

Dilip Debnath Vs. State of Tripura

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Court : Guwahati

Decided On : Dec-19-2006

Judge : Mutum B.K. Singh, J.

Appellant : Dilip Debnath

Respondent : State of Tripura

Advocate for Pet/Ap. : Mr. Section Bhattacharjee

Disposition : Appeal allowed

Judgement :

Mutum B.K. Singh, J.

1. Heard learned Counsel Mr. Section Bhattacharjee, learned Counsel for the appellant and also heard learned in-charge P.P. on behalf of the respondent.

By judgment dated 18.3.2002 passed in Sessions Trial No. 81(ST/U)/2001 the learned Sessions Judge, South Tripura, Udaipur convicted the accused-appellant under Section 304 Part-II of the Indian Penal Code and sentenced him vide order dated 19.3.2002 to undergo 7 years rigorous imprisonment and to pay a fine of Rs. 5,000, in default of payment, to undergo rigorous imprisonment for another period of 6 months.

2. Being aggrieved by and dissatisfied with the said order : of conviction and sentence the appellant challenged the impugned judgment as illegal and erroneous, in this appeal.

3. The prosecution story, in short compass, is that one Shri Nirode Debbarma (P.W. 1) lodged an ejahar on 24.7.2000 to the Kakraban Police Out Post (South Tripura) that his brother namely, Hiramani Debbarma did not return to home on 23.7.2000 and in the early morning of the next day he found his brother lying on the ground near Nutanbazar at Mirza in senseless condition with bleeding injuries on his body. The injured was taken by him and others to Kakraban Primary Health Center, but the doctor, after a short treatment, declared him dead and that his brother stated something to him and his niece, namely, Archana before his death relating to the incident.

4. During the trial prosecution examined as many as 22 witnesses and out of them (1) Shri Anil Saha (P.W. 4), (2) Shri Lab Chandra Majumder (P.W. 5), (3) Smt. Sabita Malakar (P.W. 6), (4) Shri Tapan Malakar (P.W. 7), (5) Shri Anil Debnath (P.W. 12), (6) Shri Kush Chandra Majumder (P.W. 15) and (7) Shri Laxman Chakraborty (P.W. 17) were declared as hostile witnesses, and (1) Shri Nibash Sarkar (P.W. 10), (2) Shri Sukumar Chakraborty (P.W. 18), (3) Shri Shyamal Ch. Debnath (P.W. 19) and (4) Shri Sanjit Dey (P.W. 20) were tendered but not examined.

5. Autopsy of the dead boy was conducted on 24.7.2000 by Dr. Gautam Debnath (P.W. 21) and found the following ante mortem injuries on the dead body of the deceased:

(1) One sharp cut injuries over left parital region, haematoma of 3' x 2' x 1' size.

(2) One sharp cut injury over the occipital region the haematoma of 3' x 2' x 1' size.

According to P.W. 21 the injuries were severe in nature and sufficient to cause death and the cut might have caused by sharp cutting weapon including 'Kuni', if the kuni was a heavy, but not by 'wooden file'. During cross-examination he deposed categorically that when he first attended the deceased, he was not in a

condition to speak. The learned trial court passed the impugned judgment by giving more emphasis upon the evidence of P.W. Nos. 1, 3 and 21 and the confronted portions of the hostile witnesses. In view of the above scenario, it is to be examined how far the above evidence are reliable and trust worthy.

6. P.W. 1 deposed that on getting information from P.W. 3 Kumari Archana Debbarma that her father did not return to home in the previous night, he went out to search the deceased and on the way he found his brother Hiramani Debbarma lying on the paddy field of Anil Debnath with injuries and at that time his brother was alive. On alarm being raised by him, Nitai Nag (P.W. 2) and Archana (P.W. 3) came to the spot, on query the deceased replied that he was assaulted by Dilip Debnath (Accused-appellant) and this disclosure was made in presence of Archana (P.W. 3) and Nitai (P.W. 2). Thereafter, they took the injured to Kakraban P.H.C where he expired. Thereafter, he lodged ejahar (Ext. 2). P.W. 3 the daughter of the deceased deposed the same fact as stated by P.W. 1. She also stated that on query, her father disclosed that he was assaulted by Dilip Debnath, though her father was found not in a position to speak clearly. She further stated that on that day she came to know from Anil Debnath (P.W. 12), Lab Majumder (P.W. 5) and Sridam Das (P.W. 16) that in the morning of Sunday a quarrel took place between her deceased father and Dilip Debnath, the accused-appellant. However, she admitted that she did not state the above fact relating to quarrel to the police while recording her statement under Section 161 Cr.P.C On the contrary P.W. 2 Nitai Nag, who took the deceased from the paddy field to hospital along with P.W. 1 and P.W. 3 deposed that when he found the deceased, he was alive, but he could not speak anything. He specifically deposed that the injured did not disclose to them by whom he was assaulted. P.W. 13 Smti. Kiran Bala Debbarma has also deposed that her husband did not return to her house in the right and in the early morning of the next day she sent her daughter Archana (P.W. 3) to the house of P.W. 1 to inform the matter and on hearing the alarm from P.W. 1, her self, her daughter P.W. 3 and P.W. 2 went to the spot and found her injured husband and immediately he was taken to P.H.C for treatment with her. By that time her husband was alive but on query he did not speak anything to them as he was not in a position to speak. Thereafter, her husband was declared dead. P.W. 21 has also deposed that when he first attended the deceased he was not in a

condition to speak.

According to P.W. 1 and P.W. 3 the deceased, before his death disclosed that he was assaulted by the accused-appellant. However, P.W. 2 and P.W. 13 deposed that the deceased was not in a position to speak and he did not disclose anything even on query. This second set of statement is supported by the statement of P.W. 21, who examined the deceased and also conducted autopsy.

Undoubtedly such two contradictory statement cannot exist together and the conviction on such contradictory evidence is not sustainable in law and in the absence of other corroborative reliable evidence in support of either of the two sets, both contradictory evidences are to be discarded. In *Harchand Singh and Anr. v. State of Haryana* : 1974 CriLJ366 , the hon'ble Apex Court held that when prosecution leads two sets of evidence, each one of which contradicts the other, it is difficult to convict the accused on such statement. It appears that the learned trial court arrived at a finding regarding the credibility of the statement of P.W. 3 and P.W. 1 more on emotion and sympathy without taking into consideration the existence of contradictory statement of P.W. 2, P.W. 13 and P.W. 21. In the above factual matrix, the statement of P.W. 1 and P.W. 3 with regard to the disclosure alleged to have been made by the deceased are not free from doubt and the accused should be given the benefit of such contradictory statement.

7. In this case admittedly there was no eye witness and as such the learned trial court convicted the accused basing on the circumstantial evidences and the extra-judicial confession of the accused-appellant. It is needless to mention that circumstantial evidences must be established by cogent, succinct and reliable evidence and said circumstance must be as such which cannot be explained otherwise except the guilt of the accused. In the case of *Pohalya Motya Valvi v. State of Maharashtra* (1979) Cri. L.J. 1310, the hon'ble Apex Court held that circumstances must provide a complete chain, no link of which must be missing and they must unequivocally point to the guilt of the accused without any hypothesis consistent with his innocence. In the case of *Jagjit Singh v. State of Himachal Pradesh* (1994) Cri. LJ 233, hon'ble Apex Court held that where the presence of eye witness could not be secured that would not prevent the

prosecution from relying on the evidence though circumstantial in nature and if such evidence is sufficient to bring home the guilt, the conviction should follow.

8. Applying the above principle laid down by the hon'ble Apex Court it is to be seen whether the prosecution has been able to prove the case by circumstantial evidences. Undoubtedly, the deceased was found lying with bleeding injuries on 24.7.2000 in the early morning in a paddy field and at that time he was alive. The injured succumbed to his injuries after taking him to Kakraban Primary Health Centre for treatment. The evidences reveal that on 23.7.2000 (Sunday) in the evening the deceased went to Mirza Bazar and did not return to his home. In the morning of the next day he was found with bleeding injuries as stated above. P.W. 3 Archana Debbarma, P.W. 11 Sakuni Debbarma and P.W. 13 Smti. Kiran Bala Debbarma who are the daughter, father and wife respectively of the deceased deposed that they heard that on 23.7.2000 in the morning the deceased quarrelled with the accused appellant at Nutan Bazar in connection with some amount due to the accused appellant. According to P.W. 3, she heard the said fact from P.W. Nos. 5, 12 and 16 whereas P.W. Nos. 11 and 13 did not mention from whom they learnt the above fact. P.W. Nos. 5 and 12 were declared as hostile witnesses along with others and they did not support the statement of P.W. 3 in any manner whatsoever. P.W. 16 did not mention anything about the alleged story of quarrel in his evidence. P.W. Nos. 5 and 12 did not speak anything about the previous quarrel between the deceased and the appellant in their statement given before the court as well as in the confronted portions of statement recorded under Section 161 Cr.P.C. The prosecution, thus, failed to prove the story of previous quarrel between the deceased and the accused appellant and this fact is found missing from the chain of circumstantial evidences.

9. On perusal of the impugned judgment it appears that the learned trial court has relied heavily on the evidences of the hostile witnesses while passing the impugned judgment. It may not be out of place to point out that the confronted portion of the statement of the hostile witness can only be used for the purpose of contradiction and not for any other purpose. The evidences of hostile witnesses can, however, be relied upon to the extent it supports the prosecution version, if such testimony is corroborated by other reliable evidences on record. The learned

trial court observed that on the alleged night some witnesses (P.W. 7) stated that the accused and the deceased were found quarrelling while returning to their home and on the basis of above observations learned trial court arrived at a decision that in the midst of quarreling the accused-appellant gave the alleged blow in question, by means of 'Kuni' resulting fatal injuries and ultimately the deceased succumbed to his injuries. The learned trial court further held that the injuries found on the head of the deceased might have caused by 'Kuni' seized by police in connection with the present case. In this case P.W. 7 was declared as a hostile witness and the relevant confronted portion of his statement marked Exbt. 7, recorded under Section 161 Cr.P.C runs as follows:

Yesterday that in on 23.7.2000 A.D. at about 8.30 O'clock night I found that Hiramani Debbarma of Keranikhamar and Dilip Debnath were going to their house from Mirza Bazar. Then, they were making an altercation about some what matter. On coming from behind I had gone to my own house by moving aside them.

However, this statement of P.W. 7 is not corroborated by the evidence of any reliable witness. Hence, this statement is also to be discarded and the story of last seen together should be excluded from the purview of consideration. Further, P.W. 21 who conducted the post-mortem examination was of the opinion that the injuries found on the head of the deceased might be caused by 'Kuni', if it is a heavy one. There is no evidence on record that the seized 'Kuni' is a heavy one and that even the description of the seized 'Kuni' has not been reflected in the relevant seizure list marked Exbt. 9. Thus, the prosecution has also failed to prove the fact that on 23.7.2000 in the night there was a quarrel between the deceased and the accused appellant, and the injuries found on the head of the deceased were caused by the accused-appellant by means of 'Kuni'.

In view of the above discussion, I have no hesitation in holding that the findings arrived at by the learned trial court are erroneous and perverse in law.

10. As regards the extra-judicial confession of the accused-appellant is concerned, the learned trial court was required to examine as to whether the alleged confession of the accused was made voluntarily and whether the same was reliable or not. The hon'ble Apex Court as well as other Hon'ble High Courts in

catena of cases held that the court can rely upon the evidence of extra judicial confession for convicting the accused, if such confession is voluntary and reliable. The court has to examine further, the reasons, motive and the circumstances under which the confession was made and the reliability of the persons before whom such confession was made. The hon'ble Apex Court endorsed the above proposition of law in the case of *Heramba Brahma and Anr. v. State of Assam* : 1983 CriLJ149 . In the case in hand, the learned trial court abruptly held that the accused has confessed and admitted that he assaulted the deceased by wooden file and 'Kuni'. The witnesses to whom the extra-judicial confession said to have been made by the accused appellant were all declared as hostile witnesses and that they did not support the prosecution story at all and their evidences are not corroborated by any reliable evidence. On a bare perusal of the confronted portion of 161 statement relating to the hostile witnesses, it shows that the wooden patta seized by police, was given by them to the wife of the accused-appellant and the accused was caught by them from his house and brought him forcibly to the market where they made him to confess. It shows that the confession, if any, was not voluntary and there is no evidence on record to show the reasons for giving such alleged confession. The exact words of confession are also not found in evidence. Such type of confession cannot be relied upon and it should not be treated as an extra-judicial confession.

11. Considering the above facts and circumstances of the case and the evidences on record, this Court is of the view that the prosecution has failed to prove the charge levelled against the accused-appellant either by circumstantial evidences or otherwise. The judgment of the learned trial court convicting and sentencing the accused under Section 304 Part II of the Indian Penal Code needs for interference. Consequently, the conviction and sentence dated 18.3.2002 and 19.3.2002 respectively, passed by the learned trial court in S.T.81(ST/U)/2001 are set aside. The accused-appellant is set at liberty forthwith, if not wanted in any other case. The appeal is allowed, accordingly.

Bail bond and surety bond stands cancelled and discharged.