



GAHC010002802019

Page No.# 1/13



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/9/2019

KISHAN KOIRI
SIVASAGAR.

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY PP, ASSAM.

2:SRI BOPOI KARMAKAR
S/O -LATE TIKIRA KARMAKAR
VILL.- GOSAIBARI T.E.
PS- DEMOW
DISTRICT-SIVASAGAR
ASSA

Advocate for the Petitioner : MS. M BARMAN, AMICUS CURIAE

Advocate for the Respondent : PP, ASSAM

BEFORE

HON'BLE MR. JUSTICE SUMAN SHYAM
HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

Date of hearing : 05.12.2022.

Date of judgment : 05.12.2022.



JUDGMENT & ORDER (Oral)

(Suman Shyam, J)

Assailing the judgment and order dated 04.09.2018 passed by the learned Sessions Judge, Sivasagar in connection with Sessions Case No.21 (S-S)/2018 whereby, the sole appellant was convicted under Section 302 of the Indian Penal Code (IPC) for committing the murder of Anubhab Karmakar and sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs.1000/- (Rupees One Thousand) with default stipulation, the instant Jail appeal has been filed.

2. The prosecution case, in a nutshell, is that on 21.09.2017, at around 8:00 p.m., an altercation took place between the appellant/accused and the victim Anubhab Karmakar whereby, the appellant had assaulted the victim on his head and other parts of the body with a bamboo 'lathi' (stick) causing grievous injury on Anubhab Karmakar. The victim was rushed to the hospital but he died on the next day morning at about 3:15 a.m. On 21.09.2017, Sri Bopoi Karmakar i.e. the elder brother of the victim, lodged an ejahar before the In-Charge of Nitaipukhuri Police Outpost reporting the incident, based on which GD Entry No.331/2017 dated 21.09.2017 was made and the same was forwarded to the Officer-in-Charge of Demow Police Station for registering a case. Consequently, Demow P.S. Case No.205/2017 came to be registered under Section 302 of the IPC and the matter was taken up for investigation by the police. On completion of investigation, the Investigating Officer (I.O.) had submitted charge-sheet under Section 302 of the IPC against the appellant.

3. Based on the charge-sheet the learned trial court had framed charge against

the appellant under Section 302 of the IPC. However, since the appellant had pleaded innocence and claimed to be tried, the matter went up for trial.

4. Prosecution case is primarily based on the testimony of PW-3, who was projected as an eye-witness as well as the evidence of other witnesses adducing circumstantial evidence.

5. After recording the evidence of the prosecution side, the statement of the accused was recorded under Section 313 of the Cr.P.C. The accused/ appellant had also examined himself as the lone defence witness. The DW-1 had projected a case that he had acted in exercise of right of self defence, so as to regal out of the rigors of Section 302 of the IPC.

6. Upon analyzing the evidence available on record the learned trial court had held that the prosecution side had succeeded in establishing the charge brought against the accused/appellant under Section 302 of the IPC beyond reasonable doubt. Consequently, the appellant was convicted under Section 302 of the IPC and sentenced as aforesaid. Since then the appellant is in jail.

7. We have heard Ms. Meghali Barman, learned *Amicus Curiae* appearing for the appellant. Also heard Ms. Barnali Bhuyan, learned senior counsel (Addl. P.P., Assam) assisted by Ms. M. Chakraborty, learned counsel appearing for the State/respondent No.1. None has appeared for the informant/respondent No.2.

8. Ms. Barman has argued that this is not a case of conviction under Section 302 of the IPC inasmuch as, there are materials to show that the occurrence was preceded by an altercation between the appellant and the victim. Moreover,



submits Ms. Barman, the accused has not only explained his stand but has also adduced defence evidence to establish that he had acted in exercise of right of self-defence but the said aspect of the matter had not been correctly considered by the learned trial court. The learned *Amicus Curiae* has further argued that even the element of sudden provocation meted out to the appellant by the victim and his family members was ignored by the learned court below while convicting the appellant under Section 302 of the IPC. On such counts, the learned *Amicus Curiae* submits that this is at best a case for conviction of the appellant under Section 304 Part-II of the IPC but not under Section 302 IPC.

9. Responding to the above, Ms. Bhuyan has argued that although there is no element of doubt in this case that it was none other than the appellant who had assaulted the victim with a 'lathi' causing grievous injury not only in other parts of the body but also on the head of the victim which had led to his death, yet, it cannot be denied that there is evidence to show that there was an altercation preceding the incident. Under such circumstances, the plea of grave and sudden provocation to the appellant deserves to be considered in the light of the facts and circumstances of the case. The learned Addl. P.P., however, submits that no case of exercise of right of self-defence has been made out by the accused/appellant.

10. We have considered the submissions made at the Bar and have also gone through the materials on record.

11. From an analysis of the evidence available on record it is firmly established that the victim had died a homicidal death due to the multiple bodily injuries

sustained by him. The post-mortem examination on the dead body was conducted by Dr. Subhajyoti Deka, who was posted as Associate Professor, Department of Forensic Medicine, Assam Medical College & Hospital, Dibrugarh on 21.09.2017 when the body of the victim was brought for post-mortem examination. Dr. Deka was examined as PW-9. He has proved the post-mortem report (Ext-6). According to the post-mortem report, the following injuries were found in the body of the victim :-

"Injury :

1. *Lacerated wound of 2 cm x 1cm over right knee, reddish.*
2. *Abraded contusion of 6cm x 2cm over left eyebrow and maxilla, reddish.*
3. *Abraded contusion of 10cm x 1cm over right chest, below nipple, vertically placed.*
4. *Abraded of 6cm x 5cm over left shoulder.*

Cranium & spinal canal :

Scalp - Rigor temporal contusion & skull – Rigor temporal fissure fracture 10 cm length.

Vertebrae – healthy."

PW-9 has opined that the death was due to coma as a result of head injury sustained and that all the injuries were ante-mortem and caused by blunt force impact. In his cross-examination, PW-9 has further stated that this sort of injury sustained by the victim might be caused during scuffle by exchange of blunt force.

12. Sri Bopul Karmakar @ Bopoi Karmakar, who is the informant in this case and also the elder brother of the victim, was examined as PW-1. He has deposed that the incident occurred on 20.09.2017 at about 7:00 p.m. while he was in his residence. On hearing the hue and cry coming from the house of the accused situated on the back side of his house, he went there and saw his mother Anjana Karmakar and wife of

Anubhab on the road and they were found to be holding Anubhab Karmakar. His brother Jitul was also holding Anubhab. Jitul told him that accused Kisan Koiri had assaulted Anubhab with a 'lathi' and fled away. He saw injuries on the head of Anubhab. Initially, Anubhab was taken to the Bagan (Garden) hospital and from there to Demow whereafter, he was brought to the Assam Medical College & Hospital (AMCH), Dibrugarh. Anubhab died at around 3:30 a.m. Post-mortem was conducted at Dibrugarh. He had lodged the ejahar by putting his thumb impression.

13. PW-2, Smti. Dhanmani Karmakar alias Anjana is the mother of the deceased. She has also deposed that the incident took place on 20.09.2017 at about 7:00 a.m. when she was in her residence. At that time, her daughter-in-law Junumati had informed her that accused Kishan had assaulted Anubhab and kept him lying in the house of the accused. On coming to know about the same, she, along with others, went to the house of the accused and saw that Anubhab was lying in the courtyard with injuries on his head. She immediately took Anubhab to the Bagan hospital along with her other sons Jitul and Bopul. The victim died at around 3:00 a.m. at the AMCH, Dibrugarh.

14. As noted above, PW-3, Smt. Jubati Karmakar is the sister-in-law of the victim and she was projected by the prosecution as the eye-witness to the occurrence. While confirming that the incident occurred on 20.09.2017 at around 6/7 p.m., PW-3 has further deposed that at that time she had heard accused Kishan involved in a quarrel with his parents. She had also heard that the accused was rebuking her and her parents. On hearing the same, her brother-in-law Anubhab (deceased) went to

the courtyard of the accused and asked him not to rebuke her (PW-3). On hearing this, she also came out of the house and went there and saw that accused/appellant Kishan was engaged in an altercation with Anubhab. At that time, Anubhab requested her not to enter the house of the accused but by this time her husband Jitul Karmakar had also arrived there and asked the accused not to scold her. While Anubhab was leaving the house of the accused, Kishan had assaulted him on the head with a bamboo piece. Anubhab fell down on the ground. She raised a hue and cry. After assaulting Kishan, the accused fled away. Her husband Jitul had chased Kishan. By that time, the wife and sister of accused had also fled their house. On their hue and cry, other persons gathered there and Anubhab was taken to the Bagan hospital by Bopul and her mother-in-law. Anubhab died at about 3:00 a.m. at the AMCH.

15. During her cross-examination, PW-3 had remained firm and denied the suggestion that the family members of the accused had left the house because she along with others had trespassed into the house of the accused. She has also denied the suggestion made by the defence side that she could not witness the incident properly due to darkness.

16. PW-4, Sri Jitul Karmakar is the husband of PW-3. In his testimony this witness has deposed that accused Kishan had rebuked his wife and at that time, Anubhab went to the house of the accused and requested him not to rebuke his wife. He has further stated that he came to know from his wife (PW-3) that the accused had hit his brother (victim) on the head with a bamboo piece. He along with his brother Bopul



took Anubhab to the hospital. Anubhab died at the AMCH next day, early in the morning.

17. Sri Lal Bhuyan, who was known to both the accused and the victim was examined as PW-5. He has also confirmed that the incident took place on 20.09.2017 at around 7:00 p.m. At that time, he was in his residence. VDP members informed him over phone that the accused had assaulted Anubhab and the victim had been taken to the hospital. He then went to the Bagan hospital and saw injuries in the forehead of Anubhab. As directed by the Garden Manager, he then accompanied the injured and his family members to Demow hospital and on the way, they had entered Nitaipukhuri Outpost and informed the Police about the matter. He came to know that Anubhab died at the AMCH, Dibrugarh.

18. PW-6, Constable Muhiram Deori had accompanied SI Guneswar Kumar to the Line of Gohainpukhuri T.E. in connection with investigation of the murder case. He has deposed before the court that during investigation the I.O. had recovered and seized one bamboo 'lathi' from the house of the accused vide Ext-1.

19. Sri Bijay Lohar is the uncle of the deceased. He was examined as PW-7. This witness had not seen the occurrence but he has stated that on being asked, the wife of Anubhab told him that accused Kishan had assaulted her husband.

20. SI Guneswar Kumar was the I.O., who had carried out the investigation in connection with Demow P.S. Case No.205/2017. The I.O. was examined as PW-8. He has deposed as regards the usual steps taken in connection with the investigation in this case and submission of charge-sheet against the accused person. Since the

deposition of the I.O. is based on materials available on record which are not under challenge by the defence side, we do not deem it necessary to go into the excruciating details of the evidence of PW-8. However, during his cross-examination the defence side had made an attempt to bring out the contradictions/improvements in the testimonies of the prosecution witnesses by putting him the relevant questions.

21. We have noticed that during his examination under Section 313 Cr.P.C., the accused has stated that in order to save himself, he had waived a bamboo lathi but could not say as to whom it hit. According to the accused, he did so in order to save himself from Jitul and his brother he fled away so as to take shelter in the house of his father-in-law. In response to question No.14, the accused has stated that the three brothers of the victim came to his house together and responding to question No.15, he has further stated that the three brothers had come together to quarrel with him.

22. In his deposition as DW-1, the accused/appellant has stated more or less in the same lines as indicated in his statement recorded under Section 313 Cr.P.C. In his deposition, DW-1 has stated that on the day of the incident, at about 5:00 p.m. while he had returned home and was in his house, his mother Monoi Koiri had also returned home in a drunken state and started rebuking him. At that, he had requested her not to consume liquor and had also requested her not to go to the house of Anubhab for consuming liquor. He had stated that Jitul and his family members used to take rice from his mother and in exchange, they used to provide her with liquor. On the day of the occurrence, at about 8:00 p.m. there was an altercation between him, his

mother, Bapoi, Anubhab Karmakar, Jitul Karmakar and Jubati, wife of Jitul Karmakar, who had entered his house by pushing the door. To save his life, he had used lathi but could not say as to whom it had hit. Thereafter, he fled the scene to save his life and took shelter in the house of his father-in-law. Subsequently, he came to know that Anubhab had expired. After a week, he had surrendered at the Demow Police Station wherefrom he was sent to Nitaipukhuri Outpost.

23. From the evidence of PW-3, it appears that she had seen the occurrence. There is no inherent contradiction in her version and this witness could not be shaken during her cross-examination. Therefore, we do not find any ground to disbelieve her.

24. From an objective analysis of the evidence available on record, more particularly the testimony of PW-3, it is well established that the incident took place on 20.09.2017 at around 7/7:30 p.m. in the evening in the house of the accused/appellant Kishan Koiri. It appears that at that time the accused was rebuking his mother for consuming alcohol in the house of the deceased. In the process he had also taken the name of some of the family members of the deceased. Since the house of the deceased was in the vicinity and he could hear the accused rebuke his family members, the victim went to the house of the accused. He was soon accompanied by other members of the family. It was at that stage that the accused/appellant had hit the deceased with a lathi and ran away.

On a cumulative analysis of the evidence available on record as well as the statement of the accused, we are of the opinion that the fact that it was none other than the accused/appellant who had assaulted the victim on his head with a lathi

causing grievous injury to him leading to his death in the hospital in the wee hours of the next day. Having held as above, the next question that would fall for consideration in this case is as to whether, there was any intent on the part of the accused to cause death of the victim and if not, would this come within the purview of Exception 4 of Section 300 of the IPC.

25. We have already noted herein above that it has come out from the evidence of both the prosecution side and the defence side that the occurrence was preceded by an altercation. The accused was annoyed by the conduct of his mother for consuming liquor by going to the house of the deceased. He also suspected that the family members of the deceased were trying to grab the land of the appellant's mother by offering her alcohol in lieu of rice which they get from the mother of the appellant. The accused had also started rebuking the family members of the victim. Enraged thereby, the three brothers of the deceased had gone to the house of the accused apparently to restrain him from using such foul language against the family members of the victim and on that issue, an altercation took place.

26. From the evidence available on record, it is also clear that the accused was not the aggressor in this case and the incident took place in the house of the accused when the victim and his brothers had gone there. The weapon used in the incident is also a bamboo 'lathi' which is commonly available in every rural household of the State. There is nothing on record to indicate premeditation on the part of the accused to cause death to the victim. It has come out from the materials on record that the altercation took place between the accused and the victim in the

house of the accused appellant and in the presence of his brothers. Therefore, it is highly probable that during the course of altercation, strong words were exchanged. As such, grave and sudden provocation to the accused in course of the altercation prompting him to assault the victim in a heat of passion cannot be ruled out in this case.

27. After the incident, the accused did not act in a cruel manner nor did he take undue advantage of the situation. He had later surrendered before the Police. Viewed from that perspective, we are of the un-hesitant opinion that this case would come within the sweep of Exception 4 of Section 300 of the IPC. The accused might have had the knowledge that the assault made on the head of the victim with a 'lathi' could cause death to him, but it cannot be said that there was intention on his part to cause death to the victim. The said position is also amply highlighted from the stand of the accused reflected in his statement recorded under Section 313 Cr.P.C. as well as during his deposition before the Court.

28. For the reasons stated herein above, we set aside the conviction and sentence awarded to the appellant under Section 302 of the IPC and convict him under Section 304 Part-II of the IPC. Consequently, the accused is sentenced to undergo rigorous imprisonment for a period of 10 (ten) years. The period of jail sentence already undergone by the accused during investigation and trial, if any, as well as during the pendency of this appeal, shall stand appropriately set off against the sentence awarded by this Court and the appellant shall serve the remainder of jail sentence, in accordance with law.



With the above observation, this appeal stands allowed in part.

Registry to send back the LCR.

Before parting with the record, we put on record our appreciation for the valuable services rendered by Ms. Meghali Barman, learned *Amicus Curiae* and recommend that the Registry may make payment of appropriate remuneration to the learned *Amicus Curiae* as per the existing norms.

JUDGE

JUDGE

T U Choudhury/Sr.PS

Comparing Assistant