

Niranjan Das Vs. State of Assam

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Court : Guwahati

Decided On : Nov-13-2007

Judge : Aftab Hussain Saikia and P.K. Musahary, JJ.

Appellant : Niranjan Das

Respondent : State of Assam

Advocate for Pet/Ap. : Mr. A. Choudhury

Disposition : Appeal dismissed

Judgement :

P.K. Musahary, J.

1. Convicted under Section 302 of Indian Penal Code and sentenced to undergo rigorous imprisonment for life with fine of Rs. 2000/- in default of which, he will undergo rigorous imprisonment for another four months, accused/appellant has preferred the present criminal appeal against the Judgment and Order dated 25.08.2003, passed by the learned Session Judge, Morigaon.

2. The brief facts as revealed at the time of trial, may be stated as follows:

On 18.12.1998 at 10 P.M., Friday, the accused persons namely, Niranjan Das, Chakradhar Das and Smti. Numali Das entered into the house of the informant, Maitora Das and dragged her husband out to the Courtyard and all the three

accused persons assaulted her husband with dao and lathis causing grievous injuries and leaving him in dying state there. At the time of occurrence her son Durgeswar Das was present and they tried to save her husband but they were also assaulted by the accused persons. One Mohiram Das, took the injured Deben Das to Dharamtul Police Station on 18.12.1998 and verbally reported the occurrence. GD entry being No. 367 dated 18.12.1998 was recorded at 10.30 P.M. in the general diary of the Dharamtul Police Station. The injured Deben Das was sent to Ahatguri Hospital. The Officer-in-Charge of Dharamtul Police Station issued a requisition to record the dying declaration of the injured and forwarded him to Morigaon Civil Hospital for treatment. On the next following day i.e. 19.12.1998 at 10.30 A.M., the PW-2 lodged a written FIR on the basis of which Dharamtul Police Station Case No. 58/98 was registered under Section 448/326/325/34 of Indian Penal Code. Investigation of the case was entrusted with Dhani Ram Saikia, S.I. of Police, PW-9. The said Investigating Officer, visited the place of occurrence and seized some articles at the place of occurrence and collected evidence. The injured, Deben Das expired on 19.12.1998 and post mortem examination was conducted on the dead body of the deceased after making the inquest report. The Police made a prayer for adding Section 302 of IPC and the same was granted by the C JM, Morigaon. The charge sheet was filed against the accused namely, Niranjana Das, Chakradhar Das and Numali Das. The case being triable exclusively by the Court of Sessions, the learned C JM committed it to the Court of Sessions vide his order dated 01.08.2000 for trial.

3. Heard Mr. A. Choudhury, learned Counsel for the appellant and Sri P.C. Gayan, learned Additional Public Prosecutor, Assam for the Respondent State.

4. The main thrust of argument of the learned Counsel for the appellant are:

(i) The conviction and sentence of the appellant on the basis of sole eyewitness namely, PW-2, Maitora Das, wife of the deceased, who is an interested witness without any corroboration, is not sustainable, more so when she denied that she lodged the FIR, Exhibit 6.

(ii) The evidence of PW-2, is not at all trustworthy and no reliance can be placed for conviction and sentence inasmuch as she introduced a new story in her

evidence that the accused/ appellant held her husband by chest and gave dao blows which was not stated in the FIR but stated so for the first time in her deposition only.

(iii) The other co-accused namely Chakradhar Das and Numali Das, who were charged under the same offence having been acquitted by the learned Sessions Judge, Morigaon and no independent charge having been framed under Section 302 IPC against another accused, the conviction and sentence of present appellant is unsustainable in Law and he is also liable to be acquitted.

5. The learned Sessions Judge has made certain observations in his Judgment that the Officer-in-Charge of Dharamtul Police Station failed to record the first oral information he received from one Mohiram Das, who reported the incident and registered a case only when a written FIR was lodged by the PW-2. The Police also failed to record the dying declaration of the deceased while the deceased was taken to Hospital in a serious condition. Some callousness and omission was found in discharging his duties by a Judicial Magistrate, who inspite of willingness of the accused persons failed to record confessional statements. We do not propose to discuss on those lapses as they have not stood on the way of the trial or affected any party.

6. The PW-2 in her Ejahar mentioned the names of Niranjana Das, Chakradhar Das and Numali Das, who came to her house and dragged her husband and taken out to the Courtyard and they hit him with dao and lathi causing serious injuries to the deceased. For the sake of convenience it would be prudent and necessary to refer to the injuries so recorded in the post mortem report Ext. I by the Doctor, PW-5 which may be quoted as under:

I-EXTERNAL APPEARANCE

(i) Condition of : A male, dead body of

Subject stout 40 years of age lying

emaciated, in the P.M. examination

decomposed, on Dorsal recumbent

etc. position, Rigor-mortis

is fully developed. The

dead body is moderately

stout, non-emaciated

and not decomposed.

(ii) Wounds-position,: (A) Two stitched

and character wounds on parietal and

occipital area of left

side of scalp of (1) 4'

long (2) 3' long.

(iii) Bruise Position, : The stitched removed,

size and nature The bleeding cotton

and subcutaneous

layer of skull & cut of

parietal bone and part

of occipital bone on left

side.

(iv) Mark of ligature: (B) Deep cut with expo-

on neck dissecting the tibia on Rt. Leg

tion, etc. below knee of 2' x 1' x

1/2 size, Small multiple

cut with stitches on

back near neck.

-no mark of ligature on

neck)

II. CRANIUM AND SPINAL CANAL

(i) Scalp, skull, : Collection of blood clot

vertebrae on whole subcutaneous

layer of scalp on left

side.

: Parietal bone and oc-

cipital bone of left side

also out.

: Collection of blood clot

on extradural area.

(ii) Membrane : Membrane is intact.

(iii) Brain & Spinal : Intact-NAD Cord

MORE DETAILED DESCRIPTION OF INJURY OR DISEASE

The deep cuts on scalp (U) cutting brain (skull), excessive collection of blood on subcutaneous area of scalp and collection of some blood clot on extradural area of left

side.

Deep cut on left side of on leg below knee. Multiple small cuts on back. These are caused by sharp cutting object. The Injuries are antemortem.

7. In order to bring home his submission in regard to the FIR, the learned Counsel, for the appellant has taken us to the deposition of PW-2, particularly her cross-examination who has stated: 'I did not lodge Ejahar', and also in reply to suggestion '...it is not a fact that I had lodged the Ejahar. It is not a fact that I mentioned in the Ejahar that the three accused persons and dragged my husband from inside the house by beating....

8. The learned Sessions Judge dealt with the said aspect of the matter in Para 20 and 21 of the impugned Judgment. We are in total agreement with the learned Sessions Judge as to his findings that the factum of filing the FIR cannot be doubted on the face of the written documents, Exhibit 6, which was received by the Dharamtul Police Station and the same was testified by the Investigating Officer, PW-9. No suggestion was put to this PW as to the receipt of the said FIR and as such the existence or filing of FIR by PW-2 cannot be doubted.

9. Mr. A. Choudhury, learned Counsel for the appellant has strongly urged upon us to discard the evidence of PW-2 as unreliable and untrustworthy. It is argued that the evidence of sole eyewitness was not corroborated by any independent witness and convincing circumstances and as such her evidence is liable to be discarded. In support of his submission Mr. Choudhury has placed reliance on the case of Koppula Jagdish v. State of Andhra Pradesh as reported in (2005) 12 SCC 425. We have carefully gone through this reported case and found it distinguishable as the facts and circumstances of the present case are not similar. In Koppula Jagdish's (supra) there was neither any allegation nor any evidence to the effect that the accused alone inflicted all injuries or the fatal one on the deceased. In our present case the PW-2, wife of the deceased categorically alleged that her husband was held by chest and hit with dao at the head by the appellant. The post mortem report, Exhibit-1, contains the details of description of injuries received by the deceased. One of the injuries has been described as 'deep cuts on scalp (LI) cutting brain scull, excessive collection of blood on spmeurotic area of scalp and

collection of some blood clotton extradual area of left side.' The post mortem report lends support to her allegation and deposition to that effect.

10. The defence Counsel in the trial Court could not destroy the evidence of PW-2 that she was not an eyewitness of the incident. Even no suggestion was put to her during cross-examination in that regard. It may be borne in mind that the time of occurrence as given in the FIR and the deposition of PW-2 is 10 P.M., i.e. in the night, anormal time when the villagers are asleep. Naturally, it is believable that she was also sleeping in the house with her deceased husband and children. The accused/appellant, a young boy of about 19 years, is the son of her husband's elder brother. Both families live almost as neighbours and so the PW-2 naturally knows him well from his childhood and could recognize his voice when he came to her house and called her husband as 'Maju' 'Maju' as was usually called by relations. The deceased as paternal uncle on being called by his nephew came out followed by his wife PW-2 and son PW-3. Both PW-2 and 3 saw the deceased being held by chest and dragged by the accused/appellant from the doorstep to the Courtyard and hit on the head with dao. The accused Numali Das, mother of the appellant, who accompanied him also hit the deceased with dao on the head while other accused, namely Chakradhar Das and Mineswar Das also hit the deceased with lathi. The trial Court, on the basis of the evidence on record accepted the evidence of PW-2 as wholly reliable and passed the impugned conviction and sentence and under such circumstances we have also no second view different from the one expressed by the learned trial Court to interfere with the same.

11. The learned Sessions Judge has discarded the evidence of PW-3, Durgeswar Das, mainly on the ground that he was a minor boy of only 9 years at the time of occurrence and about 12 years at the time of making his deposition and was a student of Class V. His evidence was disbelieved by the learned trial Court as tutored one by his mother, Maitora Das. We are constraint to uphold this findings of the learned Sessions Judge on this aspect. It is not in each and every case that the evidence of child witness could be termed as tutored and could be kept aside as unreliable. It is held by the Apex Court in several cases that the evidence of child witness need closer scrutiny if there are contradictions on material

particulars. In this case the PW-3 had categorically deposed before the learned Sessions Judge that on the night of occurrence he was sleeping with his father and he heard accused Niranjan Das calling his father 'Maju' 'Maju' and immediately after his father came out he was held by chest and hit on the head with dao by Niranjan Das. That the said PW-3 could witness this particular act i.e. holding by chest and hit with dao on the head is the material particular in this case. Being a minor boy, having seen such act of violence, was terrified and shocked at that time and he might have been not in a position to give the other details at the time of the deposition. In the deposition made after about three years from the date of occurrence we find no serious contradiction in so far as in giving the material particulars by this child eyewitness. The learned trial Court was required to consider how this child witness PW-3 faced and withstood the searching cross-examination by the defence Counsel and how he was answering the questions intelligently. The learned trial Court was also required to see and analyse whether the defence Counsel was able to destroy the depositions of this child witness in cross-examination. In the cross-examination he deposed in a very clear language '...I have followed my father. My father had been dragged away from the door step to the front of the house Niranjan had held my father with one hand and had hacked him on the head with other hand...'. In reply to a suggestion of the defence Counsel during cross-examination he stated, 'It is not a fact that I had not seen the occurrence; it is not a fact that I have given false evidence upon being tutored'. Considering the entire deposition of PW-3, it was required to examine whether the testimony of PW-3 could inspire confidence of the Court so as to rule out the possibility of being tutored.

12. Having gone through the testimony of the child witness, PW-3, we find that he has been a natural witness and having seen the occurrence he stated the material particulars correctly, intelligently and boldly, although he was subjected to searching cross-examination. The evidence of such a child witness, in our view cannot be discarded in a light way. In a case of *Surya Narayana v. State of Kerala* as reported in : 2001 CriLJ705 , it is observed that the discrepancies under any material particulars should not be taken seriously if the child witness can withstand the cross-examination and if the testimony can inspire confidence so as to rule out possibility of tutoring, it can be relied upon as sole basis for convicting the

accused. In the cited case, a girl of four years at the time of occurrence and six years at the time of her deposition and who was not even given oath, was considered and accepted as reliable witness. The observations made by the Apex Court in Para 5 of the said case are relevant and worth quoting:

5. Admittedly, Bhavya (PW-2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW-2 cannot be discarded only on the ground of her being of tender age. The fact of PW-2 being a child witness would require the court to scrutinize her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purpose of holding the accused guilty or not.

13. The appellant's learned Counsel cited another case namely Peerappa v. State of Karnataka as reported in : (2005)12SCC461 in support of his submission. That was a case where the presence of an alleged eyewitness who could not disclose the purpose of his visit at the place of occurrence was doubted and his evidence as to watching of incident by standing under a tree nearby minutely observing the

details of the attack was disbelieved by the Court as highly improbable. Contrast to this, in the present case the PW-2 is the wife of the deceased, a natural witness and in all probability she was present at the time of occurrence in the night in her house and could observe the whole incident. This being the position the decision of the Hon'ble Supreme Court in Peerappa's case (supra) is not applicable to the appeal case in hand.

14. The next case cited by Mr. A. Choudhury, learned Counsel for the appellant is Chagir Mia and Ors. v. State of Tripura as reported in 2006 (4) GLT 71. In that case an alleged eyewitness deposed that he saw as many as four persons were assaulting the deceased Amal with iron rods and lathis but as per medical report the said deceased received only one injury. The ocular evidence was thus found in conflict with and juxtaposed against the medical evidence on record and held the said eyewitness as wholly unreliable. In the present case, no such conflict between the evidence of eyewitness and medical report is found and as such the evidence of PW-2, is wholly trustworthy. The aforesaid cited case is also not applicable to this case.

15. The appellant's learned Counsel relied upon another case Gopal Choudhury v. State of Assam as reported in 1997 (2) GLT365. In that case some unnatural conduct of the eyewitness who was a son of the deceased was found in not making hue and cry after managing to escape so as to save his father from further assault than to go to the house of his sister with his mother and not filing the FIR himself immediately after the occurrence which he himself witnessed. Therefore, the solitary testimony of such witness was disbelieved as wholly untrustworthy. We are afraid that considering the unsimilar facts and circumstances, ratio of the above reported case could be applied to the instant case.

16. The last submission of the learned Counsel Mr. Choudhury that the charges which was based on the common intention of four accused persons having been failed with the acquittal of other three and there being no charge under Section 302 IPC simpliciter against the accused appellant, he alone could not be convicted. In other words, the accused/appellant should have also been acquitted along with other three accused charged under Section 302/34 IPC. In order to

bring home his submission, the learned Counsel has placed the decision of the Apex Court in the reported case of State of West Bengal v. Vindu Lachmandas Sakhrani @ Deru AIR 1994 CrL. LJ. 919. It was a kidnapping and murder case of six years old girl child in which both husband and wife were charged under Section 364/302/34 IPC. The trial Court acquitted the husband but convicted the wife under Section 302/364 IPC and sentenced her to life imprisonment. On appeal, the High Court set aside the conviction of the wife and acquitted her. The State of West Bengal, preferred appeal before the Hon'ble Supreme Court against the acquittal. The Apex Court upheld the acquittal order of the Hon'ble High Court holding that the charges which was based on the common intention of the two failed with the acquittal of the husband and there being no charge under Section 302 simpliciter against the wife she could not be convicted.

17. We have carefully gone through the Judgment and Order of the Apex Court passed in the above reported case. Let us examine whether the aforesaid principle of law would be applicable to the present case. First of all the ground situation of the above cited case and the present case are found unsimilar. The findings recorded in Para 2 in the Vindu's Case (supra) maybe quoted be low for this purpose.

2. We have heard learned Counsel for the parties. There is no direct evidence in this case. The prosecution relied upon various circumstances to prove the involvement of the respondent as well as her husband in the case. The High Court has examined each of the circumstances in detail and has come to the conclusion that the case against the respondent was not proved beyond reasonable doubt. We see no ground to differ with the reasoning and the conclusions reached by the High Court.

18. The present appeal is a case of direct evidence supported by sufficient medical evidence. The charge of offence under Section 302 IPC against the accused appellant has been proved beyond reasonable doubt. Now the question arises whether the appellant is liable to be acquitted as because the core charge of common intention against all the ac cused under Section 34 IPC was not established and no independent charge was framed under Section 302 IPC

simpliciter against the appellant. The aforesaid question has been discussed by a five Judge Bench of the Hon'ble Supreme Court in CrI. Appeal No. 6/1955 Willie William Slaney v. State of Madhya Pradesh as reported in : 1956 CriLJ291 . It was also a case of acquittal of one accused and conviction of the other under Section 302 IPC although both of them were charged under Section 302 read with Section 34 IPC. It is no doubt mandatory on the part of the trial Court to frame written charge against accused to inform him about the exact allegation against him for his defence. If such written charge is not framed and conveyed to him, it will amount to denial of fair trial that may cause prejudice to him. It is, therefore, necessary to examine whether any prejudice has been caused to the appellant for not framing any separate charge under Section 302 IPC simpliciter in this case.

19. In our opinion no prejudice has been caused to the appellant in view of the fact that he was informed in the charge sheet about the nature of allegation made against him i.e. the murder under Section 302 read with Section 34 IPC. No grievance was also made by the accused/appellant at any stage of the trial for not framing any independent charge under Section 302 IPC. The Supreme Court case (supra) has come to the conclusion in regard to such situation in the following words:

(93) The appellant was charged with murder and nothing short of it, although it was stated in the charge that the offence was committed by him in furtherance of a common intention. If the evidence failed to prove that the offence committed by him was in furtherance of a common intention, it would be nonetheless his offence, namely, murder, if his act in law amounted to murder. The law does not require in such a case that a separate charge for murder should be framed, because the charge of murder was already on the record.

20. The omission to frame charge under Section 302 simpliciter is a curable irregularity and it cannot be said to vitiate the trial led to conviction and sentence, although omission to frame a separate and specific charge in a particular case may be an incurable irregularity amounting to illegality. This is not a case in the present appeal where no prejudice has been caused to the accused or any incurable irregularities have been committed by the learned trial Court on the face

of the record that the accused in fact was wholly informed about the nature of allegation and the post mortem report of the deceased also corresponded with the nature of grievous injury received on the head.

21. In Vindu's case (supra) there was no direct evidence as to who actually committed the kidnapping and murder of a six years old child and as such it is distinguishable with the present case inasmuch as atleast a direct evidence was adduced by PW-2 who saw the appellant to carry dao and give blow on the head which was enough to cause serious injury leading to death of the deceased. Committing the offence under Section 302 IPC was the main allegation against the accused persons including the appellant and at the time of his examination under Section 313 Cr.P.C. questions were put on him based on the evidence of the prosecution witnesses but he simply said that he had nothing to say and evidence were false. The appellant did not adduce any evidence in his defence. He also did not take any plea that the trial was vitiated in any manner due to non framing of separate charge under Section 302 IPC simpliciter.

22. Apart from the case of Willie William Slaney v. State of Madhya Pradesh (supra) we may refer to another case of Bechara Kora Modi and Ors. v. State of West Bengal reported in : AIR 2006 SC638 which was also a case under Section 302/34 IPC, the prosecution case being that one L and four other accused surrounded the deceased and L struck a spade blow on the head of the deceased from behind causing his death. The injuries found in post mortem corresponded to the blow inflicted by L. The evidence of sole eye witness corroborated by another material witness as well as by the Doctor who conducted the post mortem examination. The Hon'ble Supreme Court held that accused L was rightly found guilty of offence of murder, there was, however, no evidence to show that the other accused/appellants were carrying incriminating materials with them or they had prior meeting of minds or they participated in the assault on deceased. So, the prosecution failed to prove that the commission of criminal act was done in furtherance of common intention and, therefore, held they would be entitled to benefit of doubt. The conviction of accused/appellant was under these circumstances converted to one under Section 302 simpliciter. In view of this decision of the Apex Court we have no hesitation to hold the similar view that the conviction

and sentence imposed on the appellant under Section 302 simpliciter is not liable to be interfered.

23. We have meticulously examined the records of the case and also considered the same in the light of the decisions given by the Hon'ble Supreme Court as cited above. We have no other different opinion on the conviction and sentence passed by the trial Court except that the learned trial Court failed to appreciate the oral evidence given by the child witness, PW-3, whose evidence should have been accepted and acted upon as corroborative evidence of his mother, PW-2.

24. With these observations, we affirm the conviction and sentence awarded by the learned Sessions Judge, Morigaon vide this Judgment and Order dated 25.08.2003.

25. In the result, the appeal fails and stands dismissed.

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