

Arjun Biswas Vs. State of Assam

Arjun Biswas Vs. State of Assam

SooperKanoon Citation : sooperkanoon.com/140637

Court : Guwahati

Decided On : Mar-31-2004

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

Acts : [Evidence Act, 1872](#) - Sections 27 and 33; [Indian Penal Code \(IPC\), 1860](#) - Sections 300; Code of Criminal Procedure (CrPC) , 1974 - Sections 164

Appeal No. : Cri. Appeal No. 344 (J) of 1997

Appellant : Arjun Biswas

Respondent : State of Assam

Advocate for Def. : F.H. Laskar, Addl. PP

Advocate for Pet/Ap. : A. Begum, Amicus Curiae

Disposition : Appeal allowed

Judgement :

I.A. Ansari, J.

1. By the judgment and order, dated 3-9-96, passed by the learned Sessions Judge, Dhemaji, in Sessions Case No. 29(DH)/1994, the appellant in this appeal, namely, Shri Arjun Biswas stands convicted under Section 302, IPC and sentenced to suffer imprisonment for life and pay a fine of Rs. 2,000.00 and, in

default of payment of fine, suffer rigorous imprisonment for a period of 1 (one) year.

2. The case against the accused-appellant, as projected at the trial, may, in brief, be stated as follows :

On 19-7-1992, at about 5.30 a.m., the accused-appellant, Arjun Biswas appeared at Dhemaji Police Station with a handleless blood stained dao in his hand and claimed that on that very day, i.e., on 19-7-1992, at about 4.30 to 5.00 a.m., he had done to death his sister-in-law, Smt. Krishna Biwas, by giving her blows with dao, for, he had suspected that she had killed his (i.e., the accused-appellant's) elder brother, Arun Biswas. The information so given by the appellant was reduced to writing in the form of Ext. 6 and treating the same as First Information Report, Dhemaji P.S. Case No. 127/92 under Section 302, IPC was registered against the accused-appellant and the dao aforementioned was, vide seizure list (Ext.3) seized from the accused-appellant. On completion of the investigation, police laid charge-sheet against the accused-appellant under Section 302, IPC.

3. During trial, the accused-appellant pleaded not guilty to the charge framed against him under Section 302, IPC. As many as 11 witnesses were examined by the prosecution. The accused-appellant was, then, examined under Section 313, Cr.P.C. and in his examination aforementioned, he denied that he had committed the offence alleged to have been committed by him, the case of the defence being that of total denial. On conclusion of the trial, the learned trial Court found the accused-appellant guilty of the charge framed against him under Section 302, IPC. The accused-appellant was accordingly convicted and the sentence, as mentioned hereinabove, was passed against him. Hence, the present appeal.

4. We have perused the materials on record. We have heard Mrs. A. Begum, learned Amicus-curiae, and Mr. F. H. Laskar, learned Additional Public Prosecutor, Assam.

5. In the present case, there is no eyewitness to the occurrence. The prosecution heavily relied on the statement allegedly made by the accused-appellant before the police at the time when he (accused-appellant) is claimed to have appeared at

the Police Station with the said blood-stained dao in his hand, the seizure of the said dao and the previous statement (Ext. 5) of Smt. Reba Biswas, wife of the accused-appellant, recorded under Section 164, Cr.P.C.

6. Keeping in view the above aspects of the case, when we come to the evidence of PW8 (Dr. Hem Ch. Barua), we notice that according to the doctor, he had held the postmortem examination on the dead body of Krishna Biswas on 19-7-92 at 4.00 p.m. and found as follows :

(1) A female dead body of average built with rigor mortis present, tongue is protruded out, face blood-stained.

(2) There are 3 sharp cut wounds on occipital area sizes are about 3' in length, 1' in depth and 1' in breadth. Brain matters is seen. Wounds are oblique in direction right to left and downwards.

(3) There are two sharp cut wounds on right lateral side sizes 3' in length, 1/2' depth and 1/2' breadth. Transverse in directions and parallel to the midline and 2' x 1' oblique in direction right to left and above to downwards.

(4) There is a sharp cut wound size 2' x 1' x 1' in the upper part of the neck on right side just below the mandible cutting the carotid artery and thyroid bone on right side.

There are haemorrhage and blood clot present in the brain membrane.

Brain is cut in different parts on the temporal and occipital area as per wounds described earlier.

Other organs are normal.

7. In the opinion of the doctor, the wounds were fresh and the same were ante-mortem in nature and that the death was caused due to shock and haemorrhage, which resulted from the injuries sustained, Ext. 4 being the post-mortem report.

8. The medical evidence on record has not been disputed at all by the defence. This apart, the unchallenged evidence of PW3 (Khaka Baidya), PW5 (Khajanti

Jamadar) and PW6 (Sada Barua) is that they all had seen the dead body of Krishna Biswas lying in a pool of blood on the floor of her house with injuries on her person, there being no dispute, however, of the fact that the accused-appellant used to live in the same house in which lived the said deceased.

9. Situated thus, it is not difficult to conclude and we do conclude that the death of the said deceased was homicidal in nature inasmuch as she had suffered as many as 4 (four) sharp cut wounds and that the shock and haemorrhage resulting from the injuries, so sustained by her, caused her death.

10. Bearing in mind the medical evidence on record, let us, now, come to the evidence of PW1 (Dimbeswar Dutta). His clear evidence is that he does not know the accused, but on hearing that in the rented house of Niroda Dutta at Station Road, a murder had taken place, he, on being called by the police, went there, saw the dead body of a woman lying there, police held inquest over the said dead body and prepared an Inquest Report, which he (PW-1) signed. To the same effect is the evidence of PW 5 (Khajanti Jamadar) inasmuch as according to this witness (PW 5) too, he, on being called by the police, came to the house of the accused, where dead body of a woman was lying and that the police held inquest over the said dead body. The evidence of PW2 (Nag Narayan) is not materially different from that of PW1 and PW5 inasmuch as according to PW2 also, he used to live as a tenant in a part of the same house in which lived the accused with the members of his family and that in the early morning of the day of occurrence, on hearing hue and cry, he came to the house of the accused and found the accused present there along with the police, Krishna's dead body was lying there, the police held inquest over the said dead body and he (PW-2) signed the inquest report.

11. Thus, a careful reading of the evidence of PWs 1, 2 and 5 merely shows that they had seen the dead body of Krishna Biswas lying on the floor of the house in which she used to live with the accused and their other family members, her dead body bearing multiple injuries. In short, the evidence of none of these witnesses help the prosecution in indicating as to who had actually killed the said deceased.

12. With the above aspect in view, when we turn to the evidence of PW4 (Atul Koch), we notice that according to his evidence, Srimati Niroda Dutta had several

rented houses at Milan Nagar, Dhemaji, he (PW 4) used to live in one of those rented houses, whereas the accused, his parents, the wife of the elder brother of the accused and the wife of the accused used to live in another rented house of Niroda Dutta.

13. As regards the occurrence, PW 4 has deposed that at the time of occurrence, he was a student of B.Sc. and apprehending that something had gone wrong at the house of the accused, he went there, where many others had already gathered. PW 4 has also deposed that the house of the accused was, at that time, closed, the door of the house was not opened at first, although they (PW 4 and others) asked the inmates of the house to do so, but later on, upon their insistence, the father of the accused opened the door and came charging at them with a bloodstained knife in his hand saying, 'I, too, will go to the thana'. PW 4 has clarified in his evidence that out of fear, he did not enter into the house, but when he went to the police station to give information about what had happened there, he (PW 4) saw the accused inside the lockup. It is in the evidence of PW 4 that even when the police came there, he did not enter into the house of the accused.

14. From a careful reading of the evidence of PW 4, it clearly transpires that when the dead body of Krishna Biswas was lying inside the house, where the accused, the father of the accused and their other family members used to live, the father of the accused, on being asked by his neighbours, opened, reluctantly, the door of the house and came out with a bloodstained knife in his hand saying that he too would go to the Police Station. However, though at the time, when the father of the accused made such a statement, the accused was already in the custody of the police at the Police Station. What is, now, pertinent to note is that the evidence of PW 4 gives no indication at all that the accused was the assailant. Far from this, his evidence casts a doubt on the father of the accused as an assailant inasmuch as when the door was opened, as claimed by PW 4, the father of the accused came out with a blood stained knife saying that he too would go to the Police Station. In other words, from the evidence of PW4, the father of the accused too appears as possible assailant.

15. Bearing in mind the above possibility, which transpires from the evidence on record, when we turn to the evidence of PW 11 (Abdus Samad), who is the Investigating Officer of the case, we find that according to the evidence of PW 11, on 19-7-1993, he was, as a Sub-Inspector of Police, on duty at Dhemaji Police Station and on that day, accused Arjun Biswas appeared, at the Police Station at 5.30 a.m., carrying a handleless bloodstained dao in his hand and informed them (PW 11) that on that day at about 5 a.m., he had cut in their rented house, located near Dhemaji Daily Bazar, his 'Nabow' (elder brother's wife) Krishna with the dao he had carried along and as a result of his such cutting, his 'Nabow' Krishna Biswas had died and for that reason, he had come to the thana to surrender, whereupon the Officer-in-Charge, Paramananda Dwibedi, recorded the statement of accused Arjun Biswas registered a case and gave him (PW 11) the charge of investigation, Ext. 6 being the said statement recorded by Paramananda Dwibedi. It is in the evidence of PW 11 that he arrested the accused and questioned him, whereupon the accused said that he (accused) had killed Krishna Biswas with dao and that he would be able to show the dead body, whereupon he (PW-11) seized the said dao by Ext. 3 and, upon reaching the place of occurrence on that very day, he (PW-11) found the dead body of Krishna Biswas inside the house as shown by the accused, he held inquest over the dead body, which bore several cut wounds, Ext. 1 being the inquest report. It is also in the evidence of PW 11 that after examining witnesses and collecting the autopsy report he submitted charge-sheet against the accused.

16. While considering the evidence of PW 11, it is of paramount importance to keep in mind that the information, which the accused-appellant gave to the police, was recorded in the form of Ext. 6 and the same has been, as already indicated hereinabove, treated as the FIR of the case. The statement, so recorded thus, 'To day (19-7-92) at or about 5.30 a.m. taking a blood stained handlesess dao in hand I came to the thana and inform that this morning (19-7-92) at about 4.30 or 5 O'clock I cut my 'nabow' (elder brother's wife) Krishna to death with the dao I have been taking along, inside our rented house near the Dhemaji Daily market. Now I desire to be punished. The blood sticking to the dao is of my 'Nabow'. I shall show the place, where 'Nabow' is lying.

I have cut my 'Nabow' Krishna to death as I suspected that she had killed my elder brother Arun Biswash one Saturday, some 14 or 15 days previously.'

17. How far as statement made to the police by an accused, who is in the police custody, can be introduced into evidence by application of Section 27 of the Evidence Act has been succinctly described in *Mohmed Inayatullah v. State of Maharashtra*, reported in AIR 1976 SC 483, wherein the Apex Court has observed and laid down as follows :

'10. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at the section and be reminded of its requirements. The Section says :

'Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.'

11. The expression 'Provided that' together with the phrase 'whether it amounts to a confession or not' shows that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any extent. Section 24, also. It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word 'distinctly' means 'directly', 'indubitably' 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly' relates 'to the fact thereby discovered' (sic) (and?) is the linchpin of the provision. This phrase refers to that part of the information supplied

by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

12. At one time it was held that the expression 'fact discovered' in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact (See *Sukhan v. Crown*, ILR 10 Lah 283 : AIR 1929 Lahore 344 : (1929 (30) Cri LJ 414) (FB); *Gangu Chandra v. Emperor*, ILR 56 Bom 172 : (AIR 1932 Bom 286) : (1932 (33) Cri LJ 396). Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (See *Pulukuri Kotayya v. Emperor*, 74 Ind App 65 : AIR 1947 PC 67) : (1947 (48) Cri LJ 533); *Udai Bhan v. State of Uttar Pradesh*, 1962 Supp (2) SCR 830 : AIR 1962 SC 1116.

13. Before proceeding further, it is necessary to be clear about the precise statement which had been made by the appellant to the Police Officer. This statement finds incorporation in the panchnama, Ex. C, and we have reproduced an English rendering of the same earlier in this judgment. While considering this statement, the High Court observed that the accused had stated that 'he had kept them (drums) there'. We have perused the original record of the statement which is in Hindi, and we are of opinion that by no stretching of the words this statement can be so read or construed as has been done by the High Court. The copy Ex. C of the Panchanama, in the Paper-Book contains a correct English rendering of the same. What the accused had stated was : 'I will tell the place of deposit of the three Chemical drums which I took out from the Haji Bunder on first August'. It will be seen that he never said that it was he who had deposited the drums at the place from which they were produced. It seems the latter part of the statement which was an outright confession of the theft, was not completely ruled out of

evidence and something of it was imported into and superimposed on the first part of the statement so as to fix the responsibility for deposit and possession of the stolen drums there, on the accused.

14. Having cleared the ground, we will now consider, in the light of the principles clarified above, the application of Section 27 to this statement of the accused. The first step in the process was to pinpoint the fact discovered in consequence of this statement. Obviously, in the present case, the threefold fact discovered was : (a) the chemical drums in question, (b) the place i.e. the Musafirkhana. Crawford Market, wherein they lay deposited and (c) the accused's knowledge of such deposit. The next step would be to split up the statement into its components and to separate the admissible from the inadmissible portion or portions-Only those components or portions which were the immediate cause of the discovery would be legal evidence and not the rest which must be excised and rejected. Thus-processed, in the instant case, only the first part of the statement, viz.. 'I will tell the place of deposit of the three Chemical drums' was the immediate and direct cause of the fact discovered. Therefore, this portion only was admissible under Section 27. The rest of the statement, namely, 'which I took out from the Haji Bunder on first August', constituted only the past history of the drums or their theft by the accused: it was not the distinct and proximate cause of the discovery and had to be ruled out of evidence altogether.'

(Emphasis is added)

18. From a careful reading of what has been laid down by the Apex Court in the case of Mohmed Inayatullah (1976 Cri LJ 481) (supra), it clearly follows that when a statement made by an accused is sought to be introduced into the evidence on record by taking recourse to Section 27, the Court shall, first, determine what fact was really discovered in consequence of the statement made by the accused and, then, the Court shall split up the statement into different components in order to enable the Court to sift the admissible portion(s) of the statement from the inadmissible ones. Only that component or portion of the statement, which was the immediate cause of the discovery, would be the legal evidence and not the entire statement. What is, now, required to be noted is that a fact discovered shall not be

treated as equivalent to the object produced. The fact discovered, in fact, embraces, within its ambit, the place from where the object is produced and the knowledge of the accused as to where the object produced was lying (See *State of Rajasthan v. Bhup Ram* reported in (1997) 10 SCO 675).

19. In the case at hand, the fact discovered is the fact that the dead body of Krishna Biswas was lying in the house in which she used to live along with not only the accused-appellant, but also her parents-in-law and other members of their family and the knowledge of the accused-appellant that Krishna Biswas was dead and as to where her dead-body was lying. Keeping in view the fact, which has been so discovered, we are, now, required to split up the statement recorded in Ext. 6 into different components and determine as to which part(s) of the statement, so made, actually led to the discovery of the said fact. The statement (Ext 6) made by the accused-appellant-that on 19-7-92, at about 4-30/5.00 a.m., he had cut his 'nabow' (i.e. elder brother's wife) Krishna Biswas to death with the dao, which he had brought along, and that the blood sticking to the dao is of his sister-in-law are inadmissible pieces of evidence under Section 27 of the Evidence Act inasmuch as the statement, so made amounts to confession made to the police and the same did not lead nor can the same be claimed to have led to the discovery of the facts pointed out hereinbefore. The part of the statement, which really led to the discovery of the facts aforesaid, was the statement, 'I shall show the place, where 'Nabow' is lying', for, it was acting upon this information that the police had come, led by the accused, to the house in question, and found the dead body of Krishna lying there. In short, the immediate cause of the discovery was. as laid down in *Mohmed Inayatullah* (1976 Cri LJ 481) (SC) (supra), the accused-appellant's statement, 'I shall show the place, where 'Nabow' is lying'.

20. It logically follows from the above discussion that the statement of the accused made to the police that he had cut Krishna to death did not actually lead to the discovery of the fact, in question. This apart, there is also no clinching evidence on record that the dao produced by the accused-appellant was the real weapon of assault inasmuch as while the dao, in question had bloodstains, the fact remains that even the knife, with which the father of the accused had come out of the house, also bore blood stains.

21. Thus, the facts discovered, namely, that the accused knew that Krishna Biswas was dead, that her dead-body was lying at the said house and that the said dead-body was, eventually, found lying at the said house are not in themselves sufficient to hold that it was none, but the accused-appellant, who had killed Krishna Biswas inasmuch as there were other inmates of the house, who could have killed Krishna Biswas, and even the father of the accused could have been the assailant of Krishna Biswas as indicated by the evidence of PW 4 and, more particularly, when there is no clinching and concrete evidence that the dao, which the accused-appellant allegedly produced at the police station, was the real weapon of assault.

22. When we proceed further, we also notice that so far as PW 6 (Sada Barua) is concerned, his evidence does not improve the case of the prosecution inasmuch as he has merely repeated the evidence given by the Investigating Officer (PW 11), which we have already discussed. Even the evidence of PW 9 (Hiren Gogoi), who is a Home-Guard personnel attached to Dhemaji Police Station, does not help the case of the prosecution in proving that it was the accused, who had killed Krishna inasmuch as this witness has merely deposed that on the instructions of the Investigating Officer, he (PW 5) had carried the dead body of the said deceased for autopsy.

23. Turning to the evidence of PW 7 (Ram Prasad Das), we notice that according to his evidence, he knows the accused, he (PW 7) was a tenant of one Dimbeswar and the accused along with his family used to live in another rented house of the same landlord, located about 50 or 60 feet away from the rented house, where he (PW 7) lived. As regards the occurrence, the evidence of PW 7 is that at about 5 O'clock in the morning, on the very day of the occurrence, when he heard a commotion in the house of the accused, he came to the house of the accused, where others had already gathered, and he heard that the sister-in-law of the accused was lying inside the house after being murdered.

24. From a bare reading of the evidence of PW 7, it is clear that his evidence is nothing but hearsay and does not assist the case of the prosecution at all.

25. When we turn to the evidence of PW 3 (Khaka Baidya), we find that according to PW 3, in the morning of the day of occurrence, his wife told him that the accused had gone out towards road carrying a dao in his hand and that apprehending that something might have happened in the house of the accused she had gone to the house of the accused, where she found the 'Nabow' (sister-in-law) of the accused lying on the floor of the house with injuries. It is also the evidence of PW 3 that he informed his landlord about what his wife had told him (PW-3). Even a cursory glance on the evidence of PW-3 shows that the evidence of PW-3. same as the evidence of PW-7, is nothing but hearsay inasmuch as the wife of PW-3 has not been examined as a witness and PW-3 has no personal knowledge as to whether the accused had really gone towards the road carrying a dao in his hand as was claimed by his wife.

26. What, thus, logically follows from the above discussion is that if the confessional portion of the statement allegedly made by the accused-appellant to the police at the Police Station and recorded in the form of Ext. 6 is, for the reason stated hereinabove, kept out of consideration, the evidence of none of the witnesses including that of the Investigating Officer can be treated to have shown, far less prove, that it was the accused, who had killed Krishna. What the relevant and admissible pieces of the evidence given by the Investigating Officer show is that the accused knew that the Krishna had been killed, he also knew the place, where the dead body of the said deceased was lying. But while considering this aspect of the matter, one cannot lose sight of the fact that in the house, where the said deceased was killed, not only the accused-appellant, but also his father and other members of their family used to live and while the accused was present at the Police Station with a blood-stained dao in his hand, the father of the accused too was present in the said house and, on being demanded by the neighbours, he reluctantly, opened the door of the house and came out with a bloodstained knife in his hand declaring that he too would be going to the Police Station. In the absence of any eye-witness to the occurrence, mere evidence of the fact that the accused knew that Krishna had been killed and he also knew that Krishna's dead body was lying in the house in which not only Krishna and the accused but also the father of the accused and their other members of the family used to live cannot be stretched to hold that it was none, but the accused, who had killed Krishna,

particularly, when there is, as already indicated hereinabove, no clinching or concrete evidence that the dao, which the accused-appellant, allegedly produced at the Police Station, was the real weapon of assault.

27. We are amazed to find that the learned trial Court has heavily relied on the statement of Smt. Reba Biswas, wife of the accused-appellant recorded under Section 164, Cr.P.C. by PW-10 (Soneka Bora), a Judicial Magistrate. According to her evidence, Ext. 5 is the statement, which she recorded of Smt. Reba Biswas, on her being produced by the police for recording her statement. According to Ext. 5, Reba Biswas stated, in her statement made under Section 164, Cr.P.C, as follows :

'Accused Arjun Biswas is my husband. Deceased Krishna Biswas was my 'Ja' (husband's brother's wife). Krishna Biswas's husband died about 15 days previously. Last night we the members of our family had been sleeping after taking our dinner. At 2 or 3 O'clock at night, Krishna Biswas had raised a hue and cry. We had got up out of fear. Krishna Biswas had said that she had screamed as somebody wanted to assault her. My father-in-law, mother-in-law and my husband asked her as to who had attempted to assault her. Then she replied that father-in-law had pressed her neck. A little after my husband asked me to prepare tea. I gave tea to all. Krishna Biswas, too, took tea. After taking tea, we all went again to bed. As the day broke, Arjun Biswas got up. I thought that he would go for work as he had done so on earlier occasions after getting up in the morning. I, again, slept along with my son. I was in light sleep. A 'mit' dao was under our pillow. Taking out the dao from under the pillow, my husband cut Krishna Biswas. I woke up at the cry of Krishna Biswas. I woke up at the cry of Krishna Biswas's baby. I found Krishna Biswas cut and her body lying on the bed. I saw dao in the hand of my husband. I got frightened at the sight of the incident. Taking the dao along, my husband went to thana. I do not know why husband had cut Krishna Biswas.'

28. The question, which is, now, required to be considered is as to whether a witness's statement made under Section 164, Cr.P.C. can be treated as relevant and admissible under Section 33 of the Evidence Act if the witness, whose statement has been so recorded, does not appear or whose presence cannot be

procured by the Court and/or kept out of the Court by adverse party.

29. Section 33 of the Evidence Act makes relevant certain evidence for proving, in subsequent proceeding, the truth of facts stated therein. According to Section 33, evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. The use of the evidence, conceived by Section 33, is, however, subject to the following three provisos, namely (a) that the proceeding was between the same parties or their representatives in-interest; (b) that the adverse party in the first proceeding had the right and opportunity to cross-examine, and (c) that the questions in issue were substantially the same in the first as in the second proceeding.

30. In other words, the evidence of a person (1) who is dead, or (2) cannot be found, or (3) is incapable of giving evidence, or (4) is kept out of the way by the adverse party, or (5) whose attendance cannot be procured without an amount of delay or expense, which the Court considers unreasonable is relevant under Section 33. Such evidence must have, however, been given (i) in a judicial proceeding, or (ii) before any person authorized by law to take such evidence e.g., arbitrator, coroner, a Sub-Registrar, who holds an enquiry under Registration Act; etc. Moreover, the evidence so tendered earlier by the persons enumerated above is admissible (1) in an entirely new judicial proceeding, or (2) in a subsequent stage of the same proceeding. But in order to admit the evidence as aforesaid (1) the previous statement must have been recorded between the same parties or their representatives in-interest, (2) the adversary must have had a right and opportunity to cross-examine that witness, and (3) the points at issue in the two proceedings, present and past, must be substantially the same. The adversary must have had a right and opportunity to cross-examine the witness (See AIR 1930 PC 79; AIR 1974 SC 1723. The opportunity and right both must be present (See 1974 SCC (Cr) 698; (1975) 3 SCC 2. The adversary must have a right to

cross-examine. If he had no right it does not become admissible. See also AIR 1921 Bombay 3 : (1921 (22) Cri LJ 241) (FB).

31. In short, one of the prime requisites for making a statement admissible in evidence by taking recourse to Section 33 of the Evidence Act is that the adversary must have had a right and opportunity to cross-examine the witness, whose statement is sought to be admitted into evidence. During the course of investigation, when the statement of a witness is recorded under Section 164, Cr.P.C, the accused neither has any right nor is he given opportunity to cross-examine such a witness. For non-fulfillment of this condition precedent alone, it is sufficient to hold that a statement of a witness recorded under Section 164, Cr.P.C. is not a statement, which can be admitted into evidence at the trial under Section 33 of the Evidence Act.

32. In view of what have been discussed above, it is clear that the statement recorded of a witness under Section 164, Cr.P.C, during the course of investigation of a case, is not the evidence, which is perceived by Section 33 of the Evidence Act and, hence, such a previous statement cannot be treated as substantive evidence against the accused. Therefore, the reliance placed in the present case by the learned trial Judge on the previous statement of Smt. Reba Biswas is wholly illegal.

33. In the present case, there is, admittedly, no eye-witness to the occurrence. When the case against an accused depends on circumstantial evidence, every Incriminating piece of evidence, which surfaces against the accused, has to be proved and the facts so proved shall make a complete chain of events leading to the hypothesis that it was the accused, who was the author of the crime. The hypothesis so adopted must not only be consistent with the guilt of the accused, but the same should also be inconsistent with his evidence.

34. In the case at hand, the chain of circumstances is grossly inadequate, for, in the present case, except the fact that the accused appeared at the Police Station with a blood-stained dao and told the police that he would show the place, where the dead body of his 'Nabow' (i.e. Krishna) was lying, and the police, acting upon this information, came to the house of the accused and found Krishna's dead body

lying there, there is no other incriminating evidence against the accused. The fact that the accused had appeared at the Police Station with a bloodstained dao is not such a circumstance, which can, in itself, be treated as proof of the fact that it is the accused, who had killed the deceased-Krishna, particularly, when even his father was found with a bloodstained knife and threatened to go to the police and when, more particularly, there is no cogent, definite, clinching and concrete evidence that the dao, in question, was the weapon of assault. The chain of circumstances is, therefore, incomplete and is grossly inadequate to hold that it was none but the accused, who had killed Krishna Biswas.

35. Because of what have been pointed out above, we conclude that the evidence on record was grossly inadequate to hold that none but the accused-appellant was the one, who had killed Krishna Biswas. Situated thus, we are firmly of the view that the accused-appellant ought to have been accorded, at least, benefit of doubt.

36. In the result and for the reasons discussed above, this appeal is allowed. The conviction and sentenced of the accused-appellant shall accordingly stand set aside.

37. Let the accused-appellant be set at liberty forthwith unless he is required to be determined in connection with any other case.

38. Send back the LCRs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com