

Prabhat Bora Vs. State of Assam

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Court : Guwahati

Decided On : Sep-04-2002

Judge : J.N. Sarma and B. Lamare, JJ.

Acts : Criminal Appeal No. 238 of 2000

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Appellant : Prabhat Bora

Respondent : State of Assam

Advocate for Def. : P. Bora, PP

Advocate for Pet/Ap. : A. Thakur, K.D. Chetri and N. Sarma, Advs.

Disposition : Appeal dismissed

Judgement :

1. This appeal has been filed by the accused Prabhat Bora against the judgment dated 24.7.2000 passed by the learned sessions Judge, Jorhat in Sessions Case No. 34(J-J)/93. By the impugned judgment, the learned Judge convicted the present appellant for life and the pay a fine of Rs. 500 in default, for further R.I. for one month. Hence this appeal.

2. We have heard Mr. A. Thakur, learned counsel for the appellant and Mr. B. Bora, learned P.P. Assam.

3. The prosecution story in brief is as follows :-

At 7 P.M. on 27th January, 1991 the deceased Gangaram Das of Madhopur Gohain Gaon was coming along the road when Shri Duti Ram Bhora and Sri Prabhat Bora of the same village intercepted him and injured him by striking with an axe. They also injured the girl Smt. Debajani Das by hitting with the same axe when they came to the place of occurrence hearing the commotion. It is further stated that Gangaram Das was attacked when he was returning to his own house from the son-in-law's house Sri Harendra Nath Das. The FIR was lodged on 27.1.1991 before the Officer incharge, Mahdopur police out post, G.D. Entry was made and the case was registered and two accused persons named above were arrested. Thereafter, charge was framed against them under Section 302/34 IPC and in Sessions Case No. as stated above the following witnesses were examined.

4. PW 1 is Harendra Nath Das, who is the son-in-law of the deceased Gangaram Das. He stated inter alia that Ganga Ram Das, Debajani and Jijimoni came to his house and stating that he would not be involved in a quarrel. Thereafter he heard an alarm at a distance of about 3 Nal and it was Ganga Ram Das who raised alarm stating 'I am dying' Prabhat Bora has beaten me. He also found that Ganga Ram was lying on the ground. He rushed to Madhopur police station and lodged the FIR. He also deposed that while in treatment at Jorhat Civil Hospital Ganga Ram was capable of speaking and he told him that Duti Ram had hold Ganga Ram while Prabhat Bora had hit him with an axe. This witness was cross-examined but it was not put to him that Ganga Ram did not make the declaration before him regarding assault as deposed by him. He admits that he is not an eye witness to the occurrence but he found Ganga Ram lying injured felling on the ground and his deposition is relevant with regard to the declaration made by Ganga Ram Das.

5. PW 2 is Sanat Das. He is the son of the deceased and he also deposed that he found his father at home in injured condition and his father told him that Duti Ram and Prabhat Bora had assaulted him. A suggestion was given to him that on the date of occurrence he along with Ranjit, Joydhan and others had attacked the

house of Duti Ram and committed assault and his father had intervened in the fight and in that situation he received the injuries.

6. PW 3 is Smt. Dabajani Das. She is the niece of the deceased (father's elder brother). She deposed that having heard a commotion Jijimoni, Gangadhar Das and she went together. In front of Haren Das house they found accused Prabhat, Duti Ram came out from the gate of Haren Das, the former with an axe in hand and the later with a dao. She further deposed that on their way back home accused Duti Ram hold Ganga Ram by his hands and right then accused Prabhat struck him in the abdomen with the axe. Shouting 'I am dying' Ganga Ram fell down. When she went to help Ganga Ram the accused Prabhat hit her in the shoulder with the blunt side of the axe then she fell down on the ground. Somehow she got up and ran away. So, she is a natural eye witness. She further deposed that at the time of committing the crime she had seen the accused persons very well. She also deposed that Prabhat had dealt several strokes with the axe. But she did not notice whether blood had come out or not. She further deposed that injured Ganga Ram and she was brought together to the Civil Hospital.

7. PW 4 is Rajib Das @ Rajat. He deposed that he is the son of the deceased. On being asked by him, his father told him that he was assaulted by the accused person. He further deposed that accused Duti Ram caught hold of his father and accused Prabhat assaulted by means of an axe on his way back home from the house of Haren Das. However, this part of the statement made by the witness was not told to the police and he admits that he did not state before the police that his father told him as indicated above. So, this part of the statement may not be clinching or is an exaggeration at a later point of time.

8. PW 5 is Jayadhatha Das. He also deposed that on being asked, Gangadhar Das told him that Prabhat and Duti Ram assaulted him. On cross-examination this witness stated that he did not state before the police about Ganga Ram being assaulted by Duti Ram and Prabhat Bora by an axe. This statement has no relevance.

9. PW 6 is Smt. Jijimoni Das. She is the wife of the deceased who claims to have an eye witness. She categorically deposed as follows :-

'On our way back from the house of Haren Das suddenly on the road accused Duti Ram Bora caught hold of my husband from the backside and Prabhat Bora dealt a blow on the stomach of my husband by the axe. My husband fell down on the ground. Myself and Debajani caught hold of my husband. Then accused Prabhat Bora gave a second blow which fell on the person of Debajani. On hearing my halla/cry Smt. Chunisha, the wife of accused Duti Ram Bora came out. One Mahendra Bharali who appeared in the scene brought my husband to out house and then he was taken to Civil Hospital, Jurhat where he died after 2 (two) days. Debojani informed Mahendra Bharali about the occurrence whereupon Mahendra Bharali went to the place of occurrence.'

There is no effective cross-examination of this witness save and except that she did not tell before the police that her husband was caught hold by Duti Ram from the back side and Prabhat Bora dealt a blow with axe.

10. PW 7 is the Dr. M.N. Gogoi who conducted the postmortem examination of the deceased. The Doctor opined that the patient died due to septicemia that resulted from the antemortem injuries of the intestine which was caused by heavy blunt object and the injuries are homicidal in nature and he further opined that injury No. 2 is sufficient to cause instantaneous death of the person. So the evidence of Doctor clearly establishes that it is a case of homicidal nature.

11. PW 8 is the police officer who first started investigation. He also recorded the statement given by the deceased with regard to the involvement of the two accused persons in the incident. But that statement recorded by the police may not be very much relevant.

12. PW 9 is the Investigating Officer who deposed inter alia as follows :-

'...I recovered and seized one axe from the house of accused Duti Ram Bora on being produced by accused Duti Ram Bora. Exbt. 5 is the seizure list and Exbt. 5(1) is my signature. Material Exbt. 1 is the said axe.'

So the weapon of murder was recovered by the police officer, i.e., Material Exbt. 1 and the Doctor has opined that he injury may be caused by such a weapon. At this

stage it will be necessary to state that a document has been exhibited which is an application filed by the defence stating that there was another Session Case being No. 78(J-J)/93 pending in this Court and both the cases arose of the same occurrence and cross-cases.

The relevant portion of the application is extracted as follows :-

'The accused persons desire to prove said injuries and for such proof, the records of the said Sessions Case No. 98 (J-J) 93 and the evidence of the Doctor who examined the injured in the said case and of the I.O. who investigated the same are essential for their defence.'

But the prayer on the application was absolutely different one. The prayer was made to bring the records of Sessions Case No. 78(J-J)/93 to the records of the above case and to allow the accused persons to examine the Doctor and the I.O. for their evidence. Accordingly, Doctor was examined as DW 1. We come to that at a latter point of time.

13. PW 10 is Mahendra Nath Bharali. He is not an eye witness. But he went to the place of occurrence immediately after the incident and he was informed by Jijimoni, wife of the deceased and by Smt. Debajani that by using blunt axe, Ganga Ram was assaulted by the accused person and he found that Ganga Ram was lying injured at the place of occurrence.

14. DW 1 is the Doctor Ahmed Habibur Rahman who examined the accused Duti Ram Bora at about 9.30 AM on 28.4.1991 at Mariani Civil Hospital. He also examined Smt. Karunima Bora wife of Duti Ram on the same day and also examined Prabhat Bora and found certain injuries on them.

15. The two accused persons, i.e., Duti Ram Bora, father and Prabhat Bora, son they were examined under Section 313 Cr.P.C. and thereafter by the impugned judgment the learned Judge acquitted the father, Duti Ram Bora holding that there was no sufficient material to hold him guilty but found the charge against accused Prabhat Bora Under Section 302 IPC was established beyond reasonable doubt and as such, conviction was given.

16. A right to private defence was taken. But that was discarded by the learned Sessions Judge holding that the accused intentionally attacked the deceased and caused injuries as a result of which he died. It was found by the learned Judge that Prabhat Bora assaulted the deceased with dangerous weapon, i.e., by axe on the abdominal part of the body of the deceased which ruptured the intestine resulting the death of deceased and that was done with the knowledge and intention causing death and as such, he was found guilty under Section 302 IPC.

17. Shri Thakur, learned counsel for the appellant has made the following submission.

(i) As there was a cross case there ought to have been simultaneous trial and failure to do so trial has caused prejudice to the accused person.

(ii) Non explanation of the injury on the part of the accused person amount to suppression of material facts by the prosecution and the benefit of doubt would go to the accused person,

(iii) The conduct of Haren Das is suspicious and he has not given the correct versions of the incident rather he has tried to suppress the fact and as such the whole foundation of the prosecution story appears to be doubtful and suspicious.

(iv) One of the accused Duti Bora is concerned, he was acquitted and applying the same ratio the other accused Sri Prabhat Bora should be acquitted.

(v) Non examination of neighbouring witnesses except two close relation witnesses, i.e., wife and niece also throws on the prosecution story.

18. Mr. Thakur in support of his contention placed reliance on the following decisions.

(1) 1999 (9) SCC 97 (Ram Chandra Ohdar v. State of Bihar). That was a case where only one blow was given with a sharp edged weapon on the neck of the deceased. The Apex Court considering the nature of the weapon, the part of body on which the blow was given and the size of the injury, convicted the appellant under Section 326 IPC and not under Sections 302/34 IPC. Paragraph 4 of the

judgment is extracted as under :-

'The appellant had given one blow with a sharp edged weapon on the neck of the deceased. The medical evidence is silent about the nature of the injury caused by the appellant. But considering the nature of the weapon, the part of the body on which the blow was given and the size of the injury, it can be said that the injury caused had endangered his life. Therefore, the appellant can be convicted for the offence punishable under section 326 IPC.'

For relying on a case in a criminal matter the principle may be applied but every case should be decided on its own facts. In this particular case the medical evidence was silent and the case was an appeal against the conviction by one of the accused under section 302/34 IPC. Three accused persons were acquitted and as such, it was urged that the case Under Section 302/34 IPC cannot be deemed to be established as against the present appellant also. The Apex Court considering the facts of that case gave the sentence as indicated above. This case is of no help to the learned counsel for the appellant.

(2) 1998 (9) SCC 81 (Omwati (Smt.) and Ors. v. Mahendra Singh and Ors.). That was a case of appeal against acquittal. Acquittal was recorded by the High Court and against that there was an appeal and the Apex Court on the facts of that case did not interfere with the acquittal given. This case is also of no help to the appellant.

(3) (1996) 1 SCC 458 (Wassan Singh v. State of Punjab). That was a case with regard to right of private defence. The Apex Court in that case pointed out that in certain cases the right of private defence even may extend to a case causing death, but the question is there must be reasonable apprehension of the accused that grievous hurt will be caused to him, if not resisted and the Apex Court further pointed out that judged from the subjective point of view of the accused cannot be subjected to microscopic and pedantic scrutiny. There is a thin line between resorting to the right of private defence and exceeding the right of private defence. That was a case where the appellant was assaulted by a number of persons receiving 9 injuries, two of them being on a vital part and one of them caused by sharp edged weapon and on such a circumstance appellant firing one shot from

his gun resulting in death of an innocent person who was not a party of that group who assaulted him and the question was whether it was a case under Section 302 IPC. The Apex Court pointed out that this cannot be case under Section 302 IPC in which exercise of the right of private defence was because of the reasonable apprehension. So, this case is of no help as in this particular case on the face of the record it will be found that this is not the situation. The deceased along with wife and niece came to the house and they were unarmed and the accused brought an axe chasing them and gave blow to the lower part of the abdomen of the deceased, as such, the right of private defence does not apply. This case is also no help to the appellant.

4. (2000) 2 SCC 755 (Chander Pal v. State of Haryana). That was a case with regard to appreciation of evidence of a murder case. The Apex Court held that even if in the evidence there is contradictions and improbabilities in prosecution case, unexplained non-examination of material witnesses and non-corroboration of testimony of interested witnesses by any independent witness, the accused appellant should be given benefit of doubt. This case is also of no help to the appellant.

5. AIR 1991 SC 1065 (State of Rajasthan v. Madho and Anr.). That was a case where the Apex Court pointed out that the injuries sustained by accused persons in the same incident in which offences under Sections 302/326 IPC are alleged to have been committed by them and the prosecution witnesses failing to explain those injuries ; their testimony giving Impression that they are suppressing some part of incident accused entitled to benefit of doubt. But this law has been explained by the Apex Court in the latest decision in (1998) 7 SCC 365 (Ram Sundar Yadav and Ors. v. State of Bihar). The question arose before the Apex Court was that failure to explain injuries on the accused - whether the prosecution obliged to explain injuries sustained by the accused in the same occurrence and whether failure to so explain would mean that the prosecution has suppressed the truth and also the origin and genesis of the occurrence and the Apex Court pointed out that this question has already been answered by a larger Bench and the Apex Court in paragraph 1 of the judgment pointed out that before the obligation is placed on the prosecution two conditions must be satisfied.

- (i) That the injury on the person of the accused must be very serious and ;
- (ii) That it must be shown that these injuries must have been caused at the time of occurrence in question.

Earlier decision of the three Judges Bench of the Supreme Court were held not to be correct proposition of law. So touchstone apply is whether obligation on the part of the prosecution explaining the alleged injuries on the accused person. The ratio of the above cited case is not applicable in the present case.

6. AIR 1990 SC 2140 (Kishore Chand v. State of Himachal Pradesh). This case is of no help to the appellant. That was a case with regard to the burden of proof on appreciation of circumstantial evidence.

The Apex Court pointed out that all circumstances from which conclusion of guilt is to be drawn must be fully established with hypothesis of guilt. Any circumstance consistent with innocence of accused, he is entitled to benefit of doubt.

7. AIR 2002 SC 989 (Chander Pal v. State Haryana). That was a case with regard to appreciation of evidence. There was evidence prior to incident that there was an altercation between the accused and the deceased while playing a game of Ludo. There was no eye witness to the scene of occurrence and there was contradiction in testimony of other witnesses. The Apex Court held that guilt of accused persons are not proved and benefit of doubt was given. This case is also no help to the appellant.

8. 2001 (2) GLT 600 (Abdul Haque Mazumdar v. State of Assam) where it was held by this Court that incomplete chain of events the accused entitled to benefits of doubt.

9. AIR 2001 SCC 164 (Surendra Pratap Chauhari v. Ram Naik and Ors.). That was the case where evidence of eye witness was believed by the Supreme Court because relation between accused and complainant strained leading to groupism in village and the evidence of the eye witnesses who were caste fellows of complainant but even such situation, the Supreme Court pointed out that the evidence of the eye witnesses cannot be discarded and the accused was given

benefit of doubt.

10. AIR 1980 SC 660 (Yogendra Morarji v. State of Gujarat). That was a case with regard to the right of private defence and already we have discussed the situation in an earlier case. So this need not further discussion. Further we bear in mind that in 2000 (1) SCC 391 wherein the Supreme Court pointed out that merely because a single blow inflicted which resulted in death, that itself will not take the offence out of purview of Section 302 IPC and other factor shall be taken into consideration depending on the facts and circumstances conviction for single blow can be either under Section 302 or Section 304 or Section 326 IPC. The Supreme Court in paragraph 9 of the judgment extracted is as follows :-

'9. Adverting to the contention of a single blow, it may be pointed out that there is no principle that in all cases of a single blow Section 302 IPC is not attracted. A single blow may, in some cases, entail conviction under Section 302 IPC, in some cases under Section 304 IPC and in some other cases under Section 326 IPC. The question with regard to the nature of offence has to be determined on the facts and circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant case, the deceased was disabled from saving himself because he was held by the associates of the appellant who inflicted though a single yet a fatal blow of the description noted above. These facts clearly establish that the appellant had the intention to kill the deceased. In any event, he can safely be attributed the knowledge that the knife blow given by him was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death.'

That has to be found is whether the appellant had intention to kill the deceased and if it is found that a single blow is imminently dangerous and that it must in all probability is likely to cause death is definitely come under Section 302 IPC. The Supreme Court in that particular case refer to earlier case, giving a single blow and pointed out that the law laid down must be considered on the basis of such case. So the argument advanced by Sri Thakur that a single blow was given to the

accused cannot be accepted straightway in view of the latest position of law as pointed out.

19. Now let us look on the evidence. We can discuss the evidence of PW 1 that Ganga Ram told him that he was assaulted by Duti Ram and Prabhat. The deposition of PW 2 that with regard to so-called dying declaration cannot be utilised in view of the fact that he did not make statement before the police and that was put to the I.O. PW 3 is an eye witness and her statement clearly establishes the guilt of the accused Prabhat Bora. Her evidence as quoted above that has not been shakend in cross-examination. She was accompanied the deceased and the deceased was her uncle and it was not expected that she will ropping some body and not the real culprit. PW 4 is another son of the deceased. He only deposed that on being asked by him, his father told him that he was assaulted by the accused persons. His statement cannot be utilised as this part of statement made by the witness was not told to the police and contradiction was brought. PW 5 also deposed with regard to the statement of the deceased recorded earlier. But this also cannot be utilised in view of the fact that this statement was not brought to the police and there was contradictions. PW 6 is the wife of the deceased who claims to have an eye witness. The material portion of the witness has already been quoted. We cannot be disbelieved her statement. She accompanied by her husband and one Smt. Debojani proceeded to the house of Haren Das. PW 9 deposed with regard to the recovery of the axe. The ground is made out by Thakur, learned counsel that the axe was recovered from the accused Duti Ram and the conviction was given to Prabhat and both of them were live in the same house.

20. On the basis of the material available on record and upon hearing the learned counsel for the parties, we find that the accused cannot have a right of private defence as the accused assaulted the deceased with the axe with the knowledge and intention to cause death and as such, we do not find any merit in this appeal and same shall stands dismissed.