
(2006) 08 GAU CK 0122
In the Gauhati High Court
Case No : C.A. No. 40 of 2001

Subhajoy Tripura and Others

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 09-08-2006

Acts Referred:

Evidence Act, 1872 — Section 106, 114

Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2006) GLT 119 Supp

Hon'ble Judges : I.A. Ansari, J;A.B. Pal, J

Bench : Division Bench

Advocate : K.N. Bhattacharjee and R. Debnath, for the Appellant; D. Sarkar, for the Respondent

Final Decision : Dismissed

Judgement

A.B. Pal, J.—A young man of 22 years was done to death in the night of 9.10.99. During investigation, two cousin brothers of the deceased and a friend were nabbed because they had taken the deceased out of his house in the evening of that day with whom he was last seen. In the trial, all the 3 persons who are Appellants herein have been found guilty and convicted u/s 302 read with Section 34 of the Indian Penal Code (for short, "IPC"). They have been sentenced to suffer imprisonment for life with a fine of Rs. 5,000/ each, in default, to suffer imprisonment for one year more. Aggrieved by the conviction and sentence so imposed on them by the judgment rendered on 30.5.01 in Sessions Trial No. 33 (ST/S) of 2000 by the Sessions Judge, South Tripura, Udaipur, the present appeal has been preferred calling in question correctness of the findings therein.

2. A brief narration of the material facts may be necessary before we consider the contentions raised. The deceased Hari Charan Tripura, aged 22 years, was the cousin brother of Bikramjoy Tripura and Rambarna Tripura, the two Appellants herein. Jogendra Tripura (PW 1), the father of the deceased and

Girindra Tripura, the father of the above two Appellants are brothers, but were locked in a land dispute generating acrimony between the members of the two families. Subhajojoy Tripura, the other Appellant herein is a common friend. On 9.10.99 at about 7-30 pm, the three Appellants herein visited the house of Hari Charan Tripura and took him outside his house situated at a place known as Naibadyapara. The parents of Hari Charan, PWs 1 and 2, were in the house and they asked the three Appellants where they were taking Hari Charan. They replied that they would together take a stroll in the village and Hari Charan would spend the night with them. No person other than the parents were present at that time, the other son of the old couple, Madhu Charan Tripura (PW 5), being in a separate house at a stone's throw distance. Though the two families had been simmering with acrimony and enmity, the parents of the deceased had no reason to fear that their son would be harmed by the Appellants one of whom, Subhajojoy, having apparently nothing to indicate any strained relationship against the deceased. Hari Charan did not return that night and naturally his parents did not consider it necessary to enquire about him during the night as they were told that he would spend the night with the Appellants herein. On the following morning at about 7 am, the parents of the deceased were informed by some plantation workers that the dead body of their son was lying on the road side at Garifa new rubber plantation. Jogendra Tripura (PW 1), the unfortunate father, shocked as he was, rushed to the place and saw the dead body with cut injury on the throat and stab injury on the abdomen with a knife penetrated. A good number of persons including fee witnesses examined by the prosecution were there one of whom had written the First Information Report (FIR) at the dictation of PW 1. In the FIR, the father of the deceased (PW 1) clearly stated that his deceased son was taken away by the three Appellants herein on the previous evening and that he did not return home that night. He suspected that the Appellants had killed his son. 3. The FIR was registered by the Manubazar Police station and investigation was at once initiated. The dead body was post mortemed during investigation and the accused persons were finally nabbed. The cause of the death was found to be cut injury on the throat and the abdomen. The dagger which has found planted in the abdomen of the deceased, being the weapon of offence, was seized. The investigation was concluded with the chargesheet against the three Appellants following which a full dressed trial was held. As has been noticed above, all the three Appellants, on conclusion of trial have been convicted and sentenced. By filling the present appeal, the Appellants are before us.

4. We have heard Mr. K. N. Bhattacharjee, learned sr. counsel assisted by Mr. R. Debath, learned Counsel for the Appellants and Mr. D. Sarkar, learned Public Prosecutor for the State.

5. The submissions of the learned Counsel for the Appellants rests mainly on two important aspects of the case. In the first place, the argument is that the entire prosecution case being based on circumstantial evidences only, the evidence of PWs 1 and 2, the parents of the deceased should have been scrutinized with

much circumspection in the background of the fact of enmity between the members of the two families over a land dispute. Once it is reasonably felt that the evidence of the Appellants alone, because of the inimical background, cannot be given full credence, there would be left no other circumstance to point out with certainty to the guilt of the Appellants. The other submission is that even if the prosecution version that the deceased was last seen with the Appellants is found to be acceptable, there is a long gap between they were last seen by PWs 1 and 2 and the discovery of the dead body on the following morning by the road side. The time gap is enough in the circumstances of the parent case to take a view that there was a possibility of any other person to intervene and murder the deceased. These two situations, according to the learned Counsel for the Appellants, if carefully and pragmatically appreciated, the only irresistible conclusion would be that whatever evidence and materials the prosecution put on place are not enough to prove the guilt of the Appellants beyond all reasonable shadow of doubts and, therefore, the Appellants are entitled to be acquitted on benefit of doubt. This submission of the learned Counsel for the Appellant is strongly controverted by the learned Public Prosecutor, according to whom, the proximity of the time when the deceased was last seen with the Appellants and the time when he was killed unequivocally suggest that there was absolutely no possibility of any third person to intervene in between. His further submission is that if a plea is taken that there was such a possibility of third person intervening, the burden to prove the same stands shifted to the defence which burden has not been discharged by adducing any evidence. As there is no reason to disbelieve the testimony of the old parents of the deceased, the reasonable conclusion must be that none but the Appellants were responsible for the murder of Hari Charan.

6. The rival submissions as noticed above would lead us to carefully appreciate the evidence of witnesses examined and other materials adduced by the prosecution. Both Jogendra and Tumkirung Tripura (PWs 1 and 2), the parents of the deceased stated in no uncertain terms that all the three Appellants had visited their house at 7/7-30 pm on the fateful day. When they were taking the victim, the witnesses asked them where they were going and in reply the Appellants told them that they would be going for a walk within the village. But their son did not return home that night and on the following morning his dead body was found one kilometer away at Kathalchhari road. In the same vein, PW 2, also stated the same fact that her son was taken by the Appellants in that fateful evening. There are, thus, only two witnesses, the old parents who had seen the Appellants taking the victim with them. In the cross-examination of the witnesses, nothing could be extracted against the credibility of what they said about the Appellants' visiting their house and taking their son with them. That they are truthful witnesses became evident when PW 1 in his FIR at the place where his son was found dead disclosed that the three Appellants had visited his house on the previous evening and had taken his son Hari Charan with them who did never return. The same disclosure was made to Jatindra Tripura (PW 4),

Madhu Charan Tripura (PW 5), Sudharshan Vaidya (PW 6) and Madhusudan Tripura (PW 8). The last witness (PW 8) was the scribe of the FIR who had written the same at the dictation of PW 1. Thus, the statements of PWs 1 and 2 about the visit of the Appellants in the evening of 9.10.99 and taking their son with them from their house remain consistent and get supported by the deposition of above noted witnesses. There is, therefore, no scope to suspect that the said statement was made with any ill motive to falsely implicate the Appellants. The question of enmity between the informant and his brother Girindra, though admitted, the fact situation of the case cannot be taken to be a factor for disbelieving the statement of PW 1, the reason being that the statement in the FIR as well as to the other witnesses was made so soon after the dead body was seen by him and the same being spontaneous, the question of fabrication or concoction to falsely implicate the Appellants, in our view, is far-fetched. The human psychology though unfathomable, its emotional response to a particular situation of every individual can be broadly examined and considered. It is very natural for a father who unexpectedly lost his son to be overwhelmed with the pains and pangs of the loss and the feelings generated therefrom do not normally attempt any falsity, fabrication or concoction. Though there was a land dispute between the two brothers, the fact that the Appellants allowed their son to go with the Appellants, two of whom are his brother's son and one of whom was a friend of the deceased would go to show that never did he think for a moment that an offence of such a magnitude was likely by which his son would be done to death. If really the Appellants did not visit and take with them the deceased from the house of PW1, he would not have, in his moments of overwhelming shocks and pains, concocted a story to falsely implicate the Appellants only because of a land dispute. As a matter of fact, there was no time gap for him to manufacture a story for false implication of the Appellants as the old man in his tears and sobs was disclosing what actually had happened on the previous evening. Under the circumstances, we reject the theory of enmity between the PW 1 and his brother Girindra as advanced by the Appellants to overshadow in any way the facts narrated in the FIR as well as in the depositions of the parents of the deceased, which are impeccable, firm and towers over all minor discrepancies or inconsistencies.

7. Once we accept with full credence the deposition of PWs 1 and 2 regarding visit of the Appellants in their house in the evening of 9.10.99, the question that next arises is whether the time gap is such that in between the time when the deceased was last seen with the Appellants and the time when probably he was killed, there was any possibility of anybody other than the Appellants to intervene and commit the offence. We have noticed that the post mortem examination was held on 11.10.99 at about 10 am the result whereof support the occur evidence that the dead body had cut injuries on the throat and the abdomen apart from scalp haematoma at frontal and parietal region. The cause of the death has not been in dispute. According to the post mortem report, the death had taken place within 48 hours from the date when the post mortem

examination was done at 10 am on 11.10.99 indicating thereby that the offence was committed in the night of 9.10.99, when in the same evening the deceased was taken out from his house by the Appellants and that was the time the deceased was last seen with them. The defence has not placed on record any material to show that during that night the deceased had left them or that at the time of occurrence they were nowhere near the place of occurrence. Once the prosecution has successfully proved that the deceased was in the custody of the Appellants in the evening of 9.10.99 and that during the same night he was brutally murdered, the burden of proof stands shifted to the Appellants to prove that during the time the deceased was in their custody nothing had happened to harm him or that at certain point of time during that night he had left them. The legal position about shifting of burden has been laid down by the Supreme Court in *State of West Bengal Vs. Mir Mohammad Omar and Others etc.*, . The relevant portion appearing in paras 33,36 and 37 are gainfully quoted below:

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercise a process of reasoning and reaches logical conclusion as the most probable position. The above principle has gained legislatures recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

36. In this context we may profitably utilize the legal principle embodied in Section 106 of the Evidence Act which reads as follows : "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

37. The Section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other fact, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

8. The evidentiary value of the last seen evidence has been further crystallized in *Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir*, The important observation made in para 32 reads as follows:

The last-seen theory where the time-gap between the point of time the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

In the present factual position as noticed above, we are of the firm view that the time gap is so small that no person other than the Appellants who were the author of the crime, committed the offence.

9. Learned Counsel for the Appellants, in support of his arguments has referred to several decisions are noted below:

(I) Gurdial Singh Vs. State of Punjab, . In this case a murder was committed, but the presence of principal eye witness who was the son of the deceased and Anr. eye witness at the scene of the occurrence were found doubtful. That apart there were material discrepancies in their evidence which made difficult to accept the prosecution version. The fact situation of that "case is totally different from the one in our hand;

(II) Chandrabhan and others Vs. State of Maharashtra, . In this case, the Appellant faced trial for offence punishable u/s 302/34 IPC. The victim did not divulge the names of the assailants. The accused were co-villagers against whom report was lodged by the victim two days prior to the occurrence. In such a situation, the prosecution evidence against the accused were not found acceptable. This judgment has no relevance in the present case;

(III) State of Rajasthan Vs. Rajendra Singh, . This case also has no relevance as the eye witnesses were totally unwilling to give true version and there were inconsistency in their evidence;

(iv) Tarseem Kumar Vs. The Delhi Administration, In this case, the testimony of eye witness who was a close relative of the victim about the last seen evidence was not found reliable. Our case is totally different where we have seen that the evidence of PWs 1 and 2 claimed full credence

(v) Jagga Singh Vs. State of Punjab, This case deals with dying declaration and, therefore, has no relevance in our case.

10. What has emerged from the above analysis is that the deceased was taken out by the three Appellants herein in the evening of 9.10.99 and during the same night he was done to death. This evidence alone coupled with immediate disclosure of the names of the three Appellants by the PWs 1 and 2 creates a strong circumstance that the deceased was in exclusive custody of the three Appellants during the night when he was brutally murdered. Placing on the anvil of the law discussed above the facts noticed by us would give rise to the only rational hypothesis that none but the Appellants were assailants who put the deceased to death. A careful perusal of the judgment impugned convinced us to hold that the same is based on terrafirma and calls for no interference.

11. For the reasons discussed above, this appeal has no merit and consequently the same is dismissed.