
(2010) 04 GAU CK 0023
In the Gauhati High Court
Case No : Criminal Appeal No. 23 of 2006

State of Tripura

APPELLANT

Vs

Nurul Amin and Others

RESPONDENT

Date of Decision : 30-04-2010

Acts Referred:

Arms Act, 1959 — Section 27(3)
Criminal Procedure Code, 1973 (CrPC) — Section 313, 378
Penal Code, 1860 (IPC) — Section 395, 396, 397

Citation : (2010) 3 GLT 768

Hon'ble Judges : H. Baruah, J; C.R. Sharma, J

Bench : Division Bench

Advocate : A. Ghosh, for the Appellant; S. Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

C.R. Sarma, J.—This appeal u/s 378 of the Code of Criminal Procedure (hereinafter called "Code of Criminal Procedure") is directed against the judgment and order, dated 11.08.2005, passed by the learned Addl. Sessions Judge, Sonamura, West Tripura, in Case No. S.T. 10 (WT/S) of 2002. By the impugned judgment and order aforesaid, the learned Addl. Sessions Judge, acquitted the Respondents from the liability of charge framed u/s 396 of the Indian Penal Code (hereinafter called "IPC") read with Section 27(3) of Arms Act.

2. The prosecution case, as unfolded at the trial, in brief may be stated as follows:

On the night of 11.06.2000, at about 12 O'clock, some miscreants forcefully entered the dwelling house of Sri Rafik Miah (hereinafter called "the deceased"), by breaking open the door and caused injury to him by using a gun. The miscreants also assaulted Smti. Bhanu Bibi (P.W. 4), wife of the deceased, by inflicting kicks on her. Thereafter, the miscreants left the place by taking away three heads of cattle and some ornaments from the house of the deceased. The deceased, who sustained gun injury on his belly, resulting protrusion of viscera,

was shifted to the Matinagar Hospital, but succumbed to the injuries before arriving at the hospital. The wife of the deceased (P.W. 4) could identify the miscreants, namely, Abul Hashem, Abul Kashem, Nurul Amin, Mafiz Miah and Kashem Miah in the focus of torch light used by the said dacoits/miscreants. The son of the deceased also, who deposed as P.W. 11, could identify the said miscreants in the focus of torch light. According to the prosecution, the deceased, on his way to the hospital, disclosed the names of the said miscreants. On the following morning Sri Tota Miah (P.W. 2) lodged an Ejahar with the police, informing the matter and the said information was registered as FIR. After receipt of the FIR, police registered a case under Sections 396/397 of IPC and 27(3) of the Arms Act, against the accused persons, namely, Sri Mafiz Miah, Sri Nurul Amin, Sri Abul Hasem @ Hasem Miah, Sri Abul Kashem @ Kashem Miah and Sri Kashem Miah @ Abul Kashem. The learned trial Judge framed charges under Sections 395/396 IPC read with Section 27(3) of the Arms Act. The charges being read over and explained to the accused persons, they pleaded not guilty. During the trial, as the accused persons, namely Sri Abul Hashem, Sri Abul Kashem and Sri Mafiz Miah were absconded, trial against them was adjourned sine die.

3. In order to prove the charges brought against the accused persons, the prosecution examined as many as 16 witnesses including the Medical Officer and the Investigating Officer. At the conclusion of the evidence for the prosecution, the accused persons were examined u/s 313 Code of Criminal Procedure. They denied the allegations brought against them and stated that they were falsely implicated due to enmity. The accused persons declined to adduce any defence witness. At the close of the trial, considering the evidence on record, the learned trial Judge came to the finding that there was no substantive evidence to believe that the P.Ws., more particularly, P.Ws. 4, 11 and the deceased could identify the accused persons on that dark night and held that the involvement of the accused persons in the alleged crime could not be established, beyond all reasonable doubt. Accordingly, for want of sufficient evidence, the learned trial Judge, acquitted the accused persons, namely, Sri Nurul Amin, Sri Abul Kashem, S/o Sultan Miah and Sri Abul Kashem, S/o Chhoban Miah, who faced the trial and set them at liberty.

Being aggrieved by the said acquittal, the State has come up with this appeal, challenging the correctness of the decision regarding acquittal of the above named accused persons/Respondents.

4. We have heard Mr. A. Ghosh, learned Addl. Public Prosecutor appearing for the State-Appellant and Mr. S. Bhattacharjee, learned Counsel appearing for the Respondents.

5. The learned Addl. Public Prosecutor appearing for the State-Appellant, taking us to the evidence on record, submitted that the witnesses, namely, P.W. Nos. 4 and 11, i.e. the wife and son respectively of the deceased, clearly stated that they could identify the Respondents in the focus of the torch light and that the

witnesses, who arrived at the place of occurrence and who carried the deceased to the hospital, stated that the deceased, on his way to the hospital, made the dying declaration indicating the involvement of the Respondents. In view of the above evidence on record, the learned Addl. Public Prosecutor submitted that the learned trial Judge committed illegality by acquitting the accused/Respondents. According to the learned Addl. Public Prosecutor, the prosecution could establish the charges, brought against the accused persons, beyond all reasonable doubt and as such the impugned judgment and order of acquittal is liable to be interfered holding the Respondents guilty of the offences charged u/s 396 IPC read with Section 27(3) of the Arms Act and that they should be adequately punished for committing the said offences.

6. Controverting the said argument, advanced by the learned Addl. Public Prosecutor, Mr. S. Bhattacharjee, learned Counsel for the Respondents, has submitted that it is the established principle of law that in a criminal trial, it is the bounden duty of the prosecution to prove the allegations brought against the accused persons beyond all reasonable doubt and that the benefit of doubt should always be given to the accused persons. The learned Counsel further submitted that in the event of two inferences, one going in favour of the defence and the other going in favour of the prosecution, the benefit should always go in favour of the defence. Drawing our attention to the evidence on record, the learned Counsel submitted that except the evidence of P.W. Nos. 4 and 11 i.e. the wife and son respectively of the deceased, the evidence of other witnesses are nothing but hear-say evidence. According to the learned Counsel, though the P.W. Nos. 4 and 11 stated that they could identify the accused persons in the focus of the torch light, it is hardly believable that the accused persons would have focused the torch light at their own faces to facilitate the said witnesses to identify the accused persons. It is further submitted that non-recovery of the said torch light i.e. the source of the light raises doubt about the existence of such torch light resulting serious suspicion against the veracity of the prosecution story. The learned Counsel appearing for the Respondents, further contended that, considering the nature of the injury sustained by the deceased, it is hardly believable that the deceased, who succumbed to his injuries before reaching the hospital, was in a fit state of mind and health to disclose the names of the accused persons. He further submitted that P.W. 8, namely, Sri Anu Miah, who claimed to be the first person to have appeared in the house of the deceased immediately after the occurrence and who accompanied the deceased to the hospital, belied the prosecution story regarding the dying declaration. The learned Counsel pointed out that this witness i.e. P.W. 8, nowhere stated that the deceased had made the dying declaration indicating the involvement of the accused persons. It is contended that if the deceased had made any dying declaration, there was no reason for P.W. 8 not to disclose the same. The silence of P.W. 8 in this regard, coupled with the question of identity of the accused persons, negates the prosecution version that the deceased had made any dying declaration.

7. In order to appreciate the counter arguments, advanced by the learned Counsel appearing for both the parties, we feel it appropriate, to briefly, recapitulate the evidence on record as follows:

8. P.W. 1, Sri Tota Miah, stated that he was informed by the wife of the deceased immediately after the occurrence. On being so informed, he rushed to the house of Rafik Miah (deceased) and found the latter lying in a pool of blood in his courtyard and could notice that his viscera had come out due to gun-shot injury sustained by him on his abdomen. He stated that the deceased, who was alive, was shifted to Matinagar Primary Health Centre and that on way to the hospital, the deceased had disclosed that the accused persons, namely, Nurul Amin, Abul Hasem, Abul Kashem, Mafiz Miah and 4/5 others had forcefully entered his house and fired on his abdomen through a gun. This witness did not state anything as to how the deceased could identify the miscreants. This witness, who stated about the dying declaration, did not state that the wife of the deceased had told him regarding the identity of the accused persons.

9. P.W. 2, an A.S.I, of Police, was a witness to the seizure of the blood-stained apparels of the deceased. He stated nothing about the involvement of the accused persons.

10. P.W. 3, another Constable of Police, stated that on being commanded, he had collected the wearing apparels of the deceased and that after the post mortem examination, the dead body of the deceased was handed over to Sri Abu Taher, the younger brother of the deceased.

11. P.W. 4, Smti Bhanu Bibi, the wife of the deceased, in her evidence given on oath, stated that the miscreants forcefully entered into their house by breaking open the door and that she could identify the miscreants in the focus of the torch light carried by them. Admittedly, the occurrence having taken place inside the closed house at about 12 O'clock at night, it was certainly dark and without any source of light, it was hardly possible to identify the miscreants. P.W. 4 had stated that the torch carried by the miscreants was the source of light. According to P.W. 4, initially three persons, namely, Abul Hasem, Abul Kashem and Nurul Amin, entered their house and while Abul Hasem and Abul Kashem caught hold of the hands of the deceased, the accused Nurul Amin had fired at her husband, causing injuries on his belly as a result of which the viscera of the deceased had come out. She further stated that after the said firing, the other accused persons, namely, Kashem Miah and Mafiz Miah, entered into their house along with 2/3 other persons and that they left after taking three cattles and some ornaments. She further stated that, on his way to the hospital, her deceased husband had disclosed the names of the said miscreants. In her cross-examination, she clearly stated that it was a drak night. Therefore, without any source of light, it was hardly possible to identify the miscreants. As the said source of light has not seized and produced in the Court, the existence of the same is doubtful. That apart, it is difficult to believe that the miscreants would have focused the light at them to disclose their identity.

12. Sri Junab Ali, who was the father of the deceased, deposing as P.W. 5, stated that coming to know about the incident, he rushed to the house of the deceased, who was found lying in a pool of blood in injured condition. According to this witness also the viscera of the deceased had come out and the deceased requested him to look after his wife and children, as he would not survive. This witness stated that, P.W. 4 told him that the accused persons forcefully entered her house and shot the deceased with a fire arms causing the injuries aforesaid. He further stated that though the deceased was taken to Matinagar Hospital, he succumbed to the injuries just in front of the said hospital. As the deceased had requested his father to take care of his wife and children immediately after meeting him (P.W. 5), if the deceased could identify the miscreants, he would have certainly disclosed the identity of the miscreants at the time of meeting his father for the first time i.e. before taking the deceased to the hospital, but the silence of P.W. 5 in this regard raises doubt about the making of any such dying declaration. Of course, this witness stated that his son, on his way to the hospital, had disclosed names of five accused persons, whom the deceased could identify but, there is nothing to find, from the evidence of P.W. 5, as to how, in that dark night, the deceased could identify the accused persons.

13. Sri Khalek Miah, deposing as P.W. 6, stated that on his arrival in the residence of the deceased, he found the latter lying on the ground with bleeding injury. This witness also stated that the deceased had requested him to look after his children and wife stating that he would not survive. He further stated that the deceased disclosed that he could recognize the accused persons, namely, Abul Hasem, Mafiz Miah, Abul Kashem, Nurul Amin and Kashem Miah. This witness also did not state anything about the source of light

14. Sri Muklesh Miah, deposing as P.W. 7, stated that, on his arrival at the place of occurrence, he found the deceased lying on the ground in injured condition with bleeding injury. According to this witness, the wife of the deceased told him that she and her husband could recognize the accused persons, who had committed the crime. He further Stated that, on his way to the hospital, the deceased had disclosed the identity of the miscreants.

15. Sri Anu Miah, deposing as P.W. 8, stated that he was the first person to arrive at the place of occurrence immediately after the occurrence and on his arrival, he found the deceased lying on the floor of the house in injured condition and that the intestine of the deceased had came out of his belly. According to him, alarm being raised by him, some villagers went to the spot and that they had taken the deceased to the Matinagar Hospital but, he succumbed to the injuries on his way to the hospital. This witness further stated that the wife of the deceased had told him that three catties were taken away by the miscreants and that she could identity some of the miscreants, namely. Nurul Amin, Abul Hashem, Abul Kashem, Kashem Mia and Mafiz Mia. In his cross-examination, this witness denied the suggestion that the wife of the deceased did not disclose the names of the miscreants to him. He also admitted that there was a quarrel between the

family members of the deceased and the family members of Sultan Miah, i.e. the father of the accused Abul Hashem. This witness also stated that he along with others had carried the deceased to the hospital, but nowhere had he stated that the deceased had made any dying declaration indicating the involvement of the accused persons. The silence of the P.W. 8 regarding the dying declaration raises doubt about the prosecution version. If the deceased had made any such disclosure then there was no reason for the P.W. 8 not to reveal the same. This silence of the P.W. 8 contradicts the prosecution version regarding the dying declaration.

16. P.W. 9, Smti. Rajiya Khatun, the mother of the deceased, stated that the deceased had told her that he could identify the accused persons. According to this witness, the wife of the deceased also indicated the involvement of the accused persons.

17. P.W. 10, Smti Eснаher Begum, who was the sister of the deceased, in time with the evidence of P.W. 9, stated that the deceased, on being asked by her, had disclosed the names of the accused persons and that the deceased, whose intestine had come out of his belly, succumbed to his injuries on his way to the hospital. This witness did not state that the deceased, on his way to the hospital, had made the dying declaration. Her evidence that the deceased, prior to his arrival at the hospital had made the dying declaration, has belied by the evidence of P.W. 8.

18. P.W. 11, Sri Faruk Hossain, the son of the deceased, supporting the evidence of his mother (P.W. 4), stated that the accused persons, namely, Abul Kashem and Abul Hashem had caught hold of his father and that accused Nurul Amin had fired at his father (deceased), causing injury to his person. He further stated that his father succumbed to the injuries on his way to the hospital. This witness also stated that he could identify the miscreants, who were previously known to him, in the focus of the torch light. P.W. 11 did not disclose as to who had carried the torch light. As discussed above, it is hardly believable that the miscreants would have focused the torch light at their own faces. Supporting the evidence of P.W. 8, this witness also stated that P.W. 8 was the first person to arrive at the place of occurrence. Therefore, taking the evidence of P.W. 8 into confidence, it is difficult to believe that the deceased had made any dying declaration involving the accused persons.

19. P.W. Nos. 12 and 16 are all formal witness, being the Police Officers. They did not state anything incriminating against the accused persons.

20. Smti. Shanu Khatoon, who was the sister of the deceased, deposing as P.W. 14, stated that she came to know about the occurrence from the wife of the deceased. P.W. 16, who was the Investigating Officer, stated that he submitted the charge-sheet after completing the investigation.

21. P.W. 15 was the Medical Officer, who performed the autopsy in respect of the dead body of the deceased. The Medical Officer opined that the deceased

sustained cut injury in the mid iliac region of the abdomen, causing prolapse of few loops of the small intestine, about one meter in length. According to the Medical Officer, the death was caused due to cardio-respiratory failure due to gunshot injury in the right iliac region of the interior abdominal wall causing haemorrhage. The injuries noticed by the Medical Officer are as follows:

Broad gun shot injury at Rt. Iliac region of anterior abdominal wall causing from a short distance. Injury caused entry wound of 1" diameter but no exit wound is present. Due to perforation of anterior abdominal wall as peritoneum causes prolapse at few loops of small intestine about one meter in length.

In his cross-examination, this witness (P.W. 15) stated that it could not be ascertained as to how much time a person could have survived with the injuries sustained by the deceased.

22. From the evidence of the aforesaid witnesses, it is found that the torch light i.e. the source of light with regard to the identity of the miscreants on that dark night, was not recovered.

23. In the light of the above discussed evidence, we find that certain quarrel existed between the parties and that there was not cordial relation between the parties. From the evidence on record, it has surfaced that the entire prosecution case is based on the evidence of P.W. Nos. 4 and 11 and the dying declaration allegedly made by the deceased. Both the P.W. Nos. 4 and 11, who were inside the house i.e. the place of occurrence at the time of the occurrence, stated that they identified the accused persons in the focus of the torch light carried by the accused persons. P.W. 4 stated that out of the three persons, who had initially entered their house, two had caught hold of her husband and the other one i.e. Nurul Amin had a gun in his hand and he had fired at her husband. Neither the P.W. 4 nor her son (P.W. 11) did not state as to in whose hand, the torch light was seen. That apart, considering the alleged role played by the said three miscreants, it is difficult to believe that they could carry any torch light with them. That apart, as discussed earlier, it is hardly believable that the miscreants, who would naturally like to conceal their identity, would have focused the torch light at their persons to facilitate the said witnesses to identify them. Fact remains that the torch light, which was the only source of light, was not recovered. In these circumstances, we find it difficult to believe the evidence of P.W. Nos. 4 and 11 that they could identify the miscreants in the focus of the torch light. That being the position, it is equally doubtful to believe that the deceased could identify the miscreants on that dark night. Therefore, we do not find it safe to believe that the said witnesses, including the deceased could identify the miscreants.

24. As the viscera of the deceased had come out of the belly and in view of the death of the deceased immediately after the occurrence i.e. before reaching the hospital, the injuries sustained by the deceased was very serious and certainly there was profuse bleeding. The Medical Officer (P.W. 15) also has not stated as

to whether the deceased, with the above injuries, was in a fit state of mind to make the dying declaration or not. In order to accept the dying declaration as a piece of substantive evidence, it has to be established that the deceased was in a fit mental condition to make the statement. The facts and circumstances of this case and the nature of the injuries sustained by the deceased do not inspire confidence that the deceased was in a fit mental condition to make the dying declaration. That apart, the silence of P.W. 8, who was the first person to meet the deceased immediately after the occurrence and who carried the deceased to the hospital, regarding the dying declaration raises doubt as to whether the deceased had made the dying declaration or not. If the deceased had made any such dying declaration either at his residence i.e. before his taking to the hospital or on his way to the hospital, there was no reason for the P.W. 8 not to disclose such fact. Therefore, in view of the evidence given by P.W. 8 and also in the light of the injuries sustained by the deceased, we do not find it safe to accept the prosecution version regarding the dying declaration. Therefore, considering the entire evidence on record, we are of the firm opinion that the prosecution failed to prove the charges brought against the Respondents beyond all reasonable doubt and as such it would be proper to extend the benefit of doubt to the Respondents herein.

25. In view of the above discussion, we do not find sufficient merit in this appeal requiring interference with the judgment and order of acquittal passed by the learned trial Judge.

26. In the result and for the foregoing reasons discussed above, this appeal, as a whole, fails and the same, accordingly, stands dismissed. Send down the Lower Court Records.