered. Similarly, pistol and ammunition, one knife, etc., were recovered at the instance of accused Hifjur Rahman.

(viii) At a later stage of investigation, Manowara Bibi was made accused by the police and was accordingly arrested and interrogated.

(ix) On finding the dead body of Naj, inquest was held on the said dead body and the same was also subjected to post mortem examination, which revealed that Naj had died of bullet injury.

4. On completion of investigation, a charge-sheet was Laid, under Sections 120B/365/302/201/384 IPC, against as many as 20 accused persons. Out of the twenty persons, named as accused in the charge sheet, 7 (seven) accused persons were shown as absconders and 13 (thirteen) accused persons faced the trial.

5. During the trial, charges u/s 120B, Section 302 read with Section 34 IPC, Section 201 read with Section 34 IPC and Section 27(3) of the Arms Act, 1959, were framed against the thirteen accused facing the trial. A separate charge, u/s 387 read with Section 34 IPC, was framed against accused Salim Uddin, Hifjur Rahman, Rehnauddin, Kamal Hussain, Rajani Talukdar and Hussain Ahmed. Yet another charge was separately framed, u/s 25(1A) of the Arms Act, 1959, against accused Hifjur. Besides these charges, a charge was further framed, u/s 365 read with Section 34 IPC, against accused Salim Uddin, Hifjur Rahman, Rehnauddin, Kamal Hussain and Hussain Ahmed.

6. When the charges, so framed, were explained to the accused, they all pleaded not guilty to their respective charges.

7. In support of their case, prosecution examined as many as 22 (twenty two) witnesses. During the course of trial, though accused Bulbul Ali, his wife, Manowara Bibi, and accused Hussain Ahmed sought to be declared approvers, it was accused Bulbul Ali only, who was made an approver, and was accordingly examined and cross-examined as P.W. 23.

8. All the accused were, then, examined u/s 313(1)(b) Cr.P.C. and, in their examinations aforementioned, all the accused denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that of denial. No evidence was, however, adduced by the defence.

9. On conclusion of the trial, learned trial Court acquitted 7 (seven) of the 13 (thirteen) accused persons, who had faced the trial, and, having found 6 (six) of the accused persons guilty of various offences, as already indicated above, they have been convicted and various sentences have been passed against them accordingly, which have been described above.

10. Though the learned trial Court has acquitted 7 (seven) of the accused persons, neither the State has preferred any appeal nor has any revision or appeal been preferred, or filed, by the informant or the victim's family. Thus, the acquittals, so granted, have attained finality so far as 7 (seven) acquitted accused persons are concerned.

11. The limited question, therefore, which confronts us, is: Whether the findings of guilt, which the learned trial Court has arrived at against the 6 (six) remaining

accused persons, are sustainable in the eyes of law and, if so, whether the sentences, awarded to them, are just and appropriate or is the conviction of all or any of the accused-appellants calls for interference by this Court and/or various sentences passed against them deserve to be confirmed.

12. We have heard Mr. P Katakya, Mrs. RB Bora, Mr. K Lahkar, Ms. M Malik, Ms. B Sharma, Ms. RD Majumdar, Mr. SC Biswas, learned counsel, who have appeared as Amicus Curiae, and Mr. D Das, learned Additional Public Prosecutor, Assam.

13. While considering the present appeal, what needs to be reiterated, at the very outset, is that as against the acquittal of the 7 (seven) accused persons, neither the State has preferred any appeal nor any appeal has been preferred or revision had been filed by the informant or the family of the victim. The acquittal of the 7 (seven) accused has, therefore, attained finality and, in the present appeal, this Court has to, now, examine not as to whether the acquittal of the said 7(seven) accused persons is or is not sustainable in law, but whether the conviction of the remaining 6(six) accused persons, under various penal provisions and the sentences awarded to them, are, in the facts and circumstances of the present case, sustainable. A reference, in this regard, may be made to the case of The State of Andhra Pradesh Vs. Thadi Narayana, wherein the relevant observations read as follows:

If an appeal is preferred against an order of acquittal by the State and no appeal is filed by the convicted person against his conviction, it is only the order of acquittal which falls to be considered by the appellate Court and not the order of conviction. Similarly, if an offender of conviction is challenged by the convicted person but the order of acquittal is not challenged by the State then it is only the order of conviction that falls to be considered by the appellate Court and not the order of the acquittal. Therefore, the assumption that the whole case is before the High Court when it entertains an appeal against conviction is not well founded and as it cannot be pressed into service in construing the expression "alter the finding".

14. In order to determine how the learned trial Court arrived at the findings of guilt under various penal provisions against the accused-appellants, we have minutely scrutinized the evidence on record vis-?-vis the impugned judgment and order. We are anguished to note that through the mouth of P.Ws. 5, 7, 8 and 9, detailed statements, allegedly made by some of the accused persons, have been reproduced by the learned trial Court, which seem to suggest that these statements were extra-judicial confessions, but no clear finding has been recorded in this regard.

15. It is rudimentary that the confession, judicial or extra-judicial, has to pass through the test of voluntariness. If the Court finds that the confession is voluntary, then, also, the Court cannot act upon such a confession, judicial or extra-judicial, unless it also arrives at the conclusion that the confession, which it considered, was not only voluntary, but truthfully made too. If the twin

conditions of voluntariness and truthfulness of a confession, judicial or extra-judicial, is established, the Court still has the duty to determine the extent to which such a confession is admissible, for, a confession, which is involuntary or untrue, cannot be treated as a confession in the eyes of law and, similarly, a confession, even if voluntary and true, would still not be admissible in evidence if made to the police or if made, while in the police custody, unless such a confession is made in the immediate presence of a Magistrate. A voluntarily and truthfully made confession by an accused, who is in police custody, would be admissible in evidence to the extent that Section 27 of the Evidence Act permits. Though there is no rule of law that a confession, if found to have been voluntarily and truthfully made, cannot be made basis of conviction, prudence demands that there be some corroboration with regard to the catalogue of events, which a confession discloses. (See *Shankaria Vs. State of Rajasthan*,

16. In the case at hand, it was the duty of the learned trial Court to have, first, determined if the various statements, which had allegedly been made by some of the accused persons to the prosecution witnesses, were or were not voluntary and if these statements were found voluntary, the question, to be still determined by the learned trial Court, was whether the statements were truthfully made. This apart, it was also the duty of the learned trial Court to segregate the admissible portion of the statement made by an accused from the inadmissible part or portion thereof, for, a statement, whether amounts to confession or not, would be admissible u/s 27 of the Evidence Act if an accused, while making the confession, is in the custody of the police officer, provided that only that part of the statement would be admissible, which would directly lead to the discovery of a fact.

17. In the present case, learned trial Court has proceeded to record the findings of guilt without undertaking the exercise, which we have indicated above. Mere reproduction of the evidence given by a witness and placing reliance thereupon, without indicating as to whether whole of the evidence of the witness or part thereof has been relied upon, is not acceptable in law; more so, when the learned trial Court is completely silent as regards the question as to whether the extra-judicial confessions, allegedly made by some of the accused persons, were or were not voluntary or true and, if so, whose confession or which part of the confession was voluntary and true and whether such a confession was, otherwise, admissible in evidence or not. We are disturbed to note that the conclusions, which the learned trial Court has reached, suffer from consideration of both admissible as well as inadmissible pieces of evidence.

18. As regards the recovery of motorcycle, the recovery of dead body and the recovery of fire-arms, the learned trial Court, as usual, has not indicated as to how far the evidence given, with regard to recovery of the materials aforementioned, were admissible if Section 27 Evidence Act had been resorted to. Whether the requirements of Section 27 Evidence Act have or have not been fulfilled, the impugned judgment is wholly silent

19. Coupled with the above, though the learned trial Court has framed a charge for offence of criminal conspiracy and has also framed a question for determination in this regard, no discernible answer has been provided by the learned trial Court. The learned trial Court has also not indicated as to whether the abducted boy, Naj, was killed pursuant to criminal conspiracy or not, and if that be so, the question of invoking Section 34 IPC would not have arisen. If Section 34 IPC was applicable, then, what offence(s) was or were decided to be committed in furtherance of the common intention is also not discernible from the impugned judgment

20. The recording of the statements of the accused-appellants, u/s 313(1)(b) Cr.P.C. is not clear and specific inasmuch very large number of facts have been amalgamated in questioning the accused, while examining them u/s 313(1)(b) Cr.P.C; whereas the law requires that every piece of incriminating evidence, howsoever weak or strong, be put to the person facing trial as an accused and his response shall be sought thereto. If the appellate Court, now, examines the accused-appellants, u/s 313(1)(b) Cr.P.C., the same would cause, in the facts and attending circumstances of the present case, serious miscarriage of justice.

21. For the infirmities from which suffer the findings of guilt, which the learned trial Court has arrived at, we are clearly of the view that such findings, which are based on both, admissible as well as inadmissible pieces of evidence, cannot be sustained. A trial necessitates a fair decision and a fair decision includes a fair and just marshaling of evidence. Fair and just marshaling of evidence is not possible unless the Court keeps its mind disabused from the influence of inadmissible piece or pieces of evidence.

22. In the case at hand, the evidence on record is an admixture of admissible as well as inadmissible pieces of evidence and unless the trial Court takes into account the admissible pieces of evidence by keeping excluded, wholly and completely, those pieces of evidence, which are inadmissible in law, and, then, points out as to how the guilt or otherwise of an accused-appellant has been reached, the conviction of the accused-appellant and the sentence passed against him would not be sustainable and has to be interfered with.

23. Having considered the entire materials on record, in the light of the impugned judgment and order, we have no hesitation in concluding, and we do conclude, that the interference with the conviction of the accused-appellant is, for the reasons, we have assigned above, imperative and that the case needs to be remanded to the learned trial Court for its disposal in accordance with law expeditiously and, preferably, within a period of three months from the date of receipt of a copy of this order.

24. We, therefore, set aside the conviction of the six appellants and the sentences passed against them. We remand the case for its disposal in accordance with law bearing in mind what have been indicated above. It is clarified that this order of remand shall not mean a de novo trial. The trial Court

is hereby directed to record the statements of the accused, u/s 313(1)(b) Cr.P.C., in the manner indicated above and dispose of the case in accordance with law.

25. Before parting with these appeals and the reference, arising out of the death sentence, we place it on record that we have consciously refrained ourselves from commenting on merit or otherwise of the conviction of the accused-appellants so that the learned trial Court remains completely free to come to its own independent finding after having examined further the accused-appellants u/s 313 Cr.P.C.

26. During the pendency of the trial, the accused-appellants shall be kept detained in the present custody and they shall not be allowed to go on bail and, depending upon the conclusion, which the learned trial Court may, eventually, reach as regards the guilt or otherwise of the accused-appellants, the question of enlarging the accused, on bail, or otherwise, or setting them at liberty, shall be decided.

27. Let the Amicus Curiae be paid a sum of Rs. 5,000/- each for their valuable assistance rendered to this Court.

28. With the above observations and directions, this appeal shall stand disposed of. Send back the LCR.