Supreme Court of India
Deny Bora vs State Of Assam on 27 August, 1947
Author: D Misra
Bench: Dipak Misra, Abhay Manohar Sapre

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 679 OF 2013

Deny Bora ..Appellant

VERSUS

State of Assam ..Respondent

J U D G M E N T

Dipak Misra, J.

The present appeal is preferred under Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 ("TADA" for short) assailing the judgment passed by the Designated Court, Guwahati in TADA Sessions Case No. 47 of 2001, whereby the Designated Court has acquitted the Appellant under TADA on the foundation that there is no material to implicate him under the provisions of TADA and found that there is adequate material to convict him under Section 302 of the Indian Penal Code, 1860 ("IPC" for short) and accordingly recorded the conviction and sentenced him to undergo rigorous imprisonment for life with fine of Rs.50,000/-, in default, to suffer further rigorous imprisonment for five years.

The prosecution case, as unfolded, is that on 2.3.1991 about 6.30 p.m., the deceased, Dr. Swapan Sathi Barman, a medical practitioner, while attending to the patients in his clinic, was shot by two unidentified youths from the point blank range as a consequence of which he breathed his last. An FIR was lodged by one Kumud Bora on the following day i.e. 3.3.1991 at Jamuguri police station under Sonitpur district and on the basis of the said FIR Station Case No. 20/91 u/s 302/34 IPC read with Sections 3/4 of TADA was registered which set the criminal law in motion.

During investigation, certain incriminating documents belonging to Assam United Reservation Movement were recovered from the residence of one Martan Dey of Tupia Gaon. The Investigating Officers examined number of witnesses who had heard about the occurrence from the wife and daughter of the deceased and on 04.11.1993, they recorded the statement of Suren Hazarika, PW-14, under Section 161 CrPC. His statement under Section 164 CrPC was also recorded. Thereafter, on the basis of the statement of Hazarika, steps were taken to apprehend the accused-appellant, and

eventually on 20.02.1999 he was arrested and ultimately charge sheet was filed before the Trial Court on 29.07.2001.

The prosecution in order to prove its case examined 17 witnesses out of which many were formal witnesses and the investigating officers as the investigation was carried out by three officers. The two relevant witnesses are Dr. Prabhash Kr. Barman, PW-17, who had conducted the post mortem and Suren Hazarika, PW-14, who claims to be the eye witness.

After the examination of the witnesses cited on behalf of the prosecution was over, statement of the accused under Section 313 CrPC was recorded in which he pleaded not guilty and took the stand of false implication. The defence chose not to adduce any evidence. The Designated Court did not find any material to show complicity of the accused in any of the offences in respect of which charges had been framed under the TADA and accordingly opined that he was not guilty of the same. However, as has been stated earlier, the Designated Court found that the prosecution had brought home the charge under Section 302 IPC against the accused. For arriving at the said conclusion, as the reasoning of the Designated Court would reveal, it has placed reliance on the testimony of PWs-14 and 17.

Mr. Goswami, learned senior counsel for the appellant, criticizing the judgment of the Designated Court, has submitted that there can be no cavil over the proposition that a conviction can rest on the sole testimony of a singular witness but the said witness has to be absolutely reliable so that the credence can be given to his testimony. In the case at hand, submits Mr. Goswami, PW-14 has surfaced after two years eight months by availing the specious plea that he was threatened and therefore, he could not apprise the investigating agency about the occurrence which makes his version absolutely incredible. It is also contended by him that as per the prosecution story, the wife was inside the house and the daughter, Ms. Prantika Barman, who was with the deceased, have not been examined and such non-examination of material witnesses, in the absence of any explanation, creates a dent in the prosecution's story. Learned senior counsel would further submit that a reference to the post mortem report by the learned trial Judge is inconsequential except that it proves the homicidal death, but unfortunately, the same has been treated as a part of the evidence to prove the guilt of the accused which is impermissible.

Mr. Navneet Kumar, learned counsel appearing for the State of Assam, per contra, would contend that the explanation offered by PW-14 about his revealing of the incident in a belated manner because of the threat given by the co-accused, namely, Dul Bhuyan, deserves to be accepted because the witnesses in certain circumstances do behave in a peculiar manner regard being had to their individual mental framework, personal courage and disposition in life. Learned counsel would further submit that the evidence of PW-14 deserves acceptation as it is reliable and the Designated Court has correctly appreciated the same and, therefore, the view expressed by it as regards the conviction, cannot be found fault with.

Be it noted that there is no dispute over the fact that the deceased was fired from the point blank range. The post mortem would reveal that he had suffered two injuries, namely, (i) one wound on the right side of the face near the outer angle of the right eye, size ½” x ½” with inverted margin and

(ii) one would present on the left side of the neck just below the ear. Size 1" x ½" with averted margin and the cause of death was due to shock and hemorrhage as a result of bullet injuries sustained by the deceased. Therefore, the death is homicidal is beyond doubt.

The question that arises for consideration is whether the prosecution has been able to establish the involvement of the appellant in the crime in question. As is manifest, neither the wife nor the daughter of the deceased has been examined. Submission of Mr. Goswami is that they are natural witnesses and no explanation has been given for their non- examination and hence, adverse inference against the prosecution deserves to be drawn. He has drawn inspiration from the authority in Surinder Kumar v. State of Haryana[1] wherein it has been held, though in a different context, that a failure on the part of the prosecution in non-examining the two children, aged about six and four years respectively, when both of them were present at the site of the crime, amounted to failure on the part of the prosecution. In this context, reference to the decision in State of H.P. v. Gian Chand[2] would be profitable. The Court while dealing with non-examination of material witnesses has expressed that:- "14 ... Non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution." The three-Judge Bench further proceeded to observe that the court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined.

In Takhaji Hiraji v. Thakore Kubersing Chamansing[3] and others the Court has ruled that it is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The Court should pose the question whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examine and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses.

In Dahari v. State of U.P.[4], while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been

fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. From the aforesaid authorities, it is quite vivid that non-examination of material witnesses would not always create a dent in the prosecution's case. However, as has been held in the Case of Gian Chand (supra) the charge of withholding a material witness from the Court levelled against the prosecution should be examined in the background of facts and circumstances of each case so as to find out whether the witnesses were available for being examined in the Court and were yet withheld by the prosecution. That apart, the court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined. Another aspect which is required to be seen whether such witness or witnesses are the only competent witnesses who could have been fully capable of explaining correctly the factual situation. As we have noticed in the case at hand, the daughter was the eye witness and the wife was slightly away from the scene of occurrence. They are the most natural and competent witnesses. They really could have thrown immense light on the factual score, but for the reasons best known to the prosecution, they have not been examined. It is also not the case of the prosecution that they had not been cited as their evidence would have been duplication or repetition of evidence or there was an apprehension that they would have not supported the case of the prosecution. In the absence of any explanation whatsoever and also regard being had to the presence of wife and daughter of the deceased at the place of occurrence, we are of the considered opinion that it has affected the case of the prosecution. We are obliged to hold so as we find the prosecution has otherwise not been able to establish the case against the appellant and, therefore, non-examination of the material witnesses cannot be regarded as inconsequential. As we find, the conviction wholly rests on the sole testimony of PW-14. It is well settled in law that conviction can be based on the testimony of a singular witness. It has been held in Sunil Kumar v. State (Govt. of NCT of Delhi)[5] that as a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But, if there are doubts about the testimony the courts will insist on corroboration. The same principle has been reiterated in Namdeo v. State of Maharashtra[6] by stating that it is open to a competent court to fully and completely rely on a solitary witness and record conviction, if the quality of the witness makes the testimony acceptable.

In the case at hand the learned trial Judge has placed reliance on the evidence of PW-14 who has come forward for recording his statement under Section 161 CrPC almost after two years and eight months. The only explanation he has given is that he was threatened by the co-accused Dul Bhuyan. It is interesting to note after his statement was recorded, the accused was arrested after six years and nothing happened to him during the said period. Thus the plea of threat to keep him silent for almost two years and eight months does not inspire confidence. Apart from that, as his testimony would show the accused-appellant had enquired about the deceased and he had accompanied them to the house of the deceased on one day, when the deceased Doctor was absent. His acquaintance with the accused- appellant was hardly a fortnight old, but he along with the appellant and another had gone to the clinic of the deceased where the other person, pretending as a patient, went inside. It is in his evidence that the accused-appellant had fired at the deceased as a result of which he fell

down and died. That the said witness could keep such an incident without disclosing to anyone, defies prudence and baffles commonsense. His plea of being threatened for such a long period to have the sustained silence, is unacceptable and we have no hesitation in holding that his testimony is thoroughly and wholly unreliable. Therefore, we are of considered view that the conviction recorded by the Designated Court on his testimony alone without any corroboration is totally unsustainable.

In the result, we allow the appeal and set aside the judgment of conviction. If the detention of the accused-appellant is not required in connection with any other case, he be set at liberty forthwith.

.....J.

[DIPAK MISRA] .....J.

[ABHAY MANOHAR SAPRE] NEW DELHI AUGUST 27, 2014

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[1] (2011) 10 SCC 173
[2] (2001) 6 SCC 71
[3] (2001) 6 SCC 145
[4] (2012) 10 SCC 256
[5] (2003) 3 SCC 169
[6] (2007) 14 SCC 150
