GAHC010065712018

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

Case No. : CRL.A(J)/36/2018

ANAN NAYAK @ PAPU NAYAK
S/O. SRI MANGRA NAYAK,
R/O. MAIJAN PATHERTALI GAON,
P.S. DIBRUGARH, DIST. DIBRUGARH.

…….Appellant

VERSUS

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

……. Respondent

With CRL.A(J)/37/2018

MANGRA NAYAK
S/O. LT. JOGE NAYAK
R/O. MAIJAN PATHERTALI GAON
P.S. DIBRUGARH
DIST. DIBRUGARH.

…….Appellant

VERSUS

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

….Respondent

Advocate for the appellant : Mr. Arunangshu Dhar, Amicus Curiae.

Advocate for the Respondent : Ms. B. Bhuyan, Addl. P.P.

BEFORE
HON'BLE MR. JUSTICE N. KOTISWAR SINGH
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

JUDGMENT & ORDER (CAV)

(N. Kotiswar Singh, J)

Heard Mr. A. Dhar, learned *amicus curiae* for the appellants. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam for the State respondent.

2. These 2 (two) jail appeals have been preferred against the common judgment and order dated 22.12.2017 passed by the learned Sessions Judge, Dibrugarh in Sessions Case No.148/2014 (G.R. Case No.1086/2014) by which the appellants were found guilty under Section 302/34 IPC and sentenced to undergo Life Imprisonment and also to pay a fine of Rs.1,000/- only each, in default of payment of fine, to undergo rigorous imprisonment for 1 (one) month each. The appellants were also convicted under Sections 341/34 IPC and sentenced to rigorous imprisonment for 6 (six) months. Both the sentences are to run concurrently.

3. The brief facts of the case as unfolded in course of the trial was that an FIR was lodged on 30.04.2014 by one Smt. Sita Lohar, wife of the deceased late Dilip Lohar, stating that at 2.30 P.M. on 30.04.2014 Sri Anan Nayak @ Pappu Nayak and Mangra Nayak, appellants herein, both residents of Maijar Pathartoli Line, confronted her husband Dilip Lohar on the

road of Pathartoli Line. The appellant Mangra Nayak held her husband's hand and the appellant Anan Nayak @ Pappu felled her husband by striking a blow on his head with a shovel. Before killing her husband he was struck on his neck which incident was witnessed by complainant's son Rajib Lohar. On the basis of said FIR, investigation was held and both the appellants were charge-sheeted.

4. The prosecution produced as many as 9 (nine) witnesses including the son of the deceased, Rajib Lohar and the complainant. On the basis of the evidences which were adduced in course of trial, learned Session Judge, Dibrugarh convicted the appellants under Section 302 as well as 341 IPC as mentioned above against which the present 2 (two) appeals have been preferred.

5. A brief reference to the evidence adduced in course of the trial may be appropriate.

6. P.W.1, Smt. Sita Lohar, wife of the deceased late Dilip Lohar, the complainant, lodged the FIR on the basis of the information furnished by her son Rajib Lohar. She testified that on the day of incident she was returning home after working in the Tea Estate and noticed a gathering on the road inside the Line and when she went there, she found her husband lying on the ground in an unconscious state. Her son was sitting near her husband. When she asked her son, Rajib as to what happened to his father, her son narrated the incident and told her that after assaulting her husband with a shovel, the appellants ran away towards the Tea Estate. Thereafter, someone called a 108 Ambulance and his father was taken to the Dibrugarh Medical College where he was declared dead.

7. P.W. 2, the son of the deceased, namely, Rajib Lohar is the eye witness of the case, who stated that both his father and the co-accused are the co-villagers. The incident took place at around 3 P.M. on the day of occurrence. He stated that his father came home taking a fish along. As his father had Rs.10 (ten) less for the price of the fish, he took the same from his home and went to the appellant Mangra's house, where the P.W.2 followed his father. His father came across both the appellants on the road. The appellant Mangra held his father's hands by bending on the back and the appellant Anan dealt three blows on his father's head with a shovel. On receiving the blows, his father fell on the ground. Thereafter, P.W. 2 sat near his father. When his mother reached the place of occurrence, he narrated to

her as to what had happened. Thereafter, a lot of people assembled there and his maternal uncle called a 108 Ambulance and took his father to the Dibrugarh Medical College, where he was declared dead. The police also came to the place of occurrence and questioned him about the incident and the police took him to the court and he made a statement before the Magistrate.

8. The Doctor, who performed the postmortem on the dead body of the deceased was examined as the P.W.3 who found the following injuries as recorded in the postmortem report:

> "*1. Incised wound of size 7X1X3 cm present on sub-mental area of neck.*
>
> *2. Incised wound of size 9X1.5X3 cm present on front of the neck at upper part horizontally.*
>
> *3. Incised wound of size 8X2 cm bone deep present on left front parietal area of scalp obliquely."*

P.W.3 gave the opinion that the death was caused due to coma as a result of head injuries. According to him, all injuries were antemortem caused by sharp cutting heavy weapon and homicidal in nature. He also gave the opinion that the head injuries found on the deceased were sufficient to cause death in ordinary course. He, however, stated in his cross-examination that this type of injury could not be caused by a shovel.

9. Other formal witnesses were also examined.

P.W. 4, Arjun Tanti is a co-villager when went along with the police to the house of the appellant Anan Nayak, where Anan Nayak produced the shovel from his father-in-law's house which he had used in the incident and police seized the same. P.W. 4 is a seizure witness of the shovel.

P.W. 5 was another co-villager and he had visited the medical college and saw the dead body, where he saw injuries on the neck and back side of the head of the deceased.

P.W. 6 is co-villager of the appellant as well as the deceased, who stated that on the date of incident while he was working in the house of the ward member of Maijan Natun Gaon, Pritam, another son of the deceased came and told him that his father was lying on

the road. Thereupon, he went to the place of occurrence where he found the deceased lying with injuries on his neck and head. He thereafter informed the ambulance and the deceased was taken to the Medical College.

10. P.W. 7, Bijay Shah was another villager who knew the deceased as well as both the appellants. He proceeded to the place of occurrence on learning that a murder had taken place and on reaching the place of occurrence he found the deceased lying on the road and was bleeding from the head and his son was covering the injuries by placing a *gamocha* on the injuries. On being asked, the boy told him that his father had sustained injuries on his head as a result of blow being dealt with a shovel. However, the boy did not tell him as to who had assaulted his father. Thereupon, he was declared as a hostile witness. On being cross-examined by the Prosecution, he denied having stated before the police that when enquiring, he learnt that the appellants had killed the deceased by dealing blows with shovel. On being cross-examined by the defence, he stated that the son of the deceased did not tell him who assaulted his father.

11. P.W.8 was the driver of an Ape Vehicle by which the appellant was taken to a house along with the police personnel and from his house, the police personnel recovered a shovel. Thereafter, P.W.8 drove them back to the Police Station.

12. P.W.9 was the Investigating Officer who went along with the appellant Anan Nayak to recover the weapon which was used in the incident as stated by the appellant Anan Nayak. He stated that appellant Anan Nayak took the police to his father-in-law Rustom Karmakar's house and produced the shovel from beneath one bed inside the house, which was seized in presence of the witnesses. P.W. 9 deposed that P.W.7, Bijay Shah stated while recording his statement that he saw the deceased lying with injuries on neck, head and left hand and his son was trying to get rid of houseflies by waving a gomasha and upon enquiring about the matter, he learnt that Anan Nayak had killed the deceased by dealing blows with shovel.

13. On the basis of the aforesaid evidences and other evidences on record, the learned trial court convicted the appellants under Sections 302 and 341 IPC.

14. The learned counsel for the appellants has submitted that there was only one eye witness to the aforesaid incident who happened to be the minor son of the deceased, P.W.2,

whose evidence could not be said to be fully trustworthy as he was an interested person since his father was the victim. It has been also submitted that his statement recorded under Section 164 Cr.P.C. is in variance of the deposition made before the Court. It has been submitted that while in course of trial the P.W. 2 testified mentioning about shortage of Rs.10/- and for buying fish and proceeding towards the house of the appellants, P.W. 2 merely stated in his statement under Section 164 Cr.P.C. that his father handed over fish to him and after washing his hand and feet when his father was going to the line for a walk, he was following him.

15. The learned counsel for the appellants submits that the incident took place on 30.04.2014, whereas the statement of P.W.2 was recorded on 05.05.2014 and the deposition was made before the Court on 26.08.2014. Thus, there is a distinct possibility of the child being tutored to improve upon the case. According to the learned counsel for the appellants, the details mentioned in his deposition before the Court are absent in his statement recorded under Section 164 Cr.P.C.

16. Learned counsel for the appellants also submits that though the said weapon of crime was stated to be a shovel which was stated to have been recovered from the house of the father-in-law of the appellant Anan Nayak, the said weapon was never produced before the court during the trial. Further, the said weapon was never sent for forensic examination to match the fingerprints on the weapon with that of the appellants nor the blood stain found on the weapon of crime was sent for forensic examination.

17. According to the learned counsel for the appellants, non production of the weapon of crime and non-examination forensically of the same are serious lapses on the part of the investigation which would cast a doubt on the veracity of the prosecution case. It has been submitted that if the weapon of crime had been sent for forensic examination and the finger prints and the blood available on the same were matched with the victim and the appellants, these could have clinched the matter. However, as the same had not been done, it cannot be said that the prosecution has been able to prove the case against the appellants beyond all reasonable doubts.

18. Learned counsel for the appellants has also submitted that though it was claimed by

the sole eye witness P.W.2 that his father was hit by the appellants Anan Nayak and Mangra Nayak on his head and neck by a shovel, the doctor who performed the postmortem in his cross-examination categorically stated that such type of injury could not have been caused by a shovel.

It has been submitted by the learned counsel for the appellants, thus, that there is inconsistency between the medical evidence and the eye witness account. In view of the aforesaid inconsistency between the ocular evidence of P.W. 2 and that of the expert witness of the P.W. 3, it cannot be said with certainty the death was caused because of the injuries caused by the shovel.

19. The Ld. Counsel for the appellants referring to the decision of the Hon'ble Supreme Court in ***Datar Singh vs. State of Punjab, (1975) 4 SCC 272***, submits that failure to examine the weapon of murder for fingerprints to connect the accused with it is extremely fatal to the prosecution case.

Further relying on the decision of ***Yogesh Singh Vs. Mahabeer Singh, (2017) 11 SCC 195***, it has been submitted that evidence of a child witness must find adequate corroboration before it is relied upon. It should be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. It has been submitted that the fact that there were discrepancies in the statement of child witness PW 2 made before the trial court and before the Magistrate made under Sec.164 CrPC would cast a doubt on the veracity of the evidence of the child witness, PW 2.

20. Further, it has been submitted that no crime could be committed without any motive. In the present case the prosecution has failed to prove the motive behind the killing of the deceased by the appellants.

21. Having heard the learned counsel for the appellants and the State and having considered the materials on record, we proceed to examine the correctness of the impugned judgment.

22. As far as the homicidal nature death of the deceased Dilip Lohar is concerned, there is no doubt about the same. It has been also proved by medical evidence that the death was caused as a result of head injuries caused by sharp cutting heavy weapon and it was

homicidal in nature.

23. This Court has to consider now, as to who were responsible for the death of the deceased and how the crime was committed.

From the records, it is clear that there was only one eye witness, namely the PW 2, who was a minor child of the deceased. He was aged about 14 years when he was examined by the trial court on 26.08.2014. When the incident occurred on 30.04.2014, it was about four months before the PW2 was examined by the court. So it may be safely assumed that the child witness would be about 13-14 years. Considering the age of the child, it cannot be said that he would be able to state the facts coherently.

24. P.W.2 had categorically stated before the trial Court that he knew both the appellants as they were co-villagers. Whatever P.W.2 had stated before the Court was a substantive reiteration of what he had stated before the Magistrate under Section 164 CrPC.

In his statement made under Sec. 164 CrPC, he categorically mentioned that at about 3:30 P.M. on 30.04.2014, his father handed over fish to him and after washing his hands and feet, he was going to the Line to have a walk and he was following him. He further stated that while going a little ahead, he saw that Mangra Nayak, the appellant held his father's hand by bending those on the back and appellant Anan Nayak dealt blow on his father's head and neck with a shovel. His father fell down and remained lying there. They then ran away from the spot. He then called people in the neighbourhood. Later on a 108 Ambulance was called and his father was taken to the hospital and died on the way.

As far as statement/deposition before the concerned court, he reiterated as to the factum of assault of his father by the appellants that while he was following his father on his way towards the appellant, Mangra's house, he came across both the appellants, Mangra Nayak and Anan Nayak on the road and Mangra held his father's hand by bending those on the back and the appellant Anan dealt three blows on his father's head with a shovel. Receiving the blows, his father fell on the ground and that he sat near his father.

25. What has been added in his deposition before the trial court is that about the shortage of 10 (ten) rupees for purchasing fish and also what happened after the incident. This part of the deposition not being very consequential, non mentioning of the same in the 164 CrPC statement, in our opinion is not very natural.

26. P.W.2 also stated in addition that when his mother reached the place of occurrence, he told her as to what had happened to his father about the assault by the appellants, Mangra and Anan.

But he also mentioned about the people assembled there as stated in his statement under Section 164 CrPC. He also mentioned about the calling of 108 Ambulance which took his father to the hospital. He also mentioned in his deposition that the police had taken him to a Magistrate for recording his statement.

27. This addition cannot be said to be embellishment, in as much other prosecution witnesses, who was declared hostile also stated but on being asked, the boy (meaning P.W.2) told him that his father had sustained injury on his head as a result of blow being dealt with a shovel.

Though in his cross-examination, P.W.7 denied having stated to the police during investigation that on enquiry about the mother, I learnt that the appellants had killed the deceased by dealing blows with shovel, the I.O. of the case, P.W.9 testified that the P.W.7 stated to him to the aforesaid effect by exhibiting his statement recorded under Sec.161 CrPC.

Thus, in our opinion, non mentioning by the P.W.2 about informing his mother when enquired that the appellants had assaulted the deceased, does not really impeach the veracity of the testimony of P.W.2.

In examining the statement of P.W. 2 recorded under Sec. 164 CrPC soon after the incident, we have noted that what was material and relevant to the incident had been recorded, i.e. witnessing the appellants assailing the deceased and with a shovel and thereafter, running away. It may be also noted that the statement was recorded on 05.05.2014. the incident happened on 30.04.2014. As per the case diary, the police interrogated and examined several witnesses on 30.04.2014, 01.05.2014 and thereafter, on 05.05.2014, the statement of P.W. 2 was recorded under Sec. 164 CrPC. Under the circumstances, we are of the view that there was no inordinate delay in recording the statement of P.W.2 to cast any doubt on the veracity of the same.

28. He was cross-examined by the defence as to whether his school was closed, to which

he replied that as on that day his school was closed. Thus, it clearly indicated that his presence in the place of occurrence cannot be said to be stage-managed.

We have also noted that P.W.1, the mother of P.W.2 and wife of the deceased stated in her deposition that she saw her son P.W.2 at the place of occurrence and saw her husband lying on the ground in an unconscious state and that she saw her son, P.W.2, sitting near her husband. In the cross-examination, she also stated that on the day of the incident, the school was closed.

29. Though he mentioned in the cross-examination that there are lots of houses near the place of occurrence and neighbouring people would come out if an incident takes place in the night, he was not asked specifically by the defence as to whether he could recognize any of the persons who had gathered at the place. He denied the suggestion that he had falsely deposed that the appellants had assaulted his father and he had adduced false evidence and being tutored by the members of his family and also denied that none of the people residing near the place of occurrence witnessed the incident.

Cross-examination of P.W.2 child witness does not show that his deposition has been shaken on material aspect of the evidence.

30. Having gone through the evidence of the P.W.2, we are of the opinion that the child witness, P.W.2 who was about 13-14 years was capable of giving proper evidence and his deposition does not suffer from any inconsistency. It appears to be natural to be at the place of occurrence along with the father who had witnessed both the appellants assaulting his father with a shovel.

Similarly, P.W. 7, though was declared a hostile witness, stated in his deposition that he saw the deceased lying on the road and bleeding from the head. He also saw his son covering injuries by pressing a gomasa on the injuries and on being asked, the boy told him that his father had sustained injury on his head as a result of blow being dealt with shovel.

Thus, the presence of the boy, i.e. P.W.2 is testified by both the mother and the P.W. 7.

In our view, the presence of the child witness, P.W.2 at the place of occurrence, therefore, cannot be doubted.

31. As mentioned above, P.W.7, however, resiled from his statement made to the police under Sec. 161 CrPC that enquiring to the mother, he learnt that the appellants had killed the deceased by dealing blows with shovel. This was specific to the question of the Prosecution in the cross-examination after declaring P.W.7 as a hostile witness when P.W.7 stated before the Court.

In his statement before the police, he said that "*I saw deceased Dilip Lohar lying on the road below the embankment and bleeding from the head. Dilip Lohar's son covered his injuries by pressing a Gamosa (bath towel) on the injuries. On being asked, the boy told me that (his father) had sustained injury on his head as a result of blow being dealt with shovel. The boy did not tell me as to who had assaulted his father. Police questioned me*."

As regards the aforesaid denial, the same question was put to P.W.9, who was the Investigating Officer. He stated before the Court that in his statement made before him, the witness Bijay Shah, P.W. 7 had stated that "*I saw that Dilip Lohar was lying with injuries on neck, head and left hand and his son was trying to get rid of houseflies by waving a Gamosa (bath towel). Upon inquiring about the matter, I learnt that Anand Naik and Managra Naik had killed Dilip by dealing blows with shovel.*"

We have also seen Ext.10 and gone through Ext.10.

Ex. 10 (1) is the signature of P.W. 9.

It is found that the P.W.7 had stated so which he denied having said when cross-examined.

Thus, apart from the factum of statement as to who had killed the deceased, which P.W.7 did not want to mention in his deposition, other facts about seeing the deceased lying on the ground and also seeing the child witness near the dead body is not disputed by the P.W. 7 himself.

32. Thus, we find the evidence of P.W.2 reliable and trustworthy. Nothing has been shown as to impeach his credibility.

33. Of course, an attempt has been made by the Prosecution based on the medical opinion as available in the post-mortem report and deposition of P.W.3 that the injuries were caused

by sharp cutting heavy weapon and those type of injury cannot be caused by a *Belcha*, a shovel contrary to P.W.2 had stated in his deposition and the statement under Section 164 CrPC.

We have also noted that though the said shovel was seized, it was not produced in course of the trial which we find to be lacuna, which lacuna we do not consider to be vital, as the cause of the death has been otherwise sufficiently proved by eye witnesses and medical evidence.

34. It is also to be noted that the opinion of the Doctor is merely an expert opinion, which though entitled to due consideration by the Court, it cannot have an overriding effect of effacing the testimonial evidence, unless the medical opinion totally rules out any such injury by shovel. It is also to be noted that the expert opinion was given by the Doctor without seeing the weapon of crime. Therefore, his opinion was of general nature, which does not totally rule out the injuries which may be caused by a shovel on the body. Unfortunately, in absence of the shovel which was seized, this Court also is not in the position to state with certainty but it is also a fact that a shovel after long use can become sharp edged on the sides and as such, since the opinion of the Doctor was that the injuries were caused by a sharp cutting heavy weapon, use of *Belcha* which is a heavy weapon cannot be totally ruled out, in spite of the opinion of the Medical Officer. The injuries found on the body of the deceased corresponds to the description given by the P.W.2 of the assault by the appellants on the head of the deceased. Merely because of this doubt as to whether the said shovel could have caused the injury cannot in our view demolish the prosecution case and the ocular evidence of the child witness.

35. In the case of ***Solanki Chimanbhai Ukabhai vs State Of Gujarat, (1983) 2 SCC 174,*** the Hon'ble Supreme Court held that the testimony of eye witness would be preferable to medical evidence, unless the medical evidence completely rules out the eye witness version.

It was held in para 13 of the aforesaid case, ***Solanki*** (supra) as follows:

> "13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can

make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries: taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

36. In the present case, the testimony of the child witness was that his father was struck with a shovel on his head by the appellants and the post-mortem report also mentions of the head injuries. Though the Medical Doctor gave his opinion that this type of injury cannot be caused by a *Belcha*, it does not necessarily mean that such injury cannot be caused by *Belcha* at all. He did not give any opinion that ruling out such injury caused by the *Belcha*. As mentioned above, Belcha used frequently can have sharp edge on the sides. Thus, we do not consider that medical evidence completely rules out of possibilities of the injuries received by the deceased father because of the use of Belcha.

In our view, the specific and categorical statement of P.W.2 that the appellant Anan struck blows in his father's head with a shovel can be relied upon for conviction of the appellants, in spite of the opinion of the Doctor, expressing his view that this type of injury cannot be caused by a *Belcha*.

37. Accordingly, for the reasons discussed above, we are also satisfied that the appellants were guilty of committing the offences under Sections 302/341/34 IPC and have been correctly convicted by the learned trial court.

The appeals, CRL.A.(J) No. 36/2018 and CRL.A.(J) No. 37/2018 are accordingly, dismissed as devoid of merit.

JUDGE **JUDGE**

Comparing Assistant