

Ashim Das and Etc. Vs. State of Assam

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Court : Guwahati

Decided On : May-02-1986

Judge : K. Lahiri and S.N. Phukan, JJ.

Appellant : Ashim Das and Etc.

Respondent : State of Assam

Judgement :

S.N. Phukan, J.

1. These three criminal appeals arise out of the common judgment and order dated 25th Nov. 1978 passed by the learned Sessions Judge, Kamrup in Sessions Case No. 140 (K-B) 1974 convicting all the four accused-appellants under Section 302 read with Section 34 of the Indian Penal Code, for short 'I. P. C and sentencing them to suffer rigorous imprisonment for life. Since the present appeals arose out of the aforesaid common judgment we propose to dispose of all the three appeals together by this judgment.

2. On 30-8-73 at about 6 to 6.30 A. M. while deceased Desiram wearing only a gamcha (big napkin) was taking tea sitting on a chair on the western varandah of his house, Horeswar came running with a spear in his hand and stabbed Dasiram on the calf of his leg. Dasiram wanted to get up for going inside his house by catching hold of the post of the varandah which broke down and Dasiram fell down on the court yard near the plinth. At that particular moment Ashim with a ballam,

Surjya with a dagger and Bhubaneswar with a 'Satpatia' (a weapon having seven pointed iron nails, which is used for catching fish) in their hands entered into the house of Dasiram. All the above persons attacked Dasiram with their weapons. Thereafter Surjya, Ashim and Bhubaneswar left the place running, but Horeswar stayed back and again stabbed Dasiram on his leg and went away towards his house. It has been alleged that Horeswar came to the place of occurrence wearing a gamcha (big napkin) which fell off and he was standing there in a naked condition and that the gamcha of Horeswar was lying near the deadbody. At first Horeswar came running and on hearing the sound, the second wife of Dasiram, Smt. Tarini came out and saw the occurrence. According to the prosecution the two wives of deceased, Dasiram namely; Jamini and Tarini, sisters and their younger sister Pranita, who was in the house at the relevant time to help Tarini as she was in her family way, saw the attack by the above four persons on deceased Dasiram. As a result of the attack by the above persons, Dasiram died. Police after investigation submitted charge sheet against all the four accused persons and the learned Sessions Judge tried them under Section 302 read with Section 34, I. P. C. and found them guilty and convicted accordingly.

3. Defence version was complete denial. According to the defence, as unfolded in the cross-examination, there was a boundary dispute between deceased Dasiram and accused Horeswar and on the morning of the date of occurrence the deceased climbed up the coconut tree which was on the disputed boundary for plucking fruits and when Horeswar saw him climbing deceased wanted to get down hurriedly and as a result he slipped down and fell from the middle of the tree on the fencing, in consequence of which he got injuries. After being injured, deceased returned to his house and fell down in the courtyard of his house and ultimately succumbed to the injuries. Defence examined four witnesses in support of their plea. Accused Surjya took a separate plea that on the morning of the date of the occurrence he left by bus for Gauhati. Accused Bhubaneswar is the son of accused Horeswar. Accused Ashim is the son of elder brother of accused Horeswar.

4. learned Counsels for the appellants urged that the prosecution story is not believable as all the eye-witnesses are closely related to the deceased and they

have falsely implicated the accused persons as there was a boundary dispute. It was further contended that there were material contradictions between the medical evidence and the ocular evidence, that the post mortem report (Ext. 9) clearly established that the occurrence did not take place in the morning of 30-8-73 as alleged by the prosecution, that prosecution suppressed the actual story by not examining all the eye-witnesses and that the learned Sessions Judge rejected the plea of alibi taken by accused appellants, without giving any reason.

5. According to prosecution Tarini, P. W. 2, Jamini, P. W. 3, wives of deceased Dasiram and their sister Pranita, P. W. 4 were eye-witnesses to the occurrence. It is in evidence that Phani, son of Dasiram was also present at the time of the occurrence. Occurrence took place in the morning in the house of deceased Dasiram and as such the above persons were natural witnesses to the occurrence being inmates of the house and under normal circumstances they are to be believed though closely related. However, we have to test the veracity of these witnesses by taking into account the medical evidence, post mortem report, inquest report and other circumstances.

6. According to Tarini P. W. 2 at first accused Horeswar appeared with a spear and stabbed the deceased on the calf of his leg and thereafter other accused persons came. According to her, Bhubaneswar carrying the Satpati stabbed the deceased. She came forward but Bhubaneswar with the handle of the 'Ballam hit her on the right side of her back. She has deposed that Ashim, who was carrying a ballam, stabbed the deceased on the left side of the back and again stabbed near the joint of the right hand of the deceased. She saw accused Surjya stabbing her husband on his chest with the dagger and thereafter accused persons Surjya, Ashim and Bhubaneswar left the place running. However, accused Horeswar, whose 'Gamcha' fell off, was standing in naked condition near the body of Dasiram and when she asked what more he wanted to do, Horeswar again stabbed the deceased on his leg and went away. She categorically stated that Phani, son of the deceased by the first wife Jamini, P. W. 3, was at the place of occurrence and was nursing his father by attending to the wounds with Dettol. Though Tarini has given a vivid picture of the occurrence by narrating which accused gave what type of blows and with what weapons on the deceased, Jamini, P. W. 3 the first wife of

deceased has only stated that all the three accused persons namely Ashim, Bhubaneswar and Surjya attacked the deceased with the weapons carried by them. She has, however, described the types of weapons carried by each accused person. She has also stated that at first she saw Horeswar coming with a spear and piercing her husband. She corroborated the fact that accused Horeswar was standing in naked condition near the deadbody. Pranita, P.W. 4 has also stated that Horeswar attacked with the spear on the joint of the leg of deceased and all other accused persons attacked deceased with their respective weapons. If we go through the evidence of these three witnesses we find that they deposed in a parrot like way. We find it difficult to believe that Jamini, P.W. 3, Tarini, P.W. 2, wives of the deceased would maintain their normal mental condition when their husband was attacked by four accused persons in the morning with weapons like spear etc. Under normal condition both the wives would have become panicky and it is difficult to believe that they could remember the incident so vividly. We get support of our impression from the evidence of Lili Bala, P.W. 5 and Jagannath, P.W. 6. According to Lili Bala, P. W. 5, the two wives of the deceased told her that the accused persons killed her husband that too on her second visit to the place of occurrence and after they recovered their senses. According to Jagannath, P. W. 6, the two wives broke down and they were lying near the deadbody. That apart, Tarini, P.W. 2 was in advanced stage of pregnancy and she was blessed with a baby after 24 days of the occurrence.

7. Dr. Hawque P.W. 7 who conducted the autopsy, found five injuries namely; one abrasion, two lacerated wounds and two ecchymosis. According to him the death was due to shock and intra-cranial haemorrhage as a result of injuries sustained. In cross-examination he has stated that this intra-cranial haemorrhage was due to injury No. 4 i.e. ecchymosis over the left side of the forehead, 3' X 2'.

8. Thus we find the evidence of the eyewitnesses does not corroborate the medical evidence. Doctor has clearly stated that there was fracture of the frontal bone of the skull towards left side, but not a single eye witness stated that any accused person gave any blow on the head of the deceased. The learned trial court rejected the evidence of Doctor on the ground that though on 31-8-73 he conducted the post mortem and kept his findings in a rough paper, the post

mortem report (Ext. 3) was signed on 27-11-73 i.e. about three months after the occurrence. On that ground he rejected the medical evidence and accepted the ocular evidence. We find it difficult to accept the said ground of the learned trial court as the Dr. Hawque, P. W. 7 has given reason for the delay by stating that there were many cases for entry in the register which were recorded in order of preference.

9. According to the inquest report (Ext. 5) the deceased was wearing striped ganicha and the following injuries were found on examination :- stab injury measuring 1 1/2' in length on the left chest, another stab injury measuring about same length on the Panjara of the left chest, a minor stab injury on the right chest, one stab injury measuring 1 1/2" on the middle joint of the right hand, two other, small injuries on either sides of the left thigh, one stab injury measuring 1' on the middle joint of the left hand, one small stab injury on the back over the waist, one stab injury measuring W below the armpit of the left hand, abrasions on both the hands and the belly and one stab injury on the left hand. If we look at the above injuries and the evidence of the eye-witnesses we find discrepancies. From the account given by the eye-witnesses there was no possibility of any abrasion on the body of the deceased. That apart, according to Tarini, P. W. 2 accused Horeswar stabbed on the calf of the leg of the deceased with a spear. If the spear was used there could not have been small injuries on the left thigh as recorded in the inquest report. From the evidence we find that injuries were caused by ballam, satpatia and dagger, but in the inquest report only stab injuries were recorded and there is no indication in the report of injuries that might have been caused by other weapons used by the accused persons more particularly 'Satpatia'.

10. So we get three different versions from three different sources namely; eye witnesses, evidence of Doctor, Haque, P.W. 7, who deposed from the post mortem report (Ext. 9) and the inquest report (Ext. 5) Dr. Haque, P.W. 7 deposed clearly and with irrefutable reasons found on physical facts noted by him at the time of autopsy. According to him injuries Nos. 1 and 2 were caused by semi-sharp weapon because margins were not regular. No injury was found on the back of the deceased. In the opinion of Dr. Haque, ecchymosis mentioned in injury No. 3 may be caused due to fall against hard substance or by a blow, abrasion may be

caused by falling over rough substance or due to assault and a lacerated wound may be caused by blunt weapon or by fall from some height on rough surface. He further stated that all the five injuries found by him on the body of the deceased might have been caused by fall from considerable height over bamboo fencing and injuries Nos. 1 and 2 i.e. lacerated wound over the 8th rib in the mid-auxiliary line towards the left chest wall and over the left costo-chondrial junction at the level of 4th rib respectively might be caused by fall over pointed or sharp bamboo post or 'goz' (sharp pointed post of bamboo) of a fencing. From the evidence of Doctor, P. W. 7 we do not find that the injuries were caused by sharp weapon as alleged by the prosecution.

11. In Ram Narain : 1975 CriLJ1500 it was held that if the evidence of the witnesses for the prosecution is totally inconsistent with medical evidence, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case. In Purshottam : 1980 CriLJ1298 it was held that if there is a contradiction between medical testimony and alleged eye-witness regarding fatal injury, medical testimony is to be preferred. In Maula Bux : (1983)1SCC379 it was held that if there is a discrepancy between the post mortem report and the inquest report and if the post mortem and the testimony of the Doctor who conducted the post mortem is otherwise reliable the benefit of discrepancy must be given to the accused by accepting the post mortem report, if it is more favourable to the accused.

12. In the instant case we have given our reasons for accepting the evidence of Doctor, P.W. 7 and we have accepted the post mortem report. Both the post mortem report and the evidence of the Doctor are favourable to the accused persons. So the benefit should go to the accused persons. Even the inquest report does not fully support the prosecution story. On that count also we find it difficult to accept the story that the deceased was killed by the accused persons with sharp and pointed weapons as alleged.

13. Coming to the other witnesses namely; P Ws 5,6 and 8 we find that there are material contradictions in their evidence. According to Lili, P.W. 5, she first arrived and thereafter Bhagwan, Jagannath, Maheshwar and Haladhar arrived at the place

of occurrence. Jagannath, P.W. 6 stated Lili, P. W. 5 and Chandrabala came after he went to the place of occurrence. Both P.Ws. 5 and 6 have not mentioned presence of Harmohan, P.W. 8, at the place of occurrence. But Harmohan, P.W. 8 stated that Lili, P.W. 5 followed him to the courtyard of deceased Dasiram and on his arrival he saw Jagannath, P.W. 6 pouring water on the heads of the wives of the deceased. But there is no such statement by Jagannath, P.W. 6. P. Ws 5, 6 and 8 are not eye witnesses to the occurrence and the prosecution has examined them to prove other circumstances.

14. Jagannath, P.W. 6 has made a very interesting statement that after sun rise the deadbody was lifted from Adhila (plinth) and was kept on a mat in the middle of the courtyard. In this part of the country sun rises early, more particularly, during summer and as according to the prosecution the occurrence took place between 6 and 6.30 A. M. in the month of August which was after sun rise, the above statement of P. W. 6 contradicts the prosecution story in material particulars.

15. From the evidence of Lili, P. W. 11, the Investigating Officer we find that on 10-10-73 he examined Pranita, P. W. 4, LiliBala, P. W. 5 and Harmohan, P.W. 8 i. e. after about two months of the occurrence. Relying on the authority of the Supreme Court in Balakrushna Swain : 1971 CriLJ670 we hold that delay in examination of witnesses by the investigating officer may give an opportunity to the witnesses to concoct a different version than what actually took place. In that case before the Supreme Court the delay was only for 10 or 11 days, but in the instant case delay was about two months. The learned Public Prosecutors tried to explain the delay by drawing our attention to the fact that P. W. 10 was transferred, which is not acceptable to us P. W. 10, who took up investigation first on 30-8-73 transferred the case to P. W. 11 for further investigation only on 13-9-73. So P. W. 10 had sufficient time to examine all the material witnesses.

16. We find that the statements of Lili Bala, Jagannath and Harmohan were recorded under Section 164 of the Cr.P.C. by P.W. 9 Sri Rai, an executive Magistrate. The provisions of Section 164 is clear and according to said section such statement can be recorded only by a judicial Magistrate. So the statement recorded by Sri Rai, P. W. 9 has no value in the eye of law.

17. Phani, son of the deceased was a witness to the occurrence. It is in evidence that phani was attending his father by putting 'dettol' on the injuries, but he was not examined on the ground that he was won over by the defence and accordingly an application was submitted before the learned trial court. On the authority of the Supreme Court in State of U.P. AIR 1973 SC 1586 : 1971 Cri LJ 1173 we hold that mere presentation of an application by the prosecution that a certain witness had been won over is not conclusive. In such a case the witness can be produced for cross-examination which would elicit correct facts. In fact though prosecution has examined Jagannath, P.W. 6 and Harmohan P.W. 8 they were declared hostile and cross-examined by the prosecution. Supreme Court had the occasion to consider the evidentiary value of witnesses declared hostile by the prosecution. In Sat Paul : 1976 CriLJ295 it was laid down that when a witness is cross-examined and contradicted with the leave of the court, his evidence cannot, as a matter of law, be treated as washed off record altogether. The court has to consider whether as a result of such cross-examination and contradiction the witness stands thoroughly discredited thereby. In view of the above authorities of the Supreme Court, we are of the opinion that prosecution should have examined Phani to enable the court to consider the value of his evidence and non-examination of Phani is fatal for the prosecution. From the evidence of Jagannath, P.W. 6 and Harmohan, P.W. 8 we find that Jagannath was cross-examined by the prosecution only in respect of his statement to the investigating officer that he named accused Ashim, though in his examination-in-chief he has described the above accused as a 'white boy'. Harmohan, P.W. 8 was cross-examined by the prosecution only to prove his statement before the investigating officer that accused Ashim told him that they had pierced the deceased. He was also cross-examined to confront the statement before the magistrate under Section 164 which we have already rejected as it was recorded by an executive magistrate. Thus it appears that the entire statements of P.Ws. 6 and 8 before the police were not impugned, only a small portion of the said statement was impugned. From this we (sic) cannot treat the entire evidence of those two witnesses as washed off the record altogether, though they were declared hostile by the prosecution.

18. The deceased was a practitioner in Homeopathy medicine. Jamini, P.W. 3, the first wife of the deceased stated that at the time of the occurrence one Lohit was

sitting in the room of their house which was used by her husband for his medical profession. Lohit, who was a disinterested witness was not examined and this creates a serious doubt in our mind regarding the prosecution story.

19. The post-mortem report (Ext. 9) is revealing, according to which the stomach contained undigested food material, bladder was full and the body was partially decomposed. According to the prosecution the occurrence took place in the morning while deceased was taking tea. A villager going to his field for cultivation normally takes food early morning. But it is not so in the case of a medical practitioner. The fact that undigested food was found in the stomach and the bladder was full will also show that occurrence took place immediately after taking food by the deceased. The occurrence took place on 30-8-73 in the morning at 6.30 and next day in the morning around 11.45 the autopsy was performed. There could not have been any decomposition of the body during that period. From these facts we do not believe that the occurrence took place at 6 or 6.30 A.M. on 30-8-73 as alleged by the prosecution. By Ext. 7 the investigating officer seized some blood stained earth from the place of occurrence, but not sent for chemical examination. This departure by the prosecution has not been explained.

20. There was a dispute regarding boundaries between the deceased and the accused persons. According to the defence Dasiram was climbing up the coconut tree and when accused Horeswar saw him deceased wanted to get down hurriedly from the tree and as a result he fell down on the fencing in the boundary. The medical evidence supports the defence version of the story regarding the manner in which the death was caused to the deceased. The evidence adduced on behalf of the defence cannot be discarded totally. From the evidence of D. Ws. 2,3 and 4 we find that there is reason to believe that on the date of the occurrence accused Surjya left for Gauhati early in the morning.

21. Learned Public Prosecutor has drawn our attention to the evidence of Lili, P. W. 5 in support of his contention that there was an extra-judicial confession by accused Surjya. Lili, P. W. 5 stated that Surjya on being asked replied that 'Doctor is finished'. This statement of Lili, in our opinion, cannot be treated as an extra-judicial confession by accused Surjya. In *Heramba Brahma* : 1983 CriLJ149 the

Apex court considered the evidentiary value of extra-judicial confession and held that such extra-judicial confession should not only be reliable, but the reasons or motive for confession and the person selected in whom confidence was reposed must also be looked into. Assuming that the above statement by accused Surjya was an extra-judicial confession, we cannot accept it as reliable as we find it difficult to believe that Surjya immediately after the occurrence would repose confidence on Lili, Therefore, the above statement needs no consideration.

22. The learned Public Prosecutor has also drawn our attention to the evidence of Jagannath, P. W. 6 who stated that he saw accused Horeswar being armed with a spear type weapon and in naked condition going towards his house from the house of the deceased. But from the evidence of investigating officer, P. W. 10 we find that Jagannath did not make any such statement at the time of investigation and as such this piece of evidence cannot be accepted.

23. Mr. Sarma, learned Counsel for the accused persons has drawn our attention to the fact that the FIR was not signed by the magistrate as is required under the law and that the investigating officer, P. W. 10 admitted in cross-examination that the case diary was maintained in loose sheets. These two factors definitely create a doubt in our mind regarding the prosecution story.

24. According to defence the deceased was climbing coconut tree early in the morning of the date of occurrence. But we have held that the occurrence did not take place on that date. Learned Public Prosecutors submitted that the defence story is not at all probable. Mr Sarma has drawn our attention to Keshav : 1971 CriLJ798 wherein their Lordships held that whether the defence story is probable or not is not immediately relevant as what the court has to see is whether the prosecution has established beyond doubt that the incident took place as alleged by the prosecution. As we have disbelieved the story of the prosecution, we need not consider whether the defence story is probable or not.

25. From the above reasons we hold that the prosecution has failed to prove the charges of Section 302 read with Section 34 I.P.C. against the accused persons beyond all reasonable doubt.

26. In the result, we allow the appeals Nos. 109, 113 and 119 of 1978 and set aside the conviction and sentence dated 14-2-77 of the learned Sessions Judge, Kamrup, Gauhati in Sessions Case No. 140 (K-B) of 1974. The accused persons are released from the liability of the bail bond.

27. All the three appeals are allowed.

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