

Md. Kamaruddln Vs. State of Assam

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Court : Guwahati

Decided On : Jan-19-2006

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

Acts : Indian Penal Code (IPC) - Sections 34 and 302; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No(s). 52(J) and 53(J) of 1999

Appellant : Md. Kamaruddin

Respondent : State of Assam

Advocate for Def. : D. Das, Adv.

Advocate for Pet/Ap. : P.J. Saikia, Adv.

Disposition : Appeal dismissed

Judgement :

1. Criminal Appeal Nos. 52(J) of 1999 and 53(J) of 1999 have arisen out of a common judgment dated 16.12.1998 passed by the learned Addl. Sessions Judge, Silchar in Sessions Case No. 28/96 whereby the learned trial court convicted the two appellants, namely, Md. Kamaruddin and Md. Parbin Ali under Section 302/34 IPC and sentenced both of them to imprisonment for life and to pay a fine of Rs. 500, in default to undergo rigorous imprisonment for one month each.

2. We have heard Mr. P.J. Saikia, learned amicus curiae and Mr. D. Das, learned Public Prosecutor, Assam.

3. The two appellants were tried by the learned Sessions Judge on the allegation that on 17.7.1994 about 9 PM they, in furtherance of their common intention, caused' the death of Md. Sakat Ali by assaulting him with sharp cutting weapon. It may be mentioned here that there was another accused named Md. Ashique Uddin against whom investigation was carried out by police but the said accused died during the pendency of the investigation itself.

4. The prosecution case in brief is that on 17.7.1994 at about 9 PM deceased Sakat Ali was found lying injured on the road side. On coming to know about the same a large number of persons including the father-in-law of the deceased, his wife and others came to the place of occurrence and the injured reported them that he has been assaulted by the two accused-appellants and another accused Md. Ashique Uddin (since deceased). The injured succumbed to the injuries, at around 11 PM on the same night while he was still lying on the road side as the informant and others could not arrange any conveyance for carrying the injured to the hospital. During trial, the prosecution examined as many as nine witnesses and we find that all the non-official witnesses as well as the Investigating Officer have deposed that the deceased was found lying on the road side with cut/stab injuries on his person. Inquest was conducted by the Investigating Officer at the above site and, thereafter the dead body was sent for post mortem, examination which was conducted by Dr. K.K. Chakraborty, P.W. 4. The doctor found as follows:

A male dead body aged about 30 years, strong built, wearing a white stepped open chest half shirt with cut in front and back and in abdominal areas stains with blood. A read sandow ganjee with cut in front and back and on abdominal area stained with blood. A blue half-pant and a red checked gamcha tied on waist over the wound stained with blood. All the clothes were handed over to the escorting constable. A bandage in right elbow. Stain of blood present in abdominal wall and on right leg. Hairs black and 1/2-1 cm. long. Rigor mortis present in the upper and lower limbs.

Injuries:

(1) Bandage of right elbow joint remove and found a cut injury on right elbow medially and along with crease of elbow measuring 4 cm. x 2 cm. x 1 cm. with cut in muscles, margins of the wound regular.

(2) Cut injury along the 11th Thorax vertebrae on left side 1 cm. away from the mid line measuring 3 cm. x 1 cm. x 1 cm. margins of the wound regular.

(3) Cut injury on back side 5 cm. above the iliac creast and 6 cm. lateral to the 3rd lumbar vertebrae with prolapse of intestine through the wound measuring 6 cm. x 2 cm. x abdominal cavity dept. Margins of the wounds are regular and inverted.

(4) Cut injury in front of the abdominal wall 1/2 cm. below the navel 1/2 cm. away from the mid line to right side through which intestine prolapsed. Measuring 3 cm. x 2 cm. x abdominal cavity deep. Margins are inverted and regular.

All the injuries are fresh and ante mortem caused by sharp pointed weapon.

THORAX - All healthy.

ABDOMEN- Peritoneal cavity contain about 2 1/2 litres. of liquid and clotted blood. Stomach congested. Mouth, pharynx, oesophagus healthy. Cut injury in the small intestine in the three parts are present. Liver, spleen, kidneys are all healthy. Scalp, skull, vertebrae, membrane, brain all healthy.

MUSCLES, BONES and JOINTS:

Muscles injury as described. Fracture not found. Fresh no abnormality found.

In the opinion of the doctor, the death was due to shock and haemorrhage as a result of the ante mortem injuries in the abdomen caused by sharp pointed weapon homicidal in nature.

5. The medical evidence has not been challenged by way of cross-examination and considering that the deceased had sustained as many as four cut injuries on different parts of his body, the trial court on the basis of the medical and oral

evidence on record rightly held this to be a case of homicidal death. We concur with the above finding.

6. In the present case, we find that there is no direct evidence as to who killed the deceased. The entire prosecution case rests on the oral dying declaration of the deceased.

7. P.W. 5 Aftar Uddin is the informant. He deposed that on the date of occurrence at about 6 PM he got the information that his son-in-law Sakat AH has been assaulted by the accused persons whereupon he went to the place of occurrence and found his son-in-law lying on the road with a dagger being pushed into the stomach. On being asked, the deceased told him that he has been assaulted by Parbin Ali, Kamar Uddin and Ashique (since deceased). He went to the police station and lodged the FIR. While returning from the police station he was informed that his son-in-law has expired. He thereafter went back to the police station. Police held inquest over the dead body and seized the dagger, Material Exhibit-1 which was found on the body of the deceased.

8. Likewise P.W.1 Motoi Mia ; P.W. 2 Sarifun Nessa, wife of the deceased and P.W. 3 Md. Abdul Wajid Ali have all deposed that on hearing the news about the assault on the deceased they went to the place of occurrence and they were informed by the deceased about the names of the accused persons as assailants. P.W. 6 Arfan Ali, however, came to the place of occurrence afterwards and found that the deceased was not in a position to speak. However, he found P.W. 2 and others there and he was informed by P.W. 2 that her husband has named Kamaruddin and Parbin as the assailants. P.W. 8 Faizul Uddin is another witness who came to the place of occurrence but as he did not fully support the prosecution version and has resiled from his earlier, statement, he has been declared hostile.

9. We, thus, find that there is evidence of four witnesses who have deposed about the oral dying declaration made by the deceased. The only discrepancy is that so far P.W. 3 is concerned he has named Kamaruddin and Ashique Uddin only and has excluded the name of Parbin Ali. It is submitted by the learned Public Prosecutor that this witness might have excluded Parbin Ali because of his

relationship with the said accused. In the present case, we find that names of the three accused persons have been mentioned in the FIR which was lodged soon after the incident and, hence, there cannot be any question of , concoction or fabrication. Moreover, the defence remained satisfied by giving suggestion to the witnesses that the accused persons have been falsely implicated without bringing out anything as to why they have been falsely implicated. The accused, persons have also merely denied their involvement. In their statement made under Section 313 Cr.P.C. also they have not stated anything as to why they have been falsely implicated.

10. The trial court has analysed the evidence of the prosecution witnesses in detail and has noticed that there are usual and minor discrepancies/ omissions here and there. However, the trial court has rightly held that these are usual phenomenon in a criminal trial where the witnesses are mostly illiterate and the trial takes place after long delay. The incident in this case took place in the year 1994 whereas the witnesses were examined sometime in the year 1997/98, i.e., after about 3/4 years of the incident. Due to lapse of time memory fails and there may be some omissions or contradictions and as held by the Apex Court in the case of State of H.P. v. Lekh Raj and Anr. : 2000 CriLJ44 these minor discrepancies and variance in evidence do not make the prosecution case doubtful and the court is required to adopt a rational approach and not take a hypertechnical view of the evidence. Hence, we accept the prosecution version that the deceased did make a dying declaration h before the witnesses. All the witnesses have, stated that at that time it was raining and although the wife of the deceased, his father-in-law and others arrived at the scene, they could not arrange conveyance to remove the deceased to the hospital for treatment. Hence, in the above circumstances, the reasons for non-recording of the dying declaration or not reducing it into writing are apparent. We also find that although the incident took place at around 6 PM the deceased was lying for about 4/5 hours and he died at around 11 PM only. In this context, we may refer to the following observation of the Apex Court in the case of Pothakumari Srinivasulu v. State of A.R : 2002 CriLJ3569 . The facts in Pothakumari (supra) are somewhat identical with the present case and the Apex Court observed :

7. We find no reason to disbelieve the dying declaration made by the deceased to the witnesses PW.s 1,2 and 3. They are all residents of the same village and are natural witnesses to the dying declaration made by the deceased. No reason is assigned, nor even suggested to any of the three witnesses, as to why at all any of them would tell a lie and attribute falsely a dying declaration to the deceased implicating the accused-appellant. Though each of the three witnesses has been cross-examined but there is nothing brought out in their statements to shake their veracity.

11. In the present case we also find that on getting information that the injured was lying on the road, his wife, father-in-law and other villagers assembled at the place of occurrence. They are all natural witnesses and have deposed about the dying declaration made by the deceased. They have also been categorical in stating that the deceased was in a position to speak although the weapon of assault was inside his body at that time.

12. In the face of the above categorical evidence of the prosecution, there is no scope to presume that the deceased was not in a position to speak. In the present case the doctor was also examined but the defence did not cross-examine him and did not try to bring out anything to show that after receiving above injuries a person will die immediately and he may not be in a position to speak. A Constitution Bench of the Apex Court in the case of *Laxman v. State of Maharashtra* : 2002 CriLJ4095 held that the certificate of the doctor as to the mental fitness of the declarant is not a sine qua non for the credibility of the dying declaration. It is for the court to decide and record a finding as regards the fitness of the said declarant's mind and in view of the evidence on record we hold that at the relevant point of time when PWs 1, 2, 3, 5 and 6 had arrived at the place of occurrence the deceased was in a fit state of health to make a statement and he did make a statement as to who assaulted him.

13. The law regarding basing conviction on the dying declaration has been crystallised and one can refer to the observations of the Apex Court in the case of *State of Rajasthan v. Bhup Singh* : [1997]1SCR190 and in *Smt. Laxmi v. Om Prakash and Ors.* : 2001 CriLJ3302 .

14. In view of the sanctity attached with the dying declaration and in view of our aforesaid discussion, we hold that dying declaration in the present case is not vitiated in any manner and it can form the basis for conviction. Hence, relying on the same, the two accused persons are held guilty of the offence alleged. Considering the nature of the injuries sustained by the deceased the intention to cause death is writ large and the conviction and sentence of the accused-appellants need no interference.

15. In the result, both the appeals stand dismissed.

16. Send down the records.

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