

**Naresh Mirdha Vs. State of Assam**

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**Court :** Guwahati

**Decided On :** May-05-2003

**Judge :** P.G. Agarwal and I.A. Ansari, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 304

**Appeal No. :** Crl. Appeal No. 18(J) of 1999

**Appellant :** Naresh Mirdha

**Respondent :** State of Assam

**Advocate for Def. :** P. Bora, PP

**Advocate for Pet/Ap. :** Dilip Mazumdar, Amicus Curiae

**Judgement :**

**I. A. Ansari, J.**

1. This appeal has been preferred against the judgment and order dated 28.10.1998, passed by the learned Single Judge, Tinsukia, in Sessions Case No. 45(T)/96, convicting the accused-appellant under Section 304 IPC and sentencing him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 2000 and in default, to undergo further rigorous imprisonment for a period of on year.

2. The case of the prosecution, as unfold at the trial, may, in brief, be stated as follows:

On 15.4.1995 at 10.15 A.M., one Smti. Chandravati Mirdha, a resident of labour line No. 37 of Chamdang Mechaijan Tea Estate, lodged a written FIR, at Doom Dooma police station, stating, inter alia, that on the previous night at about 7 P.M., while her husband, Hiralal Mirdha, went out to the same labour line, the present appellant and his brother, Ajit Mirdha, on the said labour line had assaulted Hiralal with a dao on different parts of his body seriously wounding him and on receiving information about the occurrence, when she reached the place of occurrence, she found her husband lying injured and shifted him to the hospital of Chamdang Tea Estate, wherefrom he was taken to Central Hospital, Bichakupi, where he died on the following day of the occurrence. On receipt of the said FIR, Doom Dooma police registered a case and, on completion of investigation, laid charge-sheet against the present appellant, Naresh Mirdha, and his brother, Ajit Mirdha, aforementioned, under Section 302/34 IPC.

3. The learned trial Court framed a charge under Section 302/34 IPC against the present appellant, Naresh Mirdha, and accused Ajit Mirdha aforementioned, but both the accused pleaded not guilty to the charge so framed.

4. In all, prosecution examined 9 witnesses. The accused aforementioned were examined under Section 313 Cr.P.C. and in their examination aforementioned, the accused denied to have committed offence alleged to have been committed by them, the case of the defence being that of complete denial. No evidence was, however, adduced by the defence. The trial ended in conviction of the present appellant under Section 304 IPC, while his brother, Ajit Mirdha, was acquitted. Hence, this appeal.

5. We have perused the materials on record. We have heard Mr. Dilip Mazumdar, learned Amicus Curiae appearing on behalf of accused appellant, and Mr. P. Bora, learned Public Prosecutor.

6. Turning to the evidence on record, we notice that P.W.-4, who had performed post-mortem examination on the dead body of deceased Hiralal Mirdha, found the

following injuries :-

'(1) Incised wound in the right parietal region of the scalp of size 8 x 1 cm. bone cut.

(2) 3 numbers of incised wounds o the right fore-arm outside middle part of size 7 x 1 cm., 5 x 1, cm., 7 x 1 cm bone cut.

(3) 2 numbers of incised wounds o the left forearm outside middle part of size 5 x 1, cm 7 x 1 cm bone cut.

(4) Incised wound in the right auxiliary region 8 x 1 cm x muscle deep.

(5) Incised wound on the right knee-joint on the front side of size 8 x 1 cm bone cut.'

7. In the opinion of P.W.-4, death of the deceased was caused due to shock and haemorrhage that resulted from the ante-mortem injuries caused by heavy sharp cutting weapon and that the injuries were homicidal in nature.

8. The identity of the dead body and/or the cause of death of the deceased, as deposed to by P.W.-4, have not been disputed at the trial. This apart, we see no reason to disbelieve the evidence of P.W.-4 and/or disagree with the opinion expressed by him with regard to the weapon used and/or the cause of death. Thus, the learned trial Court has correctly held that Hiralal Mirdha met with homicidal death on account of the injuries mentioned hereinabove.

9. Before proceeding further, what may be noted is that out of 9 witnesses examined by the prosecution. P.W.-1 is a mere scribe of the FIR and his evidence is not very material,. So far as P.W.-6 is concerned, his evidence is nothing but hearsay inasmuch as he has merely stated that he had heard that accused Naresh Mirdha and Ajit Mirdha had murdered Hirlal Mirdha. P.W.-7 is the Medical Officer of Bisakupi Central Hospital, where the deceased remained under treatment for multiple incised wounds sustained by him as described hereinbefore.

10. Coming to the evidence of P.W.-2, wife of the deceased, what attracts our eyes is that she, claiming to be an eye witness of the occurrence, deposed that on

the day of occurrence, she and her husband, Hiralal Mirdha, went to the place of her daughter, who resided in the same labour line, and before dusk, when they were returning home by the road located in front of the house of the two accused, she was ahead of her husband and when they were so proceeding, she heard the cries of her husband, she turned her face and saw accused Naresh and Ajit assaulting her husband with dao and tangi and, upon witnessing the occurrence, she raised hullah and ran towards her house, but one of the labourers, residing in the line, came out to help her husband, whereupon she went to inform her son-in-law, Ramesh, and on returning to the place of occurrence, she found her husband lying on the roadside drain and her husband, who was, at that time, alive, told her that accused Naresh Mirdha and Ajit Mirdha had assaulted him. It is also in the evidence of P.W.-2 that she took her husband in a hand-cart to Samdang Tea Estate hospital, wherefrom he was sent to Bisakopi Central Hospital, where he died on the next day. This witness has further deposed that she lodged the Ejahar,

11. Notwithstanding what P.W.-2 has deposed at the trial, learned Sessions Judge correctly noted that according to her statement made before the police, she was not an eyewitness to the occurrence and that she had found her husband lying injured, when she had come out of her house looking for her husband. She further stated before the police that her injured husband had told her that accused Naresh Mirdha and Ajit Mirdha had assaulted him with dao and that she had not seen the assault. This apart, the version of the occurrence depicted by the witness in her FIR (Ext.1) tallied substantially with her statement made before the investigating officer.

12. The learned trial Court has, therefore, in our view correctly held that P.W.-2 cannot be relied upon and her evidence does not establish as to who had really caused Hiralal Mirdha's death.

13. Coming to the evidence of P.W.-8, we note that she is the Judicial Magistrate, who recorded the confessional statement of the present appellant. Learned Amicus Curiae could not point out anything from the evidence of P.W.-8 to show that the confessional statement recorded by her was involuntary. We have carefully examined the evidence of P.W.-8 as well as Ext.9, which is the

prescribed form on which the confessional statement, in question, stands recorded under Section 164 Cr.P.C. The evidence given by P.W.-8 shows that the accused was brought before her, on 17.4.1995 at 11.30 A.M., not from police custody, but from judicial custody and after giving him time for reflection with due care and caution, as were required, she, again, made queries from the accused-appellant at 3.00 P.M. and, on feeling satisfied that the accused-appellant was willing to make a confession voluntarily, she recorded the confession. In this regard, it is worth noticing that on being asked by P.W.-2 as to why he wanted to confess, the appellant replied by saying that since he had killed the said deceased, he was going to make confession in his self-defence. P.W.-8 had also informed the appellant that if he chose not to make any confession, he would not be sent back to the police. Having taken necessary precautions, when the confessional statement of the appellant was recorded, we see no reason to view the confession as involuntary, particularly, when even the learned Amicus Curiae has not been able to point out anything to indicate that the confession, so recorded, was involuntary. The confessional statement of the appellant reads as follows :

'Earlier on the day of Fagua festival, I was standing near a Gumty (shop), at that time, Hiralal Mirdha came there and started assaulting me with a knife. He cut on my head and forehead and when I fell down, he fled away. I was in hospital for 5/6 days. I requested the Manager to take action in the matter. The doctor also gave me a report. Thereafter, on the night of last Friday at about 7/8 P.M., taking a long 'Kattari' (dao) measuring about two cubits, he again came to my house and wanted to assault me. I started running, I was cautious. In the meantime, I got a lathi, which was lying and picked up the stick, and gave a blow on his head. Then he started running. Then I picked up - the dao, which fell down from his hand and started assaulting him with that weapon. I assaulted him for my self-defence. But I did not think that he would die, because he was running with injury. He repeatedly wanted to assault me. So, I assaulted him, because I lost patience and there was danger to my life.'

14. When we advert to the evidence of P.W.-3, who is younger brother of the deceased, we notice that this witness has deposed that on being informed by his nephew, Amit Mirdha, about the occurrence on Saturday morning (i.e., on the

following day of the occurrence) he (P.W.-3) went to Bisakupi Central Hospital, he found his brother lying injured on the Hospital bed, his brother talked to him and on being asked about the assailants, the deceased told him that accused Naresh Mirdha and Ajit Mirdha had assaulted him with dao and tangi, whereupon he (P.W.-3) gave his brother some water and sometime thereafter, his brother died.

15. A careful and combined reading of the oral dying declaration claimed to have been made to P.W.-3, on the one hand, and the judicial confession, on the other, shows that the version of the occurrence of the assault on Hiralal, as projected in the oral dying declaration, is contrary to, and irreconcilable with, the version of assault described in the judicial confession inasmuch as Hiralal was assaulted, according to the oral dying declaration, by not only the present appellant, but also by his brother, Ajit Mirdha aforementioned, whereas the judicial confession shows that the assault on Hiralal took place only at the hands of the present appellant. In a situation, such as the present one, when the prosecution lead two sets of evidence, contradictory to each other, the criminal Court shall not adopt the easy course of rejecting both the versions merely on the ground that the two versions are not reconcilable. Far from this, since the criminal Court has the onerous duty of doing justice, it shall make endeavour to ascertain as to which of such two versions is true. If upon careful scanning of the evidence on record, the Court is unable to ascertain as to which of the two versions is true, it may, in such a situation, accord benefit of doubt to the accused; but if it is in a position to say as to which of such two versions is true, it shall not hesitate to accept the true version of the occurrence and discard the untrue one,

16. Keeping in view the above aspects of the law, when we revert to the evidence of P.W.-3, what we notice is that though the evidence of P.W.-3 cannot be discarded merely on account of the fact that he is a relative of the deceased, what is essential to note is that the deceased remained lying admitted in the hospital from the night of occurrence, which took place at about 7 P.M., till his death, no dying declaration was recorded by the doctor nor is there anything to indicate from the evidence of any other disinterested witness that injured Hiralal was capable of making statement after sustaining multiple incised wounds on his person,

17. Coupled with the above, the alleged dying declaration claimed to have been made by injured to P.W.-3 stands belied by the previous statement of P.W.-3 recorded by the police inasmuch as the Investigating Officer has confirmed that P.W.-3 did not tell him that the deceased had reported him that he was assaulted by Naresh Mirdha and Ajit Mirdha with dao and tangi. We have, therefore, no hesitation in discarding the evidence of P.W.-3 regarding the alleged oral dying declaration as untrue.

18. We may mention here that the evidence of P.W.-9 (Investigating Officer) is that when he conducted the search of the house of the accused Naresh Mirdha and Ajit Mirdha, accused Naresh Mirdha himself produced the dao by which he had assaulted the deceased and the same was seized by Seizure List (Ext. 7), relevant portion of the statement of accused Naresh Mirdha being Ext. 13. However, upon careful examination of Ext. 13, we find that this statement was recorded by the investigating officer after the dao had already been handed over to the police. This statement cannot, therefore, be treated as a statement leading to the discovery of the fact in terms of Section 27 of the Evidence Act. To this extent, the finding of the learned trial Court on Ext. 13 is incorrect. This apart, there is nothing in the evidence on record to show that the weapon seized in the present case was the weapon of offence.

19. What, however, remains unshaken on record is the judicial confession made by the appellant. From the confessional statement, it clearly transpires that Hiralal Mirdha met with the death at the hands of the appellant. This confessional statement shows that after Hiralal Mirdha was disarmed by the blow of lathi given on his hand by the appellant and starting running, the appellant took up the dao, which had fallen on the ground from the hand of Hiralal Mirdha, and gave him multiple blows with the same causing him injuries, which eventually resulted into Hiralal's death. The appellant cannot, therefore, be said to have acted in exercise of right of self-defence. In other words, after Hiralal stood disarmed and he had started running away, no right of self-defence could have been availed of by the appellant, moreso, when the appellant was under no further attack. The appellant can, therefore, be safely held to have killed Hiralal by giving him blows with dao without having any right of self-defence.

20. What is, now, of utmost importance to note is that when the confessional statement, in question, is read as a whole, it clearly transpires that on being assaulted by Hiralal, the appellant had, in the past, sustained cut injuries on his head and forehead and remained lying in the hospital for 5/6 days and even on the night of the occurrence, it was Hiralal, who had, first, come to the house of the appellant and wanted to assault him. In a situation such as this, it was not unusual for a tea garden labourer, as the appellant is, to get immensely provoked and lose his patience (as he claims in his confessional statement) and kill Hiralal anticipating that his life would remain in danger till Hiralal remained alive. Viewed from this angle, we are of the view that the appellant acted in sheer frustration as a result of grave and sudden provocation, which he had received at the hands of Hiralal and the appellant acted on the heat of passion, while he was defencing himself from the attack launched on him by Hiralal. The appellant's case was, therefore, fully covered by the provisions of Section 304 (Part II) IPC.

21. Considering the nature of evidence on record depicting the occurrence in which the appellant happened to have killed Hiralal, we are of the view that the sentence passed against the appellant is a little too harsh and the same needs to be modified and reduced.

22. Upon considering the matter in its entirety, we are of the view that the sentence of rigorous imprisonment of 6 years with a fine of Rs. 1000 will be adequate sentence for the offence committed by the appellant.

23. In the result and for the reasons discussed above, this appeal partly succeeds. While the conviction of the appellant is maintained under Section 304 (Part II) IPC, his sentence is reduced to 6 years of rigorous imprisonment with fine of Rs. 500 and in default, to undergo further rigorous imprisonment for a period of 6 months. The period already undergone by the appellant shall be set off against the sentence, so passed.

24. With the observations and directions contained hereinabove, this appeal shall stand disposed of. Let the Superintendent of District Jail, Tinsukia, Distt & Sessions Judge, Tinsukia, and Chief Judicial Magistrate, Tinsukia, be informed accordingly.

25. Send down the LCRs.

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