

Gauhati High Court

Manir Uddin vs The State Of Assam And Anr on 25 August, 2021

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GAHC010219242017

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

Case No. : Crl.A./423/2017

MANIR UDDIN  
S/O MUSHI AHMED ALI, VILL. KOTONPUR RADHAMADHABPURIN C.S. P.S.  
BAZARICHERRA, DIST. KARIMGANJ, ASSAM.

VERSUS

THE STATE OF ASSAM and ANR

2:JAHARUL ISLAM

S/O LATE ABDUL KALAM  
VILL. RADHAMADHABPUR  
P.O. KADAMANI  
P.S. BAZARICHERRA  
DIST. KARIMGANJ  
ASSAM  
PIN 78872

Advocate for the Appellant : MR.B C DAS(AMICUS CURIAE)

Advocate for the Respondent : MS. B. BHUYAN(ADDL PP, ASSAM)

Page No.# 2/14 BEFORE HONOURABLE MR. JUSTICE SUMAN SHYAM HONOURABLE MR. JUSTICE PARTHIVJYOTI SAIKIA JUDGMENT & ORDER (CAV) Date : 25-08-2021 (P.J. Saikia, J) Heard the learned Amicus Curiae, Mr. B.C. Das appearing for the appellant. Also heard Ms. B. Bhuyan, the learned Additional Public Prosecutor for the State of Assam.

2. This is an appeal under section 374 (2) of the Code of Criminal Procedure, 1973 against the judgment and order dated 25.09.2017 passed by the learned Sessions Judge at Karimganj in Sessions Case No. 108/2015 convicting the appellant under Section 302 of the Indian Penal Code and was sentenced to imprisonment for life and to pay a fine of Rs. 30,000/-, in default of payment of fine, RI for another six months.

3. On 31.10.2013 the informant Jaharul Islam had lodged an FIR alleging that while his sister Sultana Begum had gone to fetch water from the nearby rivulet, the appellant stabbed her with a knife, for which the woman died. The informant had disclosed in the FIR that the son of the deceased pulled her body out of the water and informed him about the occurrence.

4. On the basis of the said FIR, police registered the Bezaricherra P.S. Case No. 169/2013. The dead body was sent for post mortem examination. The post mortem report goes like this---

"An average built female aged about 30 years, whose rigor mortis was present, eyes closed, mouth closed. A fresh sharp cut wound was present over the left side of the chest below the 5th rib measuring about 2" X 1". Blood clot Page No.# 3/14 was seen in the wound. No other fresh injury was seen on her body. Pallor was noted on the whole body.

**CRANIUM AND SPINAL CORD :**

Scalp, skull and vertebrae, membrane were pale. Brain was also pale. THORAX : Ribs, walls and cartilages as described; plurae, larynx and trachea, both the lungs were found to be pale.

PERICARDIUM : Haemopericardium with cardia tamponade noted. IN THE HEART : Sharp cut injury noted in the right ventricle. Heart was contracted. The left ventricle showed few clotted blood. VESSELES : Few small amount of blood clot is seen in the major vessel. ABDOMEN : Wall is pale, peritoneum is pale, mouth, pharynx and his figures are pale, stomach pale and empty, small intestine also pale and empty, large intestine is also pale and contains faecal matters. Belly were the spleen and the kidneys are pale.

BLADDER Pale and empty; organs of external and internal GENITALIA also pale and normal.

The injury described earlier was ante mortem.

IN MY OPINION : Death was due to hemorrhagic shock due to cardiac tamponade resulting from the shop injury sustained."

5. On conclusion of investigation, police filed the charge-sheet against the appellant and four others.

6. The trial court framed the charges under Section 120(B)/302 of the Indian Penal Code against the present appellant and the other four. During the trial, the prosecution side examined 12 (twelve) witnesses. All the accused persons were examined under Section 313 of the CrPC. The accused persons were asked whether they would adduce defence evidence and they declined to adduce evidence. Therefore, after hearing the argument, the impugned judgment was delivered. By the impugned judgment, except the present appellant, other accused persons were acquitted.

7. We have gone through the impugned judgment.

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8. The first witness to be examined by prosecution is Badrul Islam. He was 12 years old when he adduced evidence on 18.05.2016. This witness is the son of the deceased. He has stated in his evidence that while his mother had filled water on the pot from the bank of the river, suddenly the appellant appeared there. The witness stated that by putting a knife on the neck of his mother, the appellant was dragging her by holding her head. The witness disclosed that the appellant stabbed her mother with a dagger on the left side of her chest. According to Badrul Islam, he started to raise hue and cry over the incident and also pulled out his mother from the river. The witness further stated that by that time, his younger brother Tahirul Islam (PW-8) had arrived there. Badarul Islam and PW-8 rushed to the house of the informant (PW-2)

9. The PW-2 stated in his evidence that he got the news about the incident from his nephew Ashikul Islam, who told him that the appellant had killed his mother. PW-2 immediately went to the place of occurrence and saw the dead body of the deceased. He immediately informed the G.P. President and the Vice President, who in turn had informed the police.

10. The third prosecution witness is Abdul Rahim. He is the uncle of the deceased. He stated in his evidence that at the relevant time of occurrence, the PW-8 told him that the appellant had killed his mother. On hearing the news, PW-3 immediately went to the place of occurrence and saw the dead body of the deceased. Abdul Rahim further stated that he immediately informed the police.

11. The 4th prosecution witness is Nuruddin. He knew the deceased and the appellant, Nuruddin stated that police had arrested the appellant from his village. According to Page No.# 5/14 Nuruddin, the appellant had confessed before police and the villagers that he had killed the deceased.

12. The 5th prosecution witness is Fakrul Islam. He is the relative of the deceased Fakrul Islam has stated in his evidence that on the day of the occurrence his family members informed him over phone that the deceased was killed.

13. The 6th witness is Nurul Hoque. He is the husband of the deceased. According to Nurul Hoque, the appellant lived near his house. Nurul Hoque had stated that at the time of occurrence he was at Bangalore, where he worked as a security guard. According to Nurul Hoque, his younger brother-in-law, who resided with him at Bangalore, had informed him that the appellant had killed his wife. In the evening on that day, the PW-2 also informed about the death of his wife. After 4 days of the occurrence, Nurul Hoque came home. He quoted his two sons PW-2 and PW-8 as saying to him that the appellant had killed their mother.

14. The 7th prosecution witness is Aziruddin. He is also the relative of the deceased. According to Aziruddin, he came to know about the occurrence at about 6.30 A.M. that day and immediately he went to see the dead body, which was lying on the bank of the rivulet. At that time only, Aziruddin

could identify the dead body to be that of his niece. Aziruddin further stated in his evidence that after a few days of the occurrence, the appellant was arrested by police and at that time the appellant confessed before the villagers that he had committed murder of the deceased.

15. PW-8, aged about 14 years was subjected to voir-dire. In his evidence PW-8 stated that after hearing the screams of PW-2, he went to the place of occurrence and then he saw Page No.# 6/14 that the appellant was standing there with blood stained dagger in his hands. PW-8 disclosed that the brother of the appellant took him away from the place of occurrence. PW-8 stated that through the gash on the right side of his mother's belly internal organs had come out.

16. The 9th prosecution witness is Gautam Roy Sarma, who had performed the post mortem examination upon the dead body of the deceased. His evidence relates to the post mortem report only.

17. The 10th prosecution witness is Azmar Ali. He knew the deceased and also knows the appellant. In his evidence he stated that on hearing about the incident, he immediately went to the place of occurrence at about 6.30 A.M. in the morning and saw the dead body of the deceased. He also noticed one punctured wound on the chest of the deceased.

18. The 11th prosecution witness is Nur Ahmed. He knew the deceased and also knows the appellant. He stated in his evidence that on the day of occurrence at around 6.30 A.M., the wife of the appellant came to his house and wanted to hide in his house. According to Nur Ahmed, the wife of the appellant told his wife that the appellant had killed the deceased. On hearing that Nur Ahmed refused to give shelter to the wife of the appellant, then she left the place. Nur Ahmed also went to the place of occurrence to see the dead body of the deceased. He also noticed one punctured wound on the chest of the deceased.

19. The 12th prosecution witness is the police investigating officer. He spoke about the investigation.

20. Now it is clear that the witness Badrul Islam (PW-1) is the only eye witness in this case. The PW-8 though did not witness the incident, claimed to have seen the appellant standing at the place of occurrence with a blood stained sharp weapon in his hand.

Page No.# 7/14 Therefore, the entire case depends upon the evidences of PW-1 and PW-8. Although the witnesses were extensively cross-examined by the defence counsel, there is nothing in the cross-examination to hold that these two witnesses deposed false evidence.

21. The learned counsel Mr. Das has relied upon the decision of the Supreme Court that was delivered in P. Ramesh Vs. State represented by Inspector of Police in order to challenge the credibility of child witnesses. In para 12 of this judgment, the Supreme Court has held that prior to recording of evidence of a child witness, the trial court must undertake the exercise of posing relevant question to determine the capacity of the child witness to provide rational answer.

22. Per contra, Ms. Bhuyan, the learned P.P., has relied upon Section 118 of the Indian Evidence Act. Ms. Bhuyan submits that there is no law which prohibits acceptance of evidence of a child witness. In order to buttress her point, Ms. Bhuyan has relied upon a judgment of the Supreme Court that was rendered in State of Madhya Pradesh Vs. Ramesh and Anr. reported in (2011) 4 SCC 786. Paragraph 7, 8 and 9 of the judgment are quoted as under :

"7. In Rameshwar S/o Kalyan Singh v. The State of Rajasthan, AIR 1952 SC 54, this Court examined the provisions of Section 5 of Indian Oaths Act, 1873 and Section 118 of Evidence Act, 1872 and held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind. There is always competency in fact unless the Court considers otherwise.

The Court further held as under:

".....It is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can, I think, be gathered from the circumstances when there is no formal certificate...."

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7. In Mangoo & Anr. v. State of Madhya Pradesh, AIR 1995 SC 959, this Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

8. In Panchhi & Ors. v. State of U.P., AIR 1998 SC 2726, this Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must 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."

23. We have bestowed our consideration to the rival submissions.

24. At this stage, a brief visit to Section 118 of the Evidence Act would be fruitful. Section 118 of the Indian Evidence Act reads as under :

"Section 118. Who may testify. --All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Explanation.-- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

25. According to Indian Evidence Act, there is no age limit fixed for a person to be a competent witness. A child of tender age can also be a competent witness. But his/her competency to depose is best decided by a trial judge because the trial judge has the opportunity to see the child or understand his/her capability. That is why child witnesses are always subjected to voir-dire. In the case in hand, the trial judge has certified that the PW-1 understood the meaning of oath. On the other hand, PW-8 was asked multiple questions to ascertain his competency to testify.

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26. PW-1, who is the eye witness in this case was extensively cross-examined by the defence counsel. In spite of that, it was never suggested by the defence counsel that the PW- 1 was incompetent to adduce evidence or he was tutored. The PW-1 has stated in his evidence that the appellant stabbed his mother on the left side of her chest. This fact has been corroborated by the PW-9, who performed the post mortem examination upon the dead body of the deceased. In fact, there are no discrepancy and contradiction in the evidence of PW-1.

27. The evidence of the PW-8 also inspired confidence because there are no discrepancy and contradiction in his evidence.

28. In Rameshwar (supra) the Supreme Court was dealing with the evidence of a 8 year old girl. The trial court convicted the appellant on the basis of the evidence of the said girl, but the Sessions Court in appeal held that without corroboration, the evidence of a 8 year old girl alone was not sufficient for conviction. Thereafter, the High Court held that since the evidence of the girl is admissible in law and since she informed about the occurrence to her mother and therefore, her mother's evidence to the effect amounts to corroboration. Therefore, the High Court restored the conviction of the appellant. The matter went up to the Supreme Court. The Apex Court agreed to the view of the High Court.

29. In Mangoo (supra), the Supreme Court while dealing with the evidence of a child witness observed that there was always scope of tutoring the child. The Court further held that it cannot be a ground to come to a conclusion that the child witness must have been tutored. According to the Supreme Court, the trial court must find out whether the child has been tutored or not. The Supreme Court further found that it cannot be ascertained by Page No.# 10/14 examining the

contents of the testimony of the child witness whether there are any traces of tutoring.

30. In another case before the Supreme Court, in Sathis and Anr. Vs. State of Haryana (Criminal Petition No. 757-758 of 2016 dated 26-05-2017), the father of a 12 year old boy was murdered by some persons in the presence of his mother. The son testified that his mother was present while two assailants killed his father and he was asked by his mother to leave the room. Both trial court and the appellate court found that testimony of the child was reliable and admissible. The 12 year old son identified both the assailants were there at the scene of crime. The Supreme Court found no reason to interfere with the conviction and upheld the verdict. The Supreme Court reiterated that the sole child witness, who inspires confidence, can be relied upon for convicting the accused.

31. The law on the point is very clear. At the time of examination of a child witness, the trial court has to first ascertain as to whether the child witness is a competent witness and whether the child witness has the ability to give reasonable answers to the questions put to him. In the case in hand, the trial judge has certified that PW-1 and PW-8, both child witnesses are competent witnesses. Therefore, being an appellate court, we are of the opinion that when a trial judge certifies a child witness to be a competent witness, we do not want to disturb the said finding of the trial judge.

32. The PW-1 is an eye witness to the occurrence. He was with his mother when the appellant attacked her with a knife. PW-1 has clearly stated in his evidence that the appellant stabbed his mother on the left side of her chest. His evidence is squarely supported by PW-9, Gautam Roy Sarma, who had performed the post mortem examination upon the dead body of Page No.# 11/14 the deceased. At the time of cross-examination of the PW-1, the appellant side never challenged his evidence about the facts deposed by him. Neither the appellant ever challenged the competency of the PW-1 to testify as a child witness.

33. The PW-8 has stated in his evidence that on the day of occurrence and at the relevant time he also followed his mother and his brother (PW-1) to the place of occurrence and there he saw the appellant standing with a blood stained sharp weapon in his hands. Here also the appellant never challenged that piece of evidence of PW-8 in his cross-examination. The PW- 3, who is the uncle of the deceased, has stated in his evidence that at the relevant time of occurrence, it was PW-8, who informed him that the appellant had killed his mother. This amounts to corroboration of the evidence of PW-8.

34. We have meticulously examined the evidences of PW-1 and PW-8. The occurrence took place on 31.10.2013 at about 5.30 A.M. The statement of PW-1 was recorded under Section 161 CrPC within hours of the incident. His statement recorded by police, his statement under Section 164 CrPC and his evidence recorded by the trial court are the same without any discrepancy and contradiction. There is nothing in his evidence to hold that the PW-1 was tutored to speak against the appellant. So far as PW-8 is concerned, same view can be taken for him as well. Both PW-1 and PW-8 were extensively cross-examined by the defence counsel. There is nothing in their cross-examination to hold that they were tutored or they had deposed false evidences. The PW-2 is the brother of the deceased. He has stated in his evidence that his other nephew Ashikul Islam told him that his mother was killed by the appellant and on hearing that news, he went to the place of occurrence and

saw the dead body of the deceased. PW-2 further stated that police immediately came to the place of occurrence, though he had lodged a formal FIR in the evening. The defence side made an Page No.# 12/14 attempt to impeach his evidence by suggesting that the deceased was suffering from epileptic fits and she died for that reason. PW-3 is the uncle of the deceased. He has stated in his evidence that it was PW-8, who informed him about the occurrence. We have already held that this statement amounts to corroboration of the evidence of the PW-8. The police investigating officer (PW-12) has stated in his evidence that on 31.10.2013, at 6.45 AM, he had received the news about the occurrence and he immediately rushed to the place of occurrence. According to PW-12, on that day itself, at about 5 P.M., he had received the formal FIR. PW-12 further stated that he had recorded the statement of PW-1, when he had gone to the place of occurrence.

35. The basic trust of the argument advanced by the appellant's counsel is pertaining to the reliability of the evidence adduced by the child witnesses, viz. PW-1 on the ground that the learned Sessions Judge did not record the questions and answers put to such witness, based on which, a satisfaction as regards his competence to adduce evidence was arrived at.

36. In the case of P. Ramesh (Supra) the Hon'ble Supreme Court has observed that prior to recording of evidence of a child witness, the trial Court must undertake the exercise of posing relevant question so as to determine the capacity of the child witness to provide rational answers. Therefore, it is apparent that before recording the testimony of a child witness, the Court would not only have a duty to pose pertinent questions to the witness so as to assess his/her ability and competence to depose before the Court by giving rational answers but the answers given by the witness must also form part of their evidence.

37. It is correct that the learned Sessions Judge did not record the questions posed to the witness PW-1 and answers given by him before recording his deposition. However, we find Page No.# 13/14 that the learned Sessions Judge has observed that the witness did understand the significance of oath. On such satisfaction, the testimony of PW-1 was recorded. On a careful reading of the evidence adduced by PW-1, read in conjunction with the evidence of other witnesses, we find that the child witness PW-1 has not only deposed in a reasonable manner but has also given logical answers to the questions put to him by the defence counsel. Moreover, during his cross examination, no suggestion was put to the PW-1 either to indicate that he was stating incorrect facts or that the witness was deposing on being tutored.

38. PW-1 is the sole eye witness in this case and his evidence finds due corroboration from the testimony of other witnesses. Therefore, even though the process through which the learned Sessions Judge had arrived at the conclusion as regards the competence of the child witness PW-1 to depose before the Court is not entirely reflected on the face of the record, we do not find any justifiable ground to presume that the PW-1 was deposing on being tutored.

39. The PW-2, who is the other child witness. He has deposed in a consistent manner and the learned Sessions Judge had also recorded the questions put to him and also the answers given by this witness in his deposition, based on which, satisfaction as to the competence of this witness to depose was arrived at. Under such circumstances, we are of the view that the testimony of PWs 1

and 2 inspires confidence of the Court and hence, need not be discarded merely on some technical ground by ignoring the confidence shown on them by the learned Sessions Judge more so, since PW-1 is an eye witness to the occurrence.

40. Having held as above, on a threadbare discussion of the evidence adduced on record, we find that the prosecution has been successful in establishing the charge brought against Page No.# 14/14 the accused beyond reasonable doubt. In such view of the matter, we do not find any justifiable ground to interfere with the impugned judgment and order dated 25/09/2017 passed by the learned Sessions Judge, Karimganj in Sessions Case No. 108/2015. Consequently, the appeal is held to be devoid of any merit and is hereby dismissed.

41. Before parting with the record, we would record our appreciation for the learned Amicus Curiae, Mr.B.C. Das for the valuable assistance rendered by him. The Registry is directed to pay him the remuneration as admissible under the law.

Send back the LCR.

JUDGE

JUDGE

Comparing Assistant