



GAHC010036852020

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

Case No. : CrI.A./97/2020

SRI RATAN NAYAK AND 3 ORS.
S/O- LATE KESHAB NAYAK

2: SRI LAJRUSH TAPNO
S/O- SRI HALMEN TAPNO

3: SRI RASHID GOWALA
S/O- LATE SAHADEV GOWALA

4: SRI JAGADISH LONGA
S/O- LATE JOSEPH LONGA
ALL RESIDENTS OF BOGIJAN TEA ESTATE UNDER COKIHOLA PS
KARBI ANGLONG

VERSUS

THE STATE OF ASSAM
REP. BY P.P., ASSAM.

Advocate for the Petitioner : MR. A THAKUR

Advocate for the Respondent : PP, ASSAM

BEFORE

HON'BLE MR. JUSTICE SUMAN SHYAM
HON'BLE MR. JUSTICE ARUN DEV CHOUDHURY

Date of hearing : 03.12.2021.

Date of judgment : **03.12.2021.**

JUDGMENT AND ORDER (Oral)

(Suman Shyam, J)

Heard Mr. A. Thakur, learned counsel appearing for the appellants. We have also heard Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam, appearing for the State.

2. The four appellants herein were convicted under Section 302/34 of the Indian Penal Code by the learned Sessions Judge, Karbi Anglong, Diphu by the judgment dated 21.12.2019 passed in connection with Sessions Case No.04/2012, for committing the murder of Bijoy Urang and sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs.2000/- each with default stipulations. The impugned judgment has been assailed by the appellants primarily on the ground that there is no evidence available on record to prove the charge brought against the appellants.

3. The prosecution case, in brief, is that the deceased Bijoy Urang was on duty as a night guard on 01.11.2010 in the house of Head Assistant of the Tea Estate viz., Sri Baluwan Beck along with the appellants. Next morning, deceased Bijoy Urang was found dead. U.D. Case No.1/2010 was registered by the police. After about 32 days of the incident, S.I. Anil Das had lodged an ejahar on 03.12.2010 before the Officer-in-Charge Chowkiholder Police Station reporting that on 01.11.2010 Bijoy Urang, Rashid Gowala, Lazrush Topno, Jagdish Longa and Ratan Nayak were on duty as night chowkidar in the house of Baluwan Beck, who was the "Borobabu" (Head Assistant) of the Bogijan Tea Estate. Bijoy Urang was found lying dead in the next morning. U.D.



Case No.1/2010 was registered in the Police Station and investigation was carried out. During investigation the cause of death of the deceased could not be ascertained. According to the post-mortem report it was seen that the death of the deceased occurred due to spinal injury. As such, a suspicion has arisen against the four appellants. Therefore, a prayer had been made in the ejahar dated 03.12.2010 to register a case against the accused persons.

4. Based on the ejahar dated 03.12.2010, Chowkiola P.S. Case No.6/2010 was registered under Section 302 of the IPC and the matter was taken up for investigation. On completion of investigation the I.O. had laid charge-sheet against all the four accused persons under Section 302/34 of the IPC, based on which, charge under Section 302/34 of the IPC was framed by the learned Sessions Judge against the four accused persons, to which, they had pleaded not guilty. Hence, the accused were made to face trial.

5. The prosecution had examined as many as 9 witnesses including the informant (PW-2), the doctor (PW-1) who had conducted the post-mortem examination on the dead body of the deceased and the I.O. (PW-9), so as to prove the charge brought against the accused persons. Thereafter, the statement of the accused persons were recorded under Section 313 of the Cr.P.C. wherein, they had denied all the incriminating circumstances put to them. The defence side, however, did not adduce any evidence. After completion of trial and upon analysis of the evidence brought on record, the learned trial court had held that the charge brought against the appellants under Section 302/34 of the IPC had been proved by the prosecution

beyond reasonable doubt and accordingly, convicted the appellants and sentenced them as aforesaid.

6. Mr. Thakur, learned counsel for the appellant, has argued that conviction of the appellants is based on an erroneous interpretation of Section 106 of the Evidence Act in as much as the prosecution has completely failed to prove the charge brought against the appellants. It is also the submission of Mr. Thakur that 32 days delay in lodging the ejahar in this case has remained unexplained and there is nothing to show as to what had prompted the PW-2 to lodge the ejahar on 03.12.2010. It is also submitted that the failure of the prosecution to examine the Manager of the Tea Garden had resulted into a fatal defect in the prosecution case. As such, submits Mr. Thakur, the impugned judgment dated 21.12.2019 is liable to be set aside and the appellants be acquitted.

7. Ms. B. Bhuyan, learned Addl. P.P., Assam, on the other hand, has submitted that since the appellants were on duty on the night of 01.11.2010 along with the deceased Bijoy Urang, who was found dead in the next morning under mysterious circumstances, undoubtedly a suspicion would arise about the involvement of the appellants in the death of the deceased. The learned Addl. P.P. has, however, submitted in her usual fairness that there is no other evidence to connect the appellants to the occurrence.

8. We have considered the submissions advanced by the learned counsel for both the parties and have also carefully gone through the evidence available on record.

9. We find from the record that Dr. Kalyan Kumar Bora, who had conducted the post-mortem examination on the dead body of Bijoy Urang was examined as prosecution witness No.1. The PW-1 has proved the post-mortem report Ext-1 and has also deposed before the court stating the nature of injuries that was seen in the dead body of the deceased. The following observations were made in the post-mortem report:-

“External Appearance

Healthy adult male of average built, rigor mortis was present.

Wound position and character: contusion over right side of face of size 4cm x 8cm and another of size 2 cm x 6cm.

Cranium and Spinal Cord

On examination of cranium and spinal cord scalp and skull no injuries or disease detected. Vertebra 2nd Cervical Vertebra fractured.

Membranes

At the 2nd cervical vertebra lacerated. Blood present in sub arachnoids space in spinal canal.

Brain and Spinal Cord

No injuries or disease detected in brain. Contusion over spinal cord detected at the level of 2nd cervical vertebra.

Thorax

Walls, limbs and cartilages healthy. Pleurae healthy larynx and trachea healthy, right lung healthy left lung healthy, peritoneum healthy, heart healthy full with liquid blood. Vessels healthy.

Abdomen

Walls healthy, peritoneum healthy, mouth, pharynx and esophagus healthy. Stomach and its content healthy full with food matter. Small intestine healthy full with partially digested food. Large intestine healthy full with fecal matter. Liver, spleen, kidney, bladder and organs of generation are all healthy.

Muscles bones and joints

Fracture of 2nd Cervical Vertebra with dislocation of 2nd inter vertebral joint.

More Detail Description

Contusion over right side of face of size 4cm x 10 cm and 2cm x 6 cm. The injuries are anti-mortem and caused by blunt trauma.”

The doctor (PW-1) had opined that death of the deceased was due to comma as a result of spinal injury. Cross-examination of PW-1 was declined by the defence side.

10. PW-2 , Sri Anil Das is the informant in this case. During his deposition PW-2 has proved the ejahar lodged by him. PW-2 has also deposed that on 01.11.2010, four persons along with the deceased were on duty as night guards. In the next morning, Bijoy Urang was found dead inside the Tea Estate. On receipt of information about the death of the deceased in the Chowkiholra Police Station, an unnatural death case was registered. PW-2 has stated that he did not see or hear any quarrel taking place between the accused persons and the deceased and that the family members of the deceased did not lodge any ejahar with the Police.

11. Sri Baluwan Beck was examined as PW-3. The deceased was on duty as a night guard in the house of PW-3 along with the appellants when the incident allegedly took place. PW-3 has stated that due to demand of money coming from some extremist organization the Tea Estate authority had entrusted the responsibility

of providing security to him, at his residential quarter, to some labourers. On the night of the occurrence, the four accused persons and Bijoy Urang were on duty but in the morning, Bijoy Urang was found dead inside the temporary camp. Thereafter, the employees, who were on duty in the office of the Tea Estate, had informed him about the death of the deceased. He then came to the place of occurrence and found the deceased lying dead on the bed inside the temporary camp. Later on, police came and arrested the four accused persons on suspicion. During his cross-examination, PW-3 has stated that he was not aware of any quarrel taking place between the accused persons and the deceased nor did he hear any hue and cry on the night of the occurrence. PW-3 has further stated that the doctor of the Tea Estate had said that the death of the deceased might be due to "blood pressure".

12. Sri Paresh Kumar, who was the Union Secretary of Bogijan Tea Estate, was examined by the prosecution as PW-4. This witness has also deposed in similar lines by stating that on the night of the occurrence deceased Bijoy Urang was on duty as a night chowkidar along with the four accused persons in the house of "Borobabu" Baluwan Beck. Next morning, Bijoy Urang was found dead inside the temporary camp built by them (labourers). On receipt of information he went to the place of occurrence and found the deceased lying dead on the bed. This witness has also stated that he did not see any injury mark on the dead body. Later on, the police had arrested the four accused persons on suspicion of killing the deceased. During his cross-examination, PW-4 has also stated that he did not hear any hue and cry nor did he know if there was any quarrel that had taken place between the accused persons and the deceased.

13. Sri Mando Urang i.e. the PW-5 belongs to the same Tea Estate where the accused persons lived. PW-5 has stated that his house is located near the place where the deceased had died. On the night of the occurrence the deceased Bijoy Urang was performing his duty as a night chowkidar in front of the house of "Borobabu" of the Tea Estate. The next morning his uncle viz., Timoru Urang (PW-6) saw deceased Bijoy Urang sleeping, on a mat (dhari) under a tree. When he asked Bijoy as to why he was sleeping so late and tried to lift him, his uncle suspected that Bijoy was dead and called for the Tea Estate doctor. Later on, the doctor had declared Bijoy dead. PW-5 has also stated that he did not see the dead body but got the information about the incident in the next morning. Police had arrested all the accused persons who were working as night chowkidar on the night of the incident. During his cross-examination, PW-5 has stated that he did not see the incident nor does he know as to who has murdered the deceased.

14. PW-6, Sri Timru Urang i.e. the uncle of PW-5, has deposed before the court that on the night of the occurrence the deceased and the four accused persons were on duty as night chowkidar in front of the house of the "Borobabu" of the Tea Estate. Next morning, after waking up, he found the deceased sleeping on a mat in front of his house and asked him to wake up but the deceased did not respond. Then he tried to lift the deceased by holding his hand and then it appeared to him that the deceased was no more. So he had informed the "Borobabu" and the Manager of the Tea Estate and the Manager had informed the doctor, who, after arriving at the place of occurrence had examined the deceased and declared him dead. This witness has further stated that his house in the Tea Estate is situated adjacent to the



house of the "Borobabu". During his cross-examination, PW-6 had stated that did not know how the deceased had died.

15. PW-7, Smt. Noimi Urang is the wife of the deceased. She has also stated that on the date of occurrence her husband was performing his duty as a night chowkidar. The deceased went to the garden for duty after dinner and on the next morning, one of the night chowkidars of the garden viz., Mahendra Urang came to her house and informed her about the occurrence. Immediately, she rushed to the place of occurrence and found that her husband was lying dead on the ground. After some time, police came to the place of occurrence and took away the dead body for post-mortem. She has also stated that on the day of occurrence all the accused persons and the deceased were on duty at Bogijan Tea garden and they were performing night duty in the house of "Borobabu" of the garden.

16. PW-8, Sri Raphel Sona is another resident of the Tea Estate and is also the elder brother of the deceased. It appears that he did not see anything but came to the place of occurrence on the next day after hearing that Bijoy Urang had expired while on duty as a night chowkidar. PW-8 had later heard that all the accused persons had been arrested by the police on suspicion as regards their involvement in the murder of the deceased since all of them were working as night chowkidars of the tea garden and were on duty along with the deceased on the night of the occurrence.

17. Sri Ayub Ali is the Investigating Officer (I.O.) who had carried out investigation in this case. The I.O. was examined by the prosecution as PW-9. This witness has deposed that on 03.12.2010, he was attached to the Chowkiholder Police Station as



the Officer-in-Charge. On that day, S.I. Anil Das (PW-2) had lodged an ejahar before the Chowkiahola P.S. On receipt of the ejahar he had registered Chowkiahola P.S. Case No.6/2010 under Section 302 of the IPC and took up the investigation in the aforesaid case. According to the PW-9, before registering the police case, an unnatural death case was registered on 02.11.2010 bearing U.D. Case No.01/2010. The dead body of the deceased was sent to the Diphu Civil Hospital for conducting post-mortem. According to the post-mortem report, the deceased had died due to spinal injury. Due to the above, the informant had lodged the ejahar naming the four accused persons viz. Ratan Nayak, Lazrus Toppo, Jagdish Longqa and Rasit Gowala. PW-9 has further stated that he had visited the place of occurrence, examined the witnesses, prepared sketch map and having found sufficient evidence from the statements of the witnesses indicating that the accused persons were involved in the murder, he had arrested all the accused persons. In view of the materials gathered by him during investigation, charge-sheet was submitted against the four accused persons under Section 302/34 of the IPC. During his cross-examination, PW-9 has further stated that before lodging the ejahar by S.I. Anil Das, the Manager of the Tea Estate, Sri Nripen Sarma had lodged an ejahar regarding the unnatural death of the deceased and that since 02.09.2010, the accused persons and the deceased had been working as night chowkidars in the house of the "Borobabu" of the garden. The I.O. has further confirmed that there was no eye-witnesses in this case and at the time of the occurrence, the Manager of the Tea Estate was staying at Golaghat. As such, he did not examine the Manager nor did he submit any request for recording the confessional statement of the accused persons.

18. The learned trial court had observed that there was sufficient evidence to prove that the accused persons were on duty as night guard in the house of Baluwan Beck along with the deceased on the night of the incident. Later on, the deceased was found lying dead. Since the circumstances under which the deceased had died was under the special knowledge of the accused, their failure to furnish a reasonable explanation as regards the circumstances under which the deceased had died, as per the requirement of Section 106 of the Evidence Act, would be an additional link in the chain of circumstances pointing towards the guilt of the accused persons. On the basis of such observation and by relying on the decision of the Hon'ble Supreme Court in the case of **Shambu Nath Mehra vs. State of Ajmer** reported in **1956 SCR 199** and in the case of **State of Rajasthan v. Kashi Ram** reported in **(2006) 12 SCC 254** the learned trial court had convicted the appellants under Section 302 of the IPC with the aid of Section 34 of the Code for committing the murder of deceased Bijoy Urang.

19. After evaluating the evidence available on record, we find that save and except producing evidence to show that deceased Bijoy Urang was on duty as night guard on the night of the incident along with the four accused persons, in the house of "Borobabu" Baluwan Beck, there is not even an iota of evidence to prove the charge brought against the appellants under Section 302 of the IPC. The evidence available on record is insufficient even to indicate the circumstances under which the deceased had died. The post-mortem report also does not indicate about the presence of any injury in the vital parts of the body save and except mentioning about spinal injury. During his cross-examination, the PW-3 had stated that as per the

doctor of the Tea Estate the death of the deceased might be due to "blood pressure". The tea garden doctor was evidently the first medical expert to have examined the deceased. However, for reasons not discernible, the prosecution has not examined the Tea Garden doctor as a witness. As a result of failure on the part of the prosecution to examine the Tea Estate doctor, the vital evidence of a medical expert, as regards the first signs and/or injury marks in the dead body of the deceased, is not available on record.

20. There is also significant contradiction in the prosecution case as regards the place where the dead body was found. The PW-3 had stated that the dead body of Bijoy Urang was found on the next morning on a bed inside the temporary camp built by the persons who were on duty as guards at night. The said statement of PW-3 also finds corroboration from the evidence of PW-4. However, from the testimony of PWs- 5 and 6, it appears that Bijoy Urang was found dead sleeping on a mat under a tree when the witness PW-6 had tried to lift him by holding his hand. PW-7 i.e. the wife of the deceased had seen the dead body lying on the ground. From the above, it is clear that there is considerable doubt as to the actual place where the dead body was first seen. The evidence available on record does not clearly establish as to whether the deceased had died inside the temporary camp which was built for the night guards who were on duty or his death took place outside the camp and under a tree as claimed by PW-6. For the above reason, there is also no reasonable basis to presume that the appellants were aware of the circumstances under which the deceased had died.

21. As mentioned above, the incident had occurred on the night of 01.11.2010 and the ejahar was lodged on 03.12.2010. From the evidence of PW-9, it appears that the only reason for lodging the ejahar on 03.12.2010 was the mention of spinal injury in the post-mortem report. There is virtually no explanation for the delay in lodging the ejahar in this case. Although the I.O. has stated that from the statement of the witnesses, he found sufficient evidence to implicate the accused persons with the murder of the deceased, yet, from the scrutiny of records, we do not find any such evidence so as to implicate the accused persons with the commission of a cognizable offence. The only evidence, if any, is to the effect that the accused persons were also on duty on the night of 01.11.2010 along with the deceased. From the above, it is clear that the prosecution has failed to lead cogent evidence on record so as to prima facie establish the murder charge brought against the accused persons either in their individual capacity or acting with a common intention. Notwithstanding the same, the accused/appellants had been convicted by the learned trial court primarily by relying on Section 106 of the Evidence Act.

22. It is settled law that the burden cast on the accused under Section 106 of the Evidence Act is not meant to relieve the prosecution of its burden to prove the charge brought against the accused beyond reasonable doubt. Section 106 merely lessens the burden on the prosecution by casting an obligation upon the accused to disclose those facts which were specially within his/her knowledge. In order to invoke Section 106 of the Evidence Act the prosecution must succeed in prima facie establish the charge brought against the accused. Once the prosecution succeed in establishing the links in the chain of circumstances to show that the accused person

was guilty, it is only then that the failure on the part of the accused to offer reasonable explanation as to the facts which were within his special knowledge, would furnish an additional link in the chain of circumstances so as to prove the charge brought by the prosecution. The prosecution cannot succeed in securing the conviction of an accused solely on the basis of his failure to discharge the burden under Section 106 of the Evidence Act, if sufficient evidence is not brought on record to establish the charge on its own merit.

23. In the instant case, from a careful analysis of the evidence adduced by the prosecution side, we are of the considered opinion that the prosecution has failed to lead sufficient evidence so as to establish the chain of circumstances so as to prove the guilt of the accused persons under Section 302 of the IPC beyond reasonable doubt.

24. There is yet another aspect of the matter which deserves mention in our order. We have noticed that the learned trial court had convicted all the four appellants under Section 302 of the I.P.C., with the aid of Section 34 of the IPC. However, there is neither any evidence on record nor any discussion in the impugned judgment dated 21.12.2019 as regards proof of "common intention" on the part of the accused persons to cause death to the deceased. Notwithstanding the same, all the four appellants have been convicted under Section 302/34 of the I.P.C. for murdering deceased Bijoy Urang. In our opinion, such a recourse was wholly impermissible in the eye of law. Unless the trial court records specific finding as regards "common intention" on the part of the accused persons to cause death to the victim, their



conviction with the aid of Section 34 of the IPC would not be sustainable in the eye of law.

25. For the reasons stated herein above, we are of the view that the impugned judgment dated 21.12.2019 is unsustainable in the eye of law. The same is accordingly set aside. The appellants viz. Ratan Nayak, Lazrush Topno, Jagdish Longa and Rashid Gowala stand acquitted due to lack of evidence against them.

We are informed that all the appellants are out on bail by virtue of the order dated 22.06.2020 passed by this Court in I.A.(Crl.) No.221/2020 arising out of this appeal. Therefore, their bail bonds shall stand discharged with immediate effect.

Send back the LCR.

JUDGE

JUDGE

T U Choudhury

Comparing Assistant