

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM; NAGALAND; MIZORAM &
ARUNACHAL PRADESH)

CRIMINAL APPEAL 265/2015

With
I.A. 2144/2014

Sri Bogai Bouri

-versus-

The State of Assam & Anr.

BEFORE

HON'BLE THE CHIEF JUSTICE MR. AJIT SINGH
HON'BLE MR. JUSTICE MANOJIT BHUYAN

Advocates for Appellant	::	Mr. B.K. Mahajan Mr. A. Choudhury Mr. R. Ali Mr. P.K. Das Mr. N.J. Das
Advocates for the Respondents	::	Mr.P.P. Barua, Addl.P.P., Assam
Date of Hearing	::	02.01.2017
Date of delivery of Judgment	::	02.01.2017

JUDGMENT & ORDER

(Manojit Bhuyan, J)

1. The appellant Bogai Bouri has been convicted under Section 109/302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life with fine and default stipulations for the death of Mohammed Hussain @ Faruk. Three other persons were jointly tried for the murder of Mohammed Hussain and convicted under Section 302/34 IPC and also sentenced to suffer rigorous imprisonment for life.

2. The prosecution case is that on 08.07.2010, in between 4:30 to 6 P.M., Mohammed Hussain @ Faruk of Dakhin Hengera Tea Estate was assaulted by the three other co-accused's at the instance of the appellant by means of sharp objects. The place of occurrence was beside the road of Line No. 6 of the Tea Estate, where the mutilated body of Mohammed Hussain was found in a ditch. Ejahar dated 10.07.2010 came to be lodged by Mohammed Rohimuddin Ali (PW2), who is the son of the deceased and the same was registered as Golaghat P.S. Case No. 348/2010 under Section 302 IPC. In course of investigation the appellant along with the other three accused's were arrested and upon completion of investigation, charge sheet was submitted for committing offence under Sections 341/302/109/34 IPC. The case was committed to trial.

3. The prosecution examined as many as 12(twelve) witnesses, including the Medical Officer and the Investigating Officer. The appellant was examined under Section 313 Cr.P.C. and was also heard on the point of sentence. Medical evidence brought on record disclosed 6 (six) incised wounds on the neck, lower back, buttock etc. on the person of Mohammed Hussain @ Furuk. In the opinion of Dr. Sayed Sajadur Rahman (PW4), death was due to haemorrhage and shock as a result of cut injuries caused by sharp weapon.

4. Conviction of the appellant is primarily on the confessional statements made by the other three co-accused's before Ankur Bhuyan (PW8), who at the relevant time was serving as Judicial Magistrate (1st Class) at Golaghat. The names of the other three co-accused's are Rantu Mahili, Dukhia Karmakar and Saharu Orang. As recorded by the Court below, there is no direct evidence against the appellant, save and except the confessions made by the three co-accused's mentioned above. To what extent the confessional statements, marked as Ext-7,

Ext.-8 and Ext.-9 can be made the basis for convicting the appellant, having regard to the scope of Section 30 of the Evidence Act as well as the law laid down by the Apex Court on the issue involved, is the primary point for determination in this appeal. From the materials on record there is no doubt that the confessional statements of Rantu Mahili, Dukhia Karmakar and Saharu Orang had been recorded observing the required formalities under Section 164 Cr.P.C. The contents of the confessional statements made by the three accused's persons above are pre-dominantly the same where each of them have confessed to the murder of Faruk, on having been tempted by the appellant that they will be given a sum of Rs. 15,000/-. However, the promised money was not paid. For better appreciation the confessional statements of Rantu Mahili, Dukhia Karmakar and Saharu Orang are reproduced here under:

Rantu Mahili – “About one month back Bogai Bauri intended to offer us an amount of Rs. 15,000/- (Rupees fifteen thousand) to kill Faruk. Out of the greed for money we killed Faruk in the Tea estate. As Bogai Bauri did not pay us the money after we had killed Faruk, we confess out guilt as we have committed sin by killing a person and have not been paid the promised money. I have this much to say.”

Dukhia Karmakar – “Alluring us with money Bogai Bauri got a person killed by us. But he did not pay us the money after we had killed Suikur (sic). Rantu first hacked in the head of Sukur (sic) with a ‘Bhujali’ (sword). Then I alongwith Saharu inflicted injury to Sukur (sic) with knife. As Sukur (sic) died we lifted his dead body and threw it into a ditch. I have this much to say.”

Saharu Orang – “Bogai Bauri requested Dukhia and me to kill a person. As we did not comply to his request first, he promised to pay us an amount of Rs. 15,000/- for killing Faruk and as per the version of Bogai, he had old enmity with Faruk. As we are poor, out of the greed from money we killed Faruk as per the instruction of Bogai. As we were less in member, we took Rantu along. After killing

Faruk, we threw his dead body into ditch and then left for our respective house. But Bogai Bauri has yet not paid us the money. I have nothing more to say."

5. No doubt, the confessional statements have also implicated the maker substantially to the same extent as done against the appellant. The question, therefore, is to what extent the confession made by the co-accused's persons can play in a criminal trial in the light of the provisions under Section 30 of the Evidence Act.

6. Section 30 of the Evidence Act provides that when more persons than one are being tried jointly for the same offence and a confession made by one of such persons implicating himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes all such confession. What is discernible from the provision of Section 30 is that it merely enables the Court to take the confession into account and how it is to be done have received consideration in various judicial decisions. A confession cannot be treated as evidence which is substantive evidence against a co-accused person. A Constitution Bench of the Apex Court in the case of *Haricharan Kurmi v. State of Bihar*, reported in *AIR 1964 SC 1184*, have held that in a criminal case where the prosecution relies upon the confession of one accused-person against other accused-person, the proper approach to be adopted is to first consider the other evidence against such a accused-person, and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused-person, the Court would turn to the confession to assure itself that the conclusion which it is inclined to draw from the other evidence is right. Therefore, confession can only be used to lend assurance to other evidence against a co-accused. The Apex Court held that in dealing with a case against an accused-person,

the Court cannot start with the confession of co-accused person but it must begin with other evidence adduced by the prosecution. In other words, the stage to consider the confessional statements arise only after the other evidence is considered and found to be satisfactory. It is well settled that the proper way to approach a case where conviction is based on confessional statements of other co-accused's, is first to marshal the evidence against the accused by excluding the confession altogether from consideration and see whether a conviction could safely be based on it.

7. In the case in hand, the foremost point for decision would be whether the evidence, other than the confessional statements of the co-accused's persons, on whose confession the Trial Court has primarily relied upon, is satisfactory and sufficient to prove the prosecution case. There is no dispute to the fact that there is no evidence against the appellant, either of having any inimical terms with the deceased or that the co-accused' have been seen together with the appellant at any point of time earlier to the time of the incident or that there has been any recovery of weapons from the possession or house of the appellant. The manner in which the Trial Court proceeded for convicting the appellant has been by starting with the confession of the co-accused's without first considering other evidence, other than the confessional statements, to derive satisfaction as regards the guilt of the appellant. There has been no marshalling of evidence against the appellant, save and except the confessional statements of the co-accused's persons. There is no satisfactory evidence, other than the confessional statements of the co-accused's persons, to hold the charge proved against the appellant. At the most, the confessional statements may give rise to grave suspicion of the involvement of the appellant. However, such suspicion cannot take the place of legal proof. In criminal jurisprudence, there is no scope for applying the principle of

moral conviction or grave suspicion. In the instant case what is clearly discernible is that conviction of the appellant is based solely on the confessional statements of the co-accused's persons by wholly disregarding the legal approach that is to be made while applying the provisions under Section 30 of the Evidence Act, 1872. In that view of the matter and also in absence of any other substantive evidence against the appellant, the confessional statements of the co-accused's cannot lend support to the conviction and sentence of the appellant. When the presumption of innocence is the basis of criminal jurisprudence, the fact and circumstances of the instant case cannot compel this Court to hold that the charge against the appellant has been satisfactorily proved. Resultantly, the appellant is entitled to the benefit of doubt. As a necessary corollary, the order of conviction and sentence imposed upon the appellant is set aside and the appellant is ordered to be acquitted, if not required to be detained in any other case. The impugned judgment dated 11.06.2015 passed in Sessions Case No. 153/2010, in so far as the appellant Bogai Bouri is concerned, is hereby set aside.

Lower Court Records be sent back forthwith.

JUDGE

CHIEF JUSTICE

sds