

GAHC010029232021



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

Case No. : CRL.A(J)/6/2021

KUMRU BHUMIJ
TINSUKIA, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, 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. Dutta, Amicus Curiae

Advocate for the respondents : Ms. A. Begum, Addl. PP, Assam.

Date of hearing : 25.10.2024

Date of judgment : 11.11.2024

JUDGMENT & ORDER

(S.K. Medhi, J)

The instant appeal has been preferred from jail against a judgment dated 17.02.2020 passed by the Addl. Sessions Judge-2 (FTC), Tinsukia in Sessions Case No. 52(T)/18 convicting the appellant and sentencing him to undergo with Life Imprisonment u/s 302 IPC and a fine of Rs.5,000/- (Rupees Five Thousand only), in default the accused shall have to undergo another rigorous imprisonment for 1 (one) year.

2. The criminal law was set into motion by lodging of an FIR on 18.02.2018 by one Ashok Chik (PW2), who is the brother of the deceased Sankar Chik. In the said FIR, the informant did not name anybody as accused and the allegation was that some unknown miscreant had left his younger brother near the Kali Mandir after killing him. On the basis of the FIR, the investigation was done whereafter the charge sheet was submitted. On framing of the charges and denial thereof, the formal trial had begun in which 15 numbers of prosecution witnesses were examined and certain documents were also exhibited including the sketch map. Apart from the statements made before the police under Section 161 of the Cr.P.C., the statements of 3 nos. of witnesses were also recorded under Section 164 of the Cr.P.C. After completion of the evidence, the appellant - accused was examined under Section 313 of the Cr.P.C. where he had denied the evidence against him.

3. After consideration of the materials of record including the evidence, the

impugned judgment has been passed which is the subject matter of challenge.

4. We have heard Shri M. Dutta learned Amicus Curiae for the appellant. We have also heard Ms. A. Begum, learned Addl. Public Prosecutor, Assam.

5. As indicated above, the ejahar was lodged by the brother of the deceased PW2 in which no name was mentioned. In his deposition as PW2, he had stated that he came to know from his wife regarding the fact that the deceased was lying dead near a temple and thereafter, he had lodged the ejahar which was exhibited as Exhibit - 2. The doctor who had conducted the postmortem was examined as PW1. In his deposition, he had opined that the death was due to head and bodily injuries caused by sharp heavy object. PW3, PW4, PW5, PW6 and PW7 did not name the accused as being involved with the offence and they were nearby residents and few of them were also seizure witness.

6. The evidence of PW8 would be of some relevance. PW8 has stated that he saw the deceased and the appellant fighting near a peepal tree and he had separated them whereafter they had gone away in different directions. In his cross-examination however, he admits that there were many other residences at the place of occurrence. The evidence of PW-10 would also be of relevance in the instant case. PW-10 had also claimed that there was a fighting near the peepal tree between the appellant and the deceased in which he had intervened. He further states that the accused came to his house later and told that he had killed the deceased. The evidence of PW-13, though declared hostile is of some significance. Though she deposed that she had heard from somebody regarding the incident, she had stated that on the same evening, the deceased, appellant and PW-10 were at her residence along with another person Rajiv Bakti (PW-11). There was a quarrel with regard to the appellant

asking for the muffler of the deceased which he had refused. Thereafter, the deceased, appellant and PW-10 had gone out from her house. It may be mentioned that though PW-13 has been declared hostile, her statement recorded under Section 164 of the Cr.P.C. on 23.02.2018 is almost a replica of her statement made as a witness. PW-14 is the I.O. who had investigated the case. In his cross-examination, however, he had admitted of not collecting bloodstains or any weapon. He had also stated that there was no blood found on the muffler which was seized. PW-15 is the learned Magistrate, who had recorded the statements of PW-10 and PW-8 under Section 164 of the Cr.P.C.

7. As indicated above, the conviction is mainly on the ground of "last seen together" and extra-judicial confession allegedly made before the PW-10 by the appellant.

8. Shri Dutta, the learned Amicus Curiae has strenuously urged that the conviction in the present case is wholly unsustainable as the materials to base such conviction is absolutely lacking. It is submitted that the relevant witnesses would be PW8, PW10 and PW13. He submits that PW8 claims to have seen the fighting and he had separated the deceased and the appellant, whereafter they had gone away in different directions. PW-10 also claims to have intervened the fight who, however, does not say anything about the presence of PW8 in separating the deceased and the appellant and stopping the fight. Shri Dutta has also drawn the attention of this Court to the evidence of PW-13. He submits that though the said PW13 was declared hostile, the evidence cannot be disregarded as a whole inasmuch as the said evidence matches with the statement recorded under Section 164 of the Cr.P.C. He submits that even if the evidence made as a witness is not taken into consideration as a whole, in the

statement made under Section 164 of the Cr.P.C. which was recorded immediately after the incident, it was stated that the deceased, appellant and PW10 had come to her house wherein a quarrel had started. She had also emphatically stated that PW11 was already in her house at that moment. He submits that as per the said statement, after the quarrel, the deceased, appellant and the PW-10 had gone out of the house. It may however be mentioned that PW-11 Rajiv Bakti did not say anything regarding his presence in the house of PW-13.

9. By drawing the attention of the Court to the post-mortem report, the learned Amicus Curiae has submitted that the examination time was 1.45 PM on 18.02.2018 and the death, as per the opinion was stated to be within 12 hours. He submits that according to the PW10, the witness on whose evidence the judgment has been based, the fight had occurred sometime between 9 and 10 pm and therefore the time of death as per the PM report would not be consistent. On the aspect of the impugned judgment being based on extra-judicial confession, the learned Amicus Curiae has submitted that extra-judicial confession is a weak piece of evidence. It is submitted that such extra-judicial confession has been claimed to have been made before the PW-10 in his house. There are no other circumstances which have been narrated as to why such a confession would be made before the PW-10 by the appellant in his house when the parties had left in opposite direction as claimed by PW8.

10. The learned Amicus Curiae has relied upon a judgment of ***Sahadevan & Anr. vs. State of Tamil Nadu*** reported in **(2012) 6 SCC 403** on the aspect of extra-judicial confession and "last seen theory". In the said judgment, the principles of extra-judicial confession has been laid down and the aspect of "last

seen theory" has been explained that the same cannot be independently sufficient to sustain a conviction. The learned Amicus Curiae accordingly submits that the conviction is not sustainable and is liable to be interfered with and the appellant be directed to be acquitted.

11. *Per contra*, Ms. A. Begum, the learned Addl. Public Prosecutor, Assam has defended the impugned judgment. She submits that there are sufficient evidence including the aspect of "last seen together" and the extra-judicial confession. She submits that the extra-judicial confession made by PW10 was voluntary and without any coercion. She highlights that there is no instance of any animosity of the PW-10 with the appellant which could have propelled him to make such deposition claiming that a confession was made before him. She submits that both the PW8 and PW10 are reliable and therefore, there is no occasion to interfere with the judgment.

12. The rival submissions have been duly considered and the materials placed before this Court including the LCR have been carefully perused.

13. In the instant case, the informant who was examined as PW2 did not name the appellant as the accused or for that matter any person. He had simply stated that he suspected some miscreants to have committed the offence. As per the evidence of the Doctor PW1, who had conducted the postmortem, the death was due to head and bodily injuries caused by sharp heavy object.

14. In the instant case however, there was no recovery of any weapon which might have been used for commission of the offence. As indicated above, the evidence of PW3, 4, 5, 6, 7, 9, 12 would not be relevant as their evidence would not play any role towards the complicity or otherwise of the appellant. It will

therefore be required to examine the evidence of the remaining witnesses. PW8 claims that he had seen the appellant and the deceased fighting near the peepal tree when the PW10 had called him and asked him to stop the fight. He then claims to have pulled out the appellant and the deceased, whereafter both of them had left in different direction. The aforesaid version of PW8 is however not matching with the version of PW10 who also claims to be present when the deceased and the appellant were fighting near the peepal tree. PW10 claims to have stopped the fight whereafter he had gone to his house. PW10 further claims that later the accused told him in his house that he had killed the deceased.

15. PW10 does not make even a mention of the presence or any overt act of PW8 in stopping the fight. In this context, the deposition of PW13 would also be relevant. Though the said PW13 was declared hostile, it is seen that her statement made under Section 164 of the Cr.P.C. is almost identical to her statement made in the chief examination. In her statement made under Section 164 of the Cr.P.C., immediately after the incident on 23.06.2018, she had claimed that one Rajiv Bakti PW11 was in her house when the deceased, appellant and PW10 had come to her house. In her house, there was a quarrel as the appellant had asked for the muffler of the deceased which he had refused. After the quarrel, the parties had left her house.

16. PW11 Rajiv Bakti however had said nothing regarding any of the aforesaid event. The version of PW10 though declared hostile, if examined from the context of her statement under Section 164 of the Cr.P.C. would indicate that the quarrel was in her house, whereas the PW10 claims that there was a fight near the peepal tree in which he had intervened. As indicated above, PW8

claims that he was called by the PW10 to intervene in the fight near the peepal tree which he had done whereafter the parties had left in opposite directions.

17. What is required to be examined are the two aspects which may bring in the complicity of the appellant with the alleged offence namely, the theory of "last seen together" and the aspect of extra judicial confession.

18. So far as the aspect of the "last seen together" theory, there are 3 (three) witnesses, who claims to have seen the deceased and the appellant together last. The first witness is PW8. As per this witness, he saw the deceased and the appellant fighting near a peepal tree and on being called by PW10, he had gone there and separated the deceased and the appellant whereafter they had gone away in different directions. As mentioned above, he had also admitted in his cross-examination that there were many other residences at the place of occurrence. The second witness on the aforesaid aspect of "last seen together" is PW10 who however does not make even a passing reference of PW8 in intervening the fight and separating the accused and the appellant. According to him, he had intervened the fight whereafter the accused and the appellant were separated. He subsequently states that later in the night, the accused had gone to his house and told that he had killed the deceased. We shall deal with the aspect of the extra judicial confession at a later stage. The third witness on the aspect of last seen together is PW13. Though the said PW13 was declared hostile, her evidence is required to be examined with her statement made under Section 164 of the Cr.P.C. Incidentally both the versions are almost similar. In her statement under Section 164 of the Cr.P.C., she had mentioned regarding the presence of one Rajib Bakti PW11 in her house where the quarrel had started on the issue of asking of a muffler by the appellant from the deceased.

PW11 in his examination however does not even refer to any such event or his presence in the residence of PW13. From the above evidence and discussions, it is found that the "last seen theory" though tried to be projected is wholly inconsistent. The same has also to be examined from the point of view of the evidence of the Doctor who had performed the postmortem as well as the report itself. As per the report, the death was within 12 hrs and the examination time was 1.45 PM on 18.02.2018. On the other hand, the "last seen together" even if presumed was between 8 to 9 PM on 17.02.2018.

19. Under those facts and circumstances, the aspect of application of the "last seen theory" would be against the principles of criminal jurisprudence wherein, a guilt cannot be presumed but has to be proved beyond any reasonable doubt.

20. On the other aspect of extra-judicial confession, it is a settled law that such evidence is a weak piece of evidence which is necessarily required to be corroborated with other material witnesses. In this context, let us examine the said evidence as adduced by PW10. The said PW10 had stated that the accused had told him in his house that he had killed the deceased. No other aspects or details have been narrated as to under what circumstances the appellant would come to his house to make the confession. No time has been mentioned as to when the appellant had come to his house and the same becomes important inasmuch as the fighting near the peepal tree, as per the evidence on record is between 8 to 9 PM. It may be mentioned that the incident was of 17.02.2018 and in a rural area 8 to 9 PM in February can be considered as late in the evening.

21. In the case cited by the learned Amicus Curiae of **Sahadevan** (supra) the following has been laid down on the aspect of both "last seen together" as well

as the principles of "extra-judicial confession".

"22. *The very basis of Ext. P-4 falls to the ground when one peruses the statement of Kamalal, PW 2. In her statement, she has stated that her husband was employed in a rolling mill and that there was no dispute between them. Further, she has categorically stated that she had never stated anything with regard to dispute between her husband and Accused 1 to the police and that there was no property dispute amongst them. Upon this, this witness was declared hostile by the prosecution with the leave of the court. Even in her cross-examination, nothing could be brought out to establish the fact of alleged cruelties inflicted by the deceased upon her and there being any dispute between them.*

31. *In State of U.P. v. Satis [(2005) 3 SCC 114 : 2005 SCC (Cri) 642] this Court had stated that (SCC p. 123, para 22) the principle of last seen comes into play*

"where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible."

22. By following the aforesaid principles, we are of the considered opinion that the aspect of "last seen theory" cannot be made applicable in the instant case and in any case cannot be independently sufficient to sustain the conviction. On the other aspect of extra-judicial confession as has been held, the same is a weak piece of evidence and without there being other supporting materials trustworthy of credence, the same cannot be the basis of a conviction.

23. In view of the aforesaid discussions, we are of the view that the materials on record including the evidence would not be sufficient to come to a conclusion of guilt of the appellant.

We accordingly hold that the impugned judgment dated 17.02.2020 passed by the Addl. Sessions Judge-2 (FTC), Tinsukia in Sessions Case No. 52(T)/18 is unsustainable in law and is accordingly set aside. We hold that the appellant is entitled for getting the benefit of doubt and is accordingly acquitted and be

released forthwith unless he is required in any other case.

24. Send back the LCR.

25. Before parting we would like to record our appreciation for the assistance rendered by the learned Amicus Curiae, who would be entitled to the prescribed fee.

JUDGE

JUDGE

Comparing Assistant