GAHC010273902019

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

Case No. : Crl.A./456/2019

SRI SWAPAN DEB
S/O- LATE SARJYA KUMAR DEB, R/O- VILL.- PURANA LAHORIJAN, P.S. BOKAJAN, DIST.- KARBI ANGLONG, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE PUBLIC PROSECUTOR, ASSAM.

2:SRI KRISHNA CHOWDHURY
S/O- LATE DEBEN CHOWDHURY
R/O- VILL.- PURANA LAHORIJAN
P.S. BOKAJAN
DIST.- KARBI ANGLONG
ASSAM

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

HON'BLE MRS. JUSTICE MITALI THAKURIA

Advocate for the Appellant : Shri M. Islam

Advocate for the respondents : Ms. A. Begum

Date of hearing : **22.10.2024**
Date of Judgment : **25.10.2024**

JUDGMENT & ORDER

(S.K. Medhi, J.)

The instant appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure, 1973. By the impugned judgment and order dated 12.09.2019, the learned Sessions Judge, Karbi Anglong, Diphu in Sessions Case No. 31/2005 (GR Case No. 238/2002) arising out of the Bokajan Police Station Case No. 89/2002 has convicted the accused / appellant under Section 302 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs.2,000/, and in default of payment thereof to suffer further simple imprisonment of 6(six) months. The appellant has been in jail since 12.09.2019 till date.

2. We have heard Shri M. Islam, learned counsel for the appellant. We have also heard Ms. A. Begum, learned Additional Public Prosecutor, Assam.

3. An FIR was lodged on 21.07.2002 by one Krishna Choudhury (PW1) on the death of his elder brother, Gopal Choudhury. It was narrated that on the previous night at about 9.30 PM, his brother, while coming home by riding a bicycle after purchasing ration was killed by the appellant in front of the factory of the Lahorijan Tea Estate near the railway track and when he was trying to bury the deceased in the marshy land, people caught him red handed. It has been stated that since the last three months the appellant and the deceased were working together and therefore, it was assumed that the incident had taken place because of some monetary issues. Based on the aforesaid FIR, Bokajan Police Station Case No. 89/2002 was lodged and investigation was made leading to submission of a charge sheet. As the appellant had pleaded not guilty the trial was started. In this said trial, 8 nos. of prosecution witnesses

(PW) were examined and the informant was examined as PW1.

4. The PW1 in his evidence had stated that on 20.07.2002 at about 9.00 PM, he heard *halla*, 'Bachao Bachao' and 'Ma Ma' coming from a distance of 20 feet. He had accordingly gone out and saw the cycle of his elder brother lying along with a bag with some food items. On his cry, few more persons including PW4 – Faguna Rajbongshi had come and at that time they had seen the appellant running away towards the Lahorijan Tea Factory. Thereafter, the Chowkidar of the Tea Factory caught the appellant. A search was made and the body of his brother was found in the nearby pond with a T. Shirt wrapped around his neck. The body was accordingly pulled out of the water and the informant along with Faguna Rajbongshi had gone to the Khatkhati Thana and informed the Police. The Police had accordingly come to the place of occurrence on the same night and inquest was done. The PW1 is also a signatory in the inquest report. It has been stated that the Police had seized one *Dao*, one hero cycle and one T. Shirt. Thereafter the accused was arrested and on the next date, the *ejahar* was lodged which was exhibited as Ext.3. The statement of PW1 was also recorded and the dead body was sent for post mortem. He has stated that since the appellant was the only person on the spot with his brother who had tried to run away, it was believed that the appellant had killed his brother.

5. In the cross examination, the PW1 has however stated that it was dark at that time which was about 9.30 PM.

6. Shri Uttam Bhowmick was examined as PW2. He had stated that though he had heard the *halla*, he did not see the incident and could only notice that the appellant was kept there by the public. He was also a signatory in the seizure list. He had however stated that he did not know about any quarrel between the appellant and the deceased. In his cross examination, he had

admitted that he had heard that the appellant had killed the deceased.

7. Shri Jogai Tanti had deposed as PW3 who was one of the Chowkidars in the nearby Lahorijan Tea Estate. He had stated that the appellant was found to be running away from the spot and towards the Factory when he was caught. At that time, the appellant did not have any cloth on his body and his body was wet and muddy. He had admitted that only in the next morning, he could hear that the appellant had killed the deceased. In his cross examination, he had admitted that the appellant did not make any confession before them and that he did not go to the actual place of the incident. He has clearly deposed that he did not see who had killed the deceased.

8. PW4 is one Faguna Rajbongshi. He has claimed that his house was at a distance of about 100 Mtrs. from the place of occurrence and he had heard some noise and went out in that direction. He claims to have met the brother of the deceased namely Krishna Choudhury (PW1). He also stated that many people had come there. He stated that he saw a cycle lying there. He stated that he could hear some sound coming from the water and could see that the appellant had pressed and kept the deceased inside the water and thereby asphyxiated him. He claimed to have rushed to catch the appellant who had run away towards the direction of the Tea Factory when the Chowkidars had caught him and brought him to the place of occurrence. He has stated that the body of the deceased was found in the pond and a T. Shirt was found wrapped around his neck. He also claimed that the appellant had told him that he had killed the deceased. PW4 claims to have seen the appellant killing the deceased in the manner described but he does not know the purpose as to why the appellant had killed the deceased.

9. PW5 - Ganesh Tiru is another Chowkidar of the nearby Tea Factory who

had apprehended the appellant along with the help of the other Chowkidars. He has however admitted that he did not go to the place of occurrence. In the cross examination he stated that he knew the appellant from the last five years and did not know about any criminal case against him and that the appellant did not plead guilty. He also admitted that he had heard the matter from the people.

10. PW6 is another Chowkidar, namely, Ajit Tanti. He has also admitted that he came to know about the incident from the people and he did not go to the place of occurrence. He has also stated in his cross examination that the accused appellant did not make any confession before them and he had not seen who had killed the deceased.

11. PW7 is the doctor who had conducted the post mortem namely Dr. Ratul Thakur. In his opinion, he has made the following statement.

> "*In my view the death was caused by compressing extra-dural heamotoma leading to cardio-respiratory failure.*"

12. PW8 is the IO who had done the investigation. He deposed that on the oral information received in the evening of 20.07.2002, GD Entry No. 365 was made which was exhibited as Ext. 5. He had visited the place of occurrence in the night and revisited again early next morning and had performed the inquest. He has also seized a *Dao* which was used in committing the offence, a bicycle and a T. Shirt and Ext. 2 is the seizure list which bears his signature. The *ejahar* was lodged by Krishna Choudhury on the next date which was exhibited as Ext. 3 and based on the same, GD Entry No. 373 was made. In his cross examination, he has stated that he had prepared a sketch map of the place of occurrence and nothing was mentioned in the case diary regarding the appellant

to have killed the deceased. He had also admitted that people move around the railway track and that no dispute of any nature was known to him between the appellant and the deceased and even during the investigation, he had not come to know about any such dispute. He has admitted that he did not send the cloths of the accused for forensic examination.

13. Based on the evidence of the 8 nos. of witnesses, the appellant was examined under Section 313 of the Cr.P.C. and he had denied all such allegations.

14. As indicated above, vide the impugned judgment dated 12.09.2019, the appellant has been held to be guilty and accordingly convicted under Section 302 IPC.

15. Shri Islam, learned counsel for the appellant has submitted that though PW4 claims to be an eyewitness, the facts and circumstances would make it clear that there was no eyewitness and accordingly the case was one of circumstantial evidence. He has highlighted that the deposition of PW4 claiming to be an eyewitness is not trustworthy at all as there are apparent contradictions. By drawing the attention of this Court to the said deposition, it is submitted that the said PW4 admitted that before he had reached the place of occurrence, the PW1 along with many other people were already there. He has submitted that when none of the other persons including the PW1, the own brother had stated about witnessing the appellant committing the offence of murder upon the deceased, it was wholly unbelievable that it was only the PW4 who could witness the event. By drawing the attention of this Court to the discussions made in paragraph 17 of the impugned judgment, the learned counsel has submitted that the learned Sessions Judge has himself held the evidence of PW4 to be not trustworthy inasmuch as, such narration regarding

witnessing the murder was not made before the Police by the said PW4 while making his statement under Section 161 of the CrPC.

16. The learned counsel for the appellant has submitted that the cause of death, as would be evident from the PM report and the witness evidence of PW7 - the doctor, is "extra-dural heamotoma leading to cardio-respiratory failure". However, the narration made by the PW4 regarding witnessing the manner by which the deceased was killed is not at all consistent. It is submitted that the death was due to injuries by blunt and sharp weapon on the head and not because of drowning whereas, the narration by PW4 is in the line that the appellant had forced the deceased's head under the water causing the death. By drawing the attention of this Court to the discussions made in paragraph 19 of the impugned judgment, the learned counsel has submitted that the meaning of the expression "extra-dural heamotoma leading to cardio-respiratory failure" has been explained and that being the cause of death as per the PM report, the evidence led by PW4 is wholly not worthy of any credit. He submits that if the evidence of PW4 is discarded which has already been done by the learned Sessions Judge, there will be no direct evidence and the only evidence which would be available is circumstantial in nature. He has submitted that the discussion on which the conviction is based is made in paragraph 20 of the judgment. It is submitted that only because the appellant was found to be fleeing away from the place of occurrence, he has been held to be guilty of the serious offence of murder. He submits that that cannot be sole basis of a conviction under Section 302 of the IPC and such circumstance has to be fully corroborated and supported by other evidence.

17. By relying upon the judgment of ***Rambraksh @ Jalim Vs. State of Chhattisgarh*** reported in ***(2016) 12 SCC 251***, Shri Islam, the learned

counsel for the appellant has submitted that the concept of last seen together theory has been explained and in the instant case the same cannot be a basis of the conviction.

18. On the aspect of the requirement of proof in a case of circumstantial evidence and the burden cast upon the prosecution, the learned counsel has relied upon the judgment of ***Surejdeo Mahto and Anr. Vs. the State of Bihar*** reported in ***(2022) 11 SCC 800***. In the said case, the Hon'ble Supreme Court, by relying upon the earlier judgments including the landmark case of ***Birdhichand Sarda Vs. State of Maharashtra*** reported in ***(1984) 4 SCC 116*** has laid down as follows:

> "***27.*** *This Court, in its much-celebrated judgment of Sharad Birdhichand Sarda v. State of Maharashtra, has elaborately considered the standard necessary for recording a conviction on the basis of circumstantial evidence and has further held :*
>
> > "*153. … (1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.*
> >
> > ***
> >
> > *(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
> >
> > *(3) The circumstances should be of a conclusive nature and tendency,*
> >
> > *(4) They should exclude every possible hypothesis except the one to be proved, and*

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

19. The learned counsel for the appellant accordingly submits that the materials against the appellant which have been proved before the learned Sessions Judge would not be sufficient to pass an order of conviction and therefore the impugned judgment is liable to be set aside and quashed and the appellant be acquitted.

20. *Per contra*, Ms. Begum, learned APP, Assam has submitted that the impugned judgment does not suffer from any legal infirmity. She submits that the present case is not based on circumstantial evidence inasmuch as, there is an eyewitness in the form of PW4. She submits that PW4, in his evidence has clearly stated that he saw the appellant forcing the deceased's head under the water which had caused his death. She has also submitted that the appellant was found running away from the place of occurrence and by referring to Section 106 of the Evidence Act, it is submitted that no plausible explanation was given by the appellant to explain his conduct. It is submitted that the accused is under an obligation to explain his conduct and the said obligation could not be discharged by the appellant in the present case.

21. The learned APP has relied upon the judgment of the Hon'ble Supreme Court in ***Balvir Singh Vs. State of Uttarakhand*** reported in ***AIR 2023 SC 5551***. It has been submitted that in the said case the applicability of Section 106 of the Evidence Act has been explained.

22. The learned APP accordingly submits that no interference is called for and

the conviction is proper.

23. The rival submissions have been duly considered and the materials placed before this Court including the original records of the learned Sessions Court have been carefully examined.

24. As indicated above, the prosecution had adduced evidence through 8 nos. of witnesses out of which PW4 claimed himself to be an eyewitness. Even though the learned Sessions Court has discarded the evidence of PW4 in claiming himself to be an eyewitness, let us independently examine his evidence. As per the informant who was the brother of the deceased and examined as PW1, he was the first one to reach the place of occurrence and had made a hue and cry which attracted some other persons. The incident was admittedly at about 9.30-10.00 PM and except the PW4 none of the other witnesses had made any statement of witnessing the appellant assaulting the deceased or even to the extent that both of them were found together in the marshy land. PW4 has made the following statement:

> "*The occurrence took place in the night at about 9.30-10 PM. At that time I was at home. I was sitting in the courtyard in front of my house. Then I heard cry of someone calling "Ma Ma" and the shout was coming from outside from a distance of about 100 Mtrs. Away from my home. Then I came out and went towards that direction. I also met there Krishna Choudhury, the brother of deceased Gopal Choudhury, at a point near Railway line near the Tea Estate. Many people came there, I saw a cycle lying there. There is some water body there. I heard some sound coming from the water. There I saw that accused Swapan Kr. Dey had pressed and kept Gopal Chudhury inside water, thereby asphyxiating him. Then I rushed there to catch*

Swapan kr Dey, but Swapan kr Dey ran away towards Lahorijan Tea Factory side through water. People made hulla and followed him followed him…"

25. As per the PW4, the death was caused by forcing the head of the deceased under the water by the appellant. Apart from the fact which reveals from the impugned judgment that such statement was not made by the PW4 before the Police under Section 161 of the Cr.P.C., the narration is contrary to the medical evidence as per which the death was due to extra-dural heamotoma leading to cardio-respiratory failure. The aforesaid expression means collection of blood that forms between the inner surface of the scalp and outer layer of the neural and are usually associated with a history of head trauma and scalp fracture. In fact, the Doctor has opined that the injuries found were caused by both sharp and blunt object. It also appears that from the place of occurrence one *Dao* and one T. Shirt were seized which have also been mentioned in the Seizure List - Ext. 2. There is however nothing on record to show that the *Dao* was sent for any forensic examination. The aforesaid matter gains immense significance inasmuch as, the death has been attributed to have been caused by sharp and blunt weapon by injuries caused on the head. Not to talk about any serological examination of the weapon which was seized, even the minimal forensic examination or its connection with the appellant was not even tried to be proved in the trial.

26. The learned Sessions Judge, after discussing the evidence, had held that the evidence of PW4 was not trustworthy. What is however intriguing is that the conviction is based only on the fact that the appellant was found to be running away from the place of occurrence. Though such an action can be one of the factors to form an opinion, such factor is necessarily required to be corroborated

and supported by other materials and evidence as it is the elementary principle of criminal jurisprudence that the proof has to be beyond all reasonable doubt. Even if there is an iota of doubt, such benefit has to go to the accused.

27. We have also examined the evidence of the relevant witnesses namely, PW1, PW2 and PW4 who happens to be residents of the vicinity and such examination has been examined vis-à-vis the sketch map prepared. Apart from the fact that the sketch map does not indicate any distance, the same has not even indicated the residence of the deceased from where the PW1 - Informant could hear the hue and cry allegedly made by the deceased. A bare look at the sketch map would show that on one side of the railway line there is Paddy field and on the other side, there is marshy land and the informant PW1 has claimed that from a distance of about 20 feet, he could hear the shouts for which he had gone out. On the other hand, PW4 claims that he could hear hue and cry from a distance of about 100 meters and when the said PW4 had reached the place of occurrence there are always already many other persons including the PW1 and PW2.

28. In the landmark case of ***Birdhichand Sarda*** (supra), the Hon'ble Supreme Court has laid down the golden principles to be followed in a case of circumstantial evidence which have been endorsed by subsequent decisions including the case cited of ***Surajdeo*** (supra). In the instant case, apart from the only fact that the appellant was found seen to be fleeing from the place and was caught by the Chowkidars, there are no other materials of any kind to attribute his complicity with the offence of murder of the deceased. As regards the applicability of Section 106 of the Evidence Act as relied by the learned APP the Hon'ble Supreme Court in the case cited of ***Balvir Singh*** (supra) has laid down as follows:

> "*41. Thus, from the aforesaid decisions of this Court, it is evident that the court should apply Section 106 of the Evidence Act in criminal cases with care and caution. It cannot be said that it has no application to criminal cases. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.*
>
> *42. Section 106 cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden of the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a prima facie case is established by such evidence, the onus does not shift to the accused."*

29. From the above, it becomes clear that the initial burden is upon the prosecution to complete the unbroken chain of events and only thereafter the application of 106 of the Evidence Act would come in which would give an additional link. In the instant case, when the prosecution has failed to discharge its burden to complete an unbroken chain of events which leads to only one

conclusion that the appellant is guilty, the application of Section 106 of the Evidence Act would not be relevant.

30. In view of the aforesaid discussion, we are of the considered opinion that the materials and evidence in the instant case would not be sufficient to come to a conclusion of guilt of the appellant with the offence in question. Accordingly, the impugned judgment and order dated 12.09.2019 passed by the learned Sessions Judge, Karbi Anglong, Diphu in Sessions case No. 31/2005 (GR Case No. 238/2022) is interfered with and accordingly set aside. The appellant is accordingly acquitted by giving the benefit of doubt and is to be released forthwith unless his custody is required for any other offence.

31. The LCR be returned back forthwith.

JUDGE **JUDGE**

Comparing Assistant