
(1972) 07 GAU CK 0003
In the Gauhati High Court

The State of Assam

APPELLANT

Vs

Lakhinath Duara and Others

RESPONDENT

Date of Decision : 14-07-1972

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302, 34

Citation : (1972) CriLJ 1571

Hon'ble Judges : M.C. Pathak, J;Baharul Islam, J

Bench : Division Bench

Judgement

Baharul Islam,J.

1. This appeal by the State of Assam is directed against an order of acquittal passed by the Sessions Judge. U.A.D. Jorhat in Sessions Case No. 40 (S-S)/67. There are five respondents in the case. Respondent No. 1 Lakhinath Duara and Respondent No. 2 Khora Chandra Duara had been charged under Sections 302/34. I. P.C. and these two respondents and the other three respondents, namely. Phatik Chandra Duara, Gangadhar Duara and Hazari Duara had been charged under Sections 201/34 of the Penal Code. The accused had pleaded not guilty to the charges.

2. The prosecution case in brief is that Dambaru Gogoi. who is a resident of village Laraputagaon had some cultivable land at Maganapathar and on the date of occurrence, he had left his house at about 6 or 7 in the morning with two "dangaris" (bundles of paddy) and a "Birla" (carrying split bamboo) to bring paddy from Maganapathar across the river Darika; but he did not return home. His wife Musst. Kusum Gogoi made enquiries about him through her son Jasadhar and neighbour Abapu Gogoi: but Dambaru could not be found. Next day, the dead body of Dambaru was found lying at Maganapathar. It is alleged that there was some quarrel between the accused persons and the deceased over land and cattle and that on the day preceding the day of occurrence, accused Gangadhar and Lakhinath had threatened the deceased with death. Abapu Gogoi lodged an either on 23-12-1966 at the Sibsagar Police Station and

therein he stated that he suspected accused Gangadhar and Lakhinath to be the culprits.

3. The police registered a case u/s 302 Indian P.C. took up investigation and on 24-12-1966 arrested all the five accused persons, who are relations, Accused Khora and Hazari are sons of accused Phatik. Accused Gangadhar and Lakhinath are brothers and their father and accused Phatik are brothers. The prosecution further alleges that on 22-12-1966. accused Khora and Lakhinath made confessional statements and their statements were recorded u/s 164 Cr. P.C. by Magistrate Shri B. N. Gohain and accused Phatik also made a confessional statement on 26-12-1966. It is alleged that while returning from Maganapathar. deceased Dambaru was drowned in the water of Darika river by accused lakhinath and Khora. It is further alleged that on the following night, while Premanath. brother of P. W. Anil, was sleeping in the pam house of accused Lakhinath at Maganapathar. he was roused by accused Gangadhar. Premanath woke up and saw all the five accused persons there who told him that Dambaru had been killed by Khora and Lakhinath and that they wanted to conceal the dead body. It is also alleged that the accused persons after their arrest, led the police to the place of occurrence and produced a gunny bag and two laths. Fifteen witnesses were examined in the case.

4. The learned Public Prosecutor submits that the order of acquittal has been illegal and the evidence on record warranted conviction for the offences charged with.

5. Let us first examine the case u/s 302/34 Indian P.C. against accused Lakhinath and Khora. The factum of homicide is not in dispute. The dead body of Dambaru has been identified by P. W. 1 Abapu Gogoi. The medical evidence of P. W. 2 Dr. P. Duara. who held the post mortem examination on the dead body is as follows:

(1) Incised wound 3 "X" "X bone deep on the right side of the head in partial and occvoital regions.

(2) Incised would 4 "X" "X bone deep on the right side of the head in parital and occipital region and completely cutting down the occypital bone 24" in length. In the opinion of the doctor, the injuries were ante mortem and the death was due to shock and hemorrhage due to the injuries described. His further opinion is that the injuries might be caused by a sharp weapon like a "machidao" (shown in court).

6. The only question is whether accused Lakhinath and Khora committed the murder. In this case, the prosecution relies on the following pieces of evidence:

(1) P. W. 12 Anil Duara is alleged to have seen the occurrence. According to the prosecution he is an evewitness.

(2) The confessional statements Exts. 10. 11 and 12.

(3) Extra judicial confession alleged to have been made before P. W. 14 Premanath Duara.

(4) Finds of lathis and gunny bags as produced by the accused persons.

P. W. 12 is a young school boy aged about 12 years at the time of occurrence. He says that on the date of occurrence, at the instance of his elder brother. P. W. 14 Premanath. he was going to graze buffaloes and while he was crossing a "sako" over the Darika river, he saw Dambaru being drowned by Lakhinath. "The head part of Dambaru was exposed on earth and the body part was under water". Accused Khora was on the bank and the deceased was being pushed into the water with a bamboo. Witness was afraid, screamed and ran towards home, but accused Khora stopped him with lathi and asked him on pain of death not to disclose the occurrence to anybody. Witness further said that accused Lakhinath was drowning Dambaru in water. This witness admits that he did not disclose the fact to anybody out of fear: but when he found the accused persons under arrest he disclosed the matter to P. W. 7. Golap Duara, his father Kulai Duara and Giridhari Duara regarding the occurrence. Kulai Duara and Giridhari Duara were not examined in the case. Giridhari is the brother of Dambaru. In cross-examination, P. W. 12 said he did not disclose the occurrence to anybody till the arrest of the accused out of fear. This witness has been disbelieved by the learned Sessions Judge and in our opinion, correctly. Although it is Possible that he might have been shocked at the sight of the murder of Dambaru and at the threat of the accused and might not have disclosed the matter to anybody for sometime, but it was normally expected that he would confide the matter at least to the inmates of his house, including his father Kulai, but he did not do so. Secondly, his evidence is that accused Lakhi and Khora actually drowned Dambaru in the water of river Darika. But his evidence is completely belied by the medical and other evidence on record. There is no evidence at all that Dambaru died of drowning. On the contrary, according to the medical evidence, the deceased died of the two incised injuries received by him on the head. We have no doubt in our mind that the evidence of P. W. 12 was concocted.

7. The second piece of evidence on which the prosecution relied is the three confessional statements, Exts. 10, 11 and 12. In order to be admissible a confessional statement must be proved to be both voluntary and true. Ext. 10 is the confessional statement of accused Khora Duara. The Magistrate. Shri B. N. Gohain. who recorded the confessional statements is since dead. Exts. 10, 11 and 12 have been proved by P. W. 11" Amburam Gogoi. who was the Bench Assistant of Shri B. N. Gohain. Ext. 10 shows that accused Khora had been arrested at 8 A.M. on 24-12-1966. taken to the Sib-sagar Police Station at 6 P. M. on the same day and detained there till 27-12-1966. From police custody he was produced in the court of Mr. Gohain for recording his statement on 27-12-1966.

Ext. 11 is the confessional statement of accused Lakhi Nath Duara. It discloses that he had been arrested at 6 A. M. on 24-12-1966. taken to the Sibsagar Police

Station at 12 noon on the same day and kept in police custody there till 27-12-1967 and from Sibsagar he was sent to the Magistrate for recording his confessional statement on 27-12-1966.

The confessional statement of accused Khora is as follows:

I gave two blows of lathi on the head of Dambaru while deceased Dambaru was carrying "dangari" from the Kawarpur field and arrived at the "sako" of Darika river on Friday last. Then Dambaru fell down in the water. After that, as Lakhi pressed down Dambaru under water. Dambaru died. The occurrence took place at about 8 or 9 A. M. Lakhi and myself carried the dead body at night and threw it in the Kowarpur field. Phatik Gangadhar and Hazari accompanied us.

The statement of Lakhinath is as follows:

On Friday last at about 8 or 9 A. M., Khora gave two blows with a "mahar takon" (lathi used for grazing buffaloes) on the head of Dambaru while deceased Dambaru was carrying "dansari" from Maganapathar and arrived at the bank of Darika river. Then Dambaru fell down in Darika river. Then I pressed down Dambaru. Dambaru died as a result of drinking water. I had a grudge on Dambaru from before. The dead body was brought to the Kowarpur field at night and thrown it there. The dead body was carried by Khora and myself. Phatik. Gangadhar and Hazari also accompanied us. We took them forcibly.

8. The alleged confessions as per Exts. 10 and 11 to the effect that two blows were given on the head of the deceased and that the deceased fell down into water when he was drowned by accused Lakhinath. are completely belied by the medical evidence. The medical evidence proves that the confessional statements are untrue. Further according to the confessions Dambaru was killed on Friday, while according to the prosecution he was killed on Thursday. This also proves the falsity of the confessional statements.

The two confessing accused, namely Khora and Lakhi had been in police custody from the time of their arrest. on! 24-12-1966 till they were presented before the Magistrate on 27-12-1966. Their minds therefore were not free from the influence of the police. Further the two accused persons were produced before the Magistrate on the same day and the confessional statements were recorded on that very day and it is apparent that sufficient time was not given to the accused persons to think over the matter and confess on their own accord if they so desired. The prosecution has failed to prove that the confessional statements were voluntary. In the circumstances the confessional statements Exts. 10 and 11 are neither voluntary nor true and therefore they are not admissible in evidence.

Ext. 12 purports to be a statement made by accused Phatik Duara and recorded by Magistrate Shri B. N. Gohain on 26-12-1966. This document has not been incorporated in the Paper Book. We have perused the original. Ext. 12 also has been proved by P. W. 11 Amburam Gogoi. It appears that the learned Magistrate

recording the confessional statement did not comply with the Form No. 96 of Assam Schedule VIII (Form No. 84) prescribed for the purpose of recording confessions and statements u/s 164 of the Criminal P.C. The evidence of P. W. 11 also does not show that this statutory form was complied with by the Magistrate. Ext. 12 therefore being in violation of the statutory provision of law, can immediately be ruled out as inadmissible in evidence.

9. The next piece of evidence on which reliance has been placed by the prosecution is the alleged extra judicial confession alleged to have been made before P. W. 14. Premanath Duara. He is the elder brother of P. W. 12 Anil Duara. He used to stay in the buffalo khuti of accused Lakhinath. He also has some buffaloes of his own in Lakhinath's Khuti and he used to stay there in the Khuti. In the night following the day of occurrence, he was sleeping in a khuti house of accused Lakhinath and at midnight. Gangadhar. elder brother of accused Lakhinath woke him up. On awaking he saw all the five accused persons. Gangadhar told him that they committed a "great occurrence". On being questioned, Gangadhar told him that they had killed Dambaru.

He further deposes that he did not disclose the matter to anybody as the accused persons threatened him with life. He disclosed the matter for the first time on Saturday to his father Kulai after the police brought the accused persons under arrest. As stated earlier. Kulai has not been examined in the case. The evidence of this witness cannot be accepted for two reasons. Firstly, he did not disclose the occurrence to anybody for two days although normally he was expected to do so; secondly, it is not likely that the accused persons would come to him at midnight, rouse him and confess their guilt to him. There is nothing on record to show as to why of all persons, this witness, who was a voune buffalo boy of 16 years was selected to confide with such a grave offence. The learned Sessions Judge also rightly refused to rely on the evidence of this witness.

10. The last piece of evidence is the finds of lathis, pieces of Bhaluka bamboo and funny baas alleged to have been pointed out by accused Khora and Lakhinath and seized under seizure lists Exts, 5 and 6. In view of the medical evidence that Dambaru died of the incised wounds received on the head these finds are innocuous and irrelevant.

11. There is another circumstance to which reference has been made by the learned Sessions Judge. Evidence on record shows that the occurrence took place on a "hat" day and the people of the nearby villages usually so to and come back from that "hat" from morning till evening by crossing the "sako" over the Darika river. The occurrence as alleged took place in broad day light: it is not probable that nobody would see it.

12. On a consideration of all the evidence on record, we hold that the prosecution has failed to establish that accused Khora and Lakhi committed the murder of Dambaru and bring home the charge under Sections 302/34 Indian P.C. against Lakhinath and Khora. In our opinion the order of acquittal of Khora

and Lakhinath of the charge under Sections 302/34 Indian P.C. has been correctly passed by the learned Sessions Judge.

13. Let us now turn to the charge under Sections 201/34 Indian P.C. against all the five accused persons. The only evidence on this charge is the evidence of P. W. 14 and Ext. 12. Ext. 12 has already been ruled out as inadmissible. P. W. 14 say that after having been informed of the murder of Dambaru. Phatik and others took him from the Khuti house to the house of Phatik and asked him to sleep there. He was sitting in Phatik's house. The five accused persons went to the river side and came back towards the early hours of the morning and asked him not to disclose that. The evidence is not that he either saw any concealment of the dead body or that the accused persons confessed to him any such concealment. He has not proved any confession before him. The least we can say about his evidence is that it is worthless. There is no evidence to warrant a conviction against any of the accused persons u/s 201/34 Indian P.C.

14. There is no substance in this appeal and it is dismissed.

15. Counsel for the respondents was not called upon.

M.C. Pathak, J:16. I agree.