
(2008) 11 GAU CK 0064
In the Gauhati High Court
Case No : Criminal A. No. 15 of 2008

Swadesh Das

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 14-11-2008

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34, 346, 436, 457

Citation : (2009) 2 GLT 319

Hon'ble Judges : Mutum B.K. Singh, J; B.K. Sharma, J

Bench : Division Bench

Advocate : S. Kar Bhowmik, for the Appellant; B.R. Das Roy, for the Respondent

Final Decision : Dismissed

Judgement

Mutum B.K. Singh, J.—The judgment dated 27.08.1999 passed by the learned Sessions Judge, South Tripura, Udaipur, in Sessions Trial No. 38 (ST/S)/1998, convicting the Appellant and one another u/s 302 read with Section 34 IPC and sentencing them to imprisonment for life, is under challenge in this appeal.

2. Heard Mr. S. Kar Bhowmik, learned Counsel appearing for the Appellant and Mr. B.R. Das Roy, learned Special Public Prosecutor for the State-Respondent.

3. The prosecution case, in brief, is that on 25.05.1997, one Shri Kamini Kumar Das lodged a written report to the O/C, Sabroom Police Station, stating that in the late night of 24.05.1997 while he was sleeping, his wife and younger daughter, Smti Purnima Das, who went outside their house, informed him that the door of the deceased was found open and a kerosene lamp was burning inside but did not respond to their call. Thereafter, they went together to the room of the deceased and found the dead body of his; daughter-in-law, namely, Sanju Das, lying in the pool of blood in the north-western corner of the room. Police entered the incident in G.D. No. 609 and after visiting the place of occurrence, FIR Case No. 30/1997 was registered under Sections 457 and 302 IPC on the basis of the written report and investigated the case. On completion

of the investigation, charge-sheet against the Appellant and one Upendra Das was submitted u/s 302 read with Section 34 of the Indian Penal Code. The learned trial court, having found a prima facie case, framed charge u/s 302 read with Section 34 IPC against both the accused persons, to which they pleaded not guilty and claimed to be tried.

4. The prosecution, to substantiate the charge levelled against the accused persons, examined as many as 19 witnesses and also exhibited many documents during the course of trial. However, out of the said 19 prosecution witnesses, 5 witnesses were declared hostile by the prosecution. No defence witness was adduced. The learned trial court, at the conclusion of the trial, found both the accused persons guilty of the commission of the offence of murder of Sanju Das and convicted u/s 302 read with Section 34 IPC and sentenced them to imprisonment for life.

5. Before entering into the merit of the case, it would be convenient to mention that P.W. Nos. 1, 2, 5, 8 and 11 were declared hostile by the prosecution. P.W. No. 10, who was aged about 8 years, is the only eyewitness to the occurrence. P.W. Nos. 12, 13, 14, 15 and 16 are the inquest and seizure witnesses respectively. P.W. No. 17 is the police officer who registered the case and P.W. No. 19 is the Investigating Officer. P.W. No. 18 is the Doctor who conducted the postmortem examination over the dead body. P.W. Nos. 3 and 7 are the brother-in-law and wife of the Appellant. P.W. No. 9 is the father of the deceased and P.W. No. 6 is a neighbour. P.W. No. 4 is the private tutor of the children of the deceased.

6. Upon hearing the rival submissions advanced by the learned Counsel for the parties, the question to be determined in the present appeal is whether the conviction of the present accused-Appellant u/s 302 read with Section 34 of the IPC is sustainable in law in the given proved facts and the circumstances of the case.

7. What have been emanated from the depositions of the prosecution witnesses are that the deceased (Sanju Das) received a sum of Rs. 1,46,000/- (Rupees one lakh forty six thousand) only as compensation in connection with the death of her husband in a vehicular accident. Out of the said amount, Rs. 90,000/- was kept in fixed deposit account in Tripura Gramin Bank in her name and retained the remaining with her in cash. The accused-Appellant, younger brother-in-law of the deceased, persuaded the deceased to part with some portion of the said amount to him and on refusal to do so, the deceased was ill-treated and repeatedly tortured physically and mentally by the accused-Appellant. The matter was apprised to the P.W. No. 1, father of the accused-Appellant, but of no effect. On the day of incident, a "kirtan" was held in the house of P.W. No. 2 in which the accused-Appellant along with Upendra Kumar Das were also attended till about 11-30 pm. Thereafter, according to the prosecution, the accused-Appellant with Upendra Kumar Das went to the house of the deceased and committed the offence. The only eyewitness to the occurrence was the minor

daughter of the deceased, who was examined as P.W. No. 10.

8. P.W. No. 10, Kumari Ruma Das, who was about 8 years old, categorically stated in her deposition that on the day of occurrence she was in the dwelling hut with her mother and her younger brother, who was by then aged about 3 years. After taking dinner she went to bed for sleeping but she heard the accused-Appellant and Upendra uncle talking loudly with her mother inside the room. The accused-Appellant assaulted her mother with "Benda" (wooden lathi) but Upendra uncle did not assault. She did not sleep the rest of the night and also did not raise alarm even after departure of the accused-Appellant. Her mother was found bleeding on her mouth. After some time, she stated to P.W. No. 1 and P.W. No. 8, who came to the house, that her mother was assaulted by the accused-Appellant. She also stated that her mother was assaulted by the accused-Appellant on many days before the occurrence for money. When this child witness was confronted with her previous statement, the above statement were not found. She admitted in her cross-examination that her maternal grandfather told her to depose before the court what she had seen in the alleged date and time and how to depose before the court.

9. Mr. S. Kar Bhowmik, the learned Counsel appearing for the Appellant strenuously submits that the statement of P.W. No. 10 is not at all reliable as she had contradicted herself on material particulars and gave a developed statement before; the court on being tutored by her maternal grandfather. We have carefully scrutinized the statement of P.W. No. 10 as she appears to be a child and the sole eyewitness to the occurrence. It is in the evidence of P.W. No. 10 that in the night of the incident she was in the dwelling hut with her mother and younger brother. It is also an admitted fact that the dead body of her mother was found lying inside the same dwelling hut in a pool of blood. In her cross-examination, she denied the defence suggestion that she did not find the accused-person talking with her mother inside the hut and that both herself and her younger brother were sleeping on bed and woke up in the morning. It shows that the defence had also admitted the presence of P.W. No. 10 in the same hut at the time of occurrence but according to the defence, she was sleeping throughout the night and woke up only in the morning.

10. That, according to the learned Counsel appearing for the Appellant, the statement of P.W. No. 10 could not be relied upon as she had contradicted herself on material particulars. The learned Counsel forcefully contended that she had stated in her deposition that Swadesh uncle assaulted her mother by lathi and Upendra uncle did not assault. But she did not make such statement before the police while recording her statement. Thus, she had contradicted herself on material particulars, the learned Counsel urged. It is true that she had not stated in her previous statement which was recorded on 26.05.1997 that Swadesh uncle assaulted her mother by lathi and Upendra uncle did not assault. But she had stated in a very comprehensive form that her uncle Swadesh Das used to beat her mother everyday and she does not know the reason of beating. The material

particular in the present case, is whether the Appellant assaulted the deceased. True, the entire statement what she has given before the court was not stated in verbatim while recording her statement by the police. Nevertheless, she stated before the court as well as to the police that the Appellant used to assault her mother. Thus, her statement that her mother was assaulted by the accused-Appellant remains unshaken and appears to be reliable. The Appellant's learned Counsel, however, in support of his submission, relied upon a decision of the Hon'ble Apex Court reported in *Pratap Singh and Another Vs. State of Madhya Pradesh*, in which the Hon'ble Apex Court expressed the view that in all situations, evidence of a minor must be corroborated by other independent witness is not Mandatory but requires a closer scrutiny when he contradicted himself on material particulars. We have carefully perused the above cited case law. In that case, the only eyewitness was a minor who witnessed the occurrence from a distance of about 50 hands and stated that he went up on a mound and saw the incident therefrom. But in his statement before the police, he did not make any statement that he had seen the occurrence from a mound. The existence of the mound was very vital in the said case as he was not in a position to witness the occurrence in detail from a distance. The ratio of the said case is not applicable in the case at hand as the facts are quite different. In the instant case, P.W. No. 10 stated both to the police and before the court that the accused-Appellant assaulted her mother and her presence in the same dwelling house at the time of occurrence is not in dispute. It has been well proved that a "Kupi bati" was burning inside the said dwelling house where the occurrence took place and the accused-Appellant is her uncle. Thus, the question of mistaken identity of the assailant also does not arise. It is not the case that the incident occurred in a separate room and she was sleeping in another room of the same dwelling hut. The dwelling hut, as per the sketch-map marked Exbt. P/12 consists of only one living room and the occurrence took place in the same living room. Considering the factual position and circumstances of the case and the proved evidence on record, we are, unable to accept the above contention advanced by the Appellant's learned Counsel.

11. During the course of hearing, the Appellant's learned Counsel has also submitted that accused-Appellant and one Sri. Upendra Kumar Das were convicted for commission of offence of murder of the deceased u/s 302 read with Section 34 of the Indian Penal Code by the same impugned judgment. The involvement of the co-accused, Sri Upendra Kumar Das, in the commission of offence of murder was doubted by this Court and acquitted him vide judgment dated 15.09.2004 passed by this Court in Criminal Appeal No. 36 of 1999 of the Agartala Bench. Since the co-accused has been acquitted by this Court, the conviction of the present Appellant is not sustainable in law. In support, the learned Counsel cited a decision of the Hon'ble Apex Court reported in 1989 Supp (1) SCC 214 *Sukhram v. State of Madhya Pradesh*, in which the Hon'ble Apex Court held that when two named accused persons were convicted by the trial court u/s 302 read with Section 34 IPC and on acquittal of one of them by

the High Court on benefit of doubt, the other accused person cannot be held to have acted conjointly with anyone in the commission of the offence. Thus, the acquittal of one of the named accused would stand in the way of the Appellant being convicted constructively u/s 34 IPC for substantive offences u/s 302 and Section 436 IPC.

12. Now, the question before us is whether when one of the two accused persons, who were convicted for commission of a substantive offence with the aid of Section 34 of IPC, has been acquitted, the conviction of the other accused person is sustainable in law. Section 34 of IPC is only a rule of evidence and does not create a substantive evidence and it has been enacted on the principle of joint liability of several persons for doing a criminal act if it is proved that the criminal act was done in furtherance of common intention of all persons. It is also not mandatory to show some overact on the part of all persons. Even if the prosecution fails to show the existence of common intention, there is no bar in convicting one of them for his/her individual criminal act.

13. In *Sukhram v. State of Madhya Pradesh* (supra), two accused persons were convicted under Sections 302/346 read with Section 34 of IPC and the High Court acquitted one of the accused persons on benefit of doubt, but upheld the conviction of the other accused person. The Hon''ble Apex Court observed that when two accused persons convicted under Sections 302/346 read with Section 34 IPC and acquitted one of them, the conviction of the other accused person under Sections 302/346 read with Section 34 IPC cannot stand as the other accused person cannot be held to have acted conjointly with any one of the commission of offences. In *Gurdial Singh Vs. State of Punjab*, , the Hon''ble Apex Court, reiterating the same proposition of law, observed that lone accused person, out of the three accused persons who were acquitted except the Appellant, cannot be convicted with the aid of Section 34 of IPC but he is liable for his individual act only. The corollary is that when two accused persons are charged for commission of a substantive offence with the aid of Section 34 of IPC and in case of acquittal of the one accused person, the other accused person can be held guilty for commission of a substantive offence depending upon the proved evidence. Taking into consideration the above proposition of law laid down by the Hon''ble Apex Court, we are of the firm view that when one of the co-accused has been acquitted, the other accused person cannot be convicted with the aid of Section 34 of the Indian Penal Code, but he can be convicted for commission of substantive offence if the prosecution evidence is sufficient and unambiguous to show that he had committed a substantive offence.

14. Coming to the case in hand, it is in the evidence that the accused-Appellant is the brother-in-law of the deceased. The deceased received a sum of Rs. 1,46,000/- as compensation in connection with the death of her husband, the elder brother of the accused-Appellant. The accused-Appellant demanded some portion of the said amount, which was turned down by the deceased. As a result of which, frequent altercation took place with the deceased and also ill-treated

her. It is also in the evidence of P.W. Nos. 2 and 3 that on the fateful night, the accused-Appellant and Upendra Kumar Das who was subsequently acquitted, attended a "Kirtan" in the house of P.W. No. 2 till about 11.30 p.m. and thereafter, they left the place. P.W. No. 10 categorically stated that both the accused-Appellant and Upendra Kumar Das entered into their dwelling hut in the night and talked with the deceased loudly. The accused-Appellant assaulted her mother with a "Benda". A wooden file (Exbt. MO-1) tainted with blood stain at one of its ends was seized by the police from the place of occurrence. As per the evidence of P.W. No. 18 who conducted the post mortem examination, the cause of death was shock and haemorrhage due to in-juries caused on her and the injuries were homicidal in nature. He was also of the opinion that such injuries might have caused by heavy blunt weapon like wooden file (Exbt. MO-1).

15. We have also noticed that, this Court while acquitting the co-accused Upendra Kumar Das who was convicted by the trial court along with the present accused-Appellant u/s 302 read with Section 34 IPC for commission of the offence of murder of the deceased, observed in paragraph No. 6 of the judgment dated 15.09.2004 passed in Criminal Appeal No. 36 of 1999 as follows:

A reading of the evidence tendered by the prosecution witnesses, the core of which has been noticed in a preceding part of this order, shows that on the night of the occurrence, the accused-Appellant along with the co-accused Swadesh Das had visited the room of the deceased and both of them were seen talking to the deceased. Thereafter, the accused Swadesh Das assaulted the deceased with a lathi but the accused-Appellant Upendra Kumar Das did not participate in such assault. No other circumstance against the present accused-Appellant, apart from what has been noticed above, has been proved by the prosecution.

16. We have thoughtfully considered the circumstances and the evidence that have been proved by the prosecution as discussed hereinabove and are of the view that the accused-Appellant had committed the offence of murder of the deceased. Thus, in lieu of convicting the accused-Appellant u/s 302 IPC read with Section 34 of IPC, he is convicted u/s 302 of the Indian Penal Code for commission of murder of Sanju Das. However, the sentence awarded against him by the learned trial court is maintained. Resultantly, this appeal stands dismissed.