

A BIKASH BORA AND ORS.  
v.  
THE STATE OF ASSAM  
(Criminal Appeal No. 164 of 2011)

B FEBRUARY 05, 2019

**[A. M. KHANWILKAR AND K. M. JOSEPH, JJ.]**

*Penal Code, 1860 – s. 302 – Murder – Prosecution case that appellants caused fatal injuries to victim to which he succumbed – Conviction of the appellants u/ss. 302/34, and sentenced accordingly, on the basis of the circumstantial evidence and the evidence of an eye witness – High Court upheld the order of conviction and sentence, however held that the prosecution witness was not an eyewitness – On appeal, held: All the circumstances taken together do not clinchingly establish the complicity of the appellants-BB, AB and HR – Mere presence at the scene of crime, cannot be the basis to record a finding of guilt against them by applying s. 34 – However, circumstances noted by the courts below establish the involvement of appellant-DB in causing death of deceased, on account of recovery of the weapon from his house, which was used to assault the deceased – Courts below right in relying upon the evidence of the eye witness and the doctor – Conclusion by the High Court that it was a case of causing murder of the deceased, albeit by DB, an offence liable to be punished u/s. 302 simpliciter is upheld – It is not a case to convert the offence of murder to one u/s. 304 (II) – Appellants-BB, AB and HR acquitted of the offence u/ss. 302/34 by giving them benefit of doubt – However, the conviction and sentence of DB u/s.302 upheld.*

**Disposing of the appeal, the Court**

**HELD: 1.1 There is no evidence regarding common intention of the accused persons or prior meeting of their minds to kill the deceased. The evidence of PW-5, mentions about the mere presence of all the appellants at the spot where deceased was seen lying on the ground. He does not state that all the appellants were wielding lathis at the relevant time. Nor has he spoken about any disclosure made by the appellants regarding the sequence of events resulted in causing fatal injuries to the**

deceased. Thus, there is no evidence to indicate as to how appellants-BB, AB and HR could be made accountable for the fatal injuries caused to the deceased to which he eventually succumbed. Even if all the nine circumstances are taken as it is, the same do not clinchingly establish the complicity of appellants BB, AB and HR. There is no tittle of evidence to show that they were wielding lathis or had assaulted the deceased by lathi so as to hold them responsible by applying Section 34 IPC. At best, the chain of proved circumstances would point finger only towards appellant DB, from whose house lathi used to assault the deceased, was recovered. Further, the two fatal injuries, in the opinion of the doctor PW-8, could be caused by a blunt weapon like lathi. Accordingly, for want of clinching evidence to indicate the complicity of three appellants, namely, BB, AB and HR, it would be difficult to sustain their conviction by applying Section 34 IPC, which was the charge framed against them. [Para 4][1101-E-F]

1.2 As regards, appellant DB, the nine circumstances noted by the trial court and affirmed by the High Court would certainly establish his involvement in the commission of crime, and in particular, on account of recovery of the weapon from his house, which was used to assault JK. He has not offered any explanation except claiming to be innocent. The medical evidence does indicate that the two injuries were fatal and each of them was sufficient to cause death in ordinary course of nature. PW-8 has deposed that a patient with such injuries can survive up to one hour and beyond that possibility of survival is minimal. The trial court as well as the High Court were right in relying upon the evidence of PW-5 and PW-8 to hold that the nine circumstances were duly established. That being a possible view, the same is upheld. The proved circumstances clinchingly point towards the involvement of appellant DB in the commission of the stated offence of murder. Thus, the concurrent conclusion reached by the two courts about the finding of guilt against the appellant DB for causing the death of JK is upheld. [Para 5][1101-G-H; 1102-A-C]

1.3 The fact that only two fatal injuries have been noticed during the postmortem of the dead body of deceased would not bring the case within any exception to hold that it was a case of

A culpable homicide not amounting to murder. The High Court has found that the deceased was not armed and could not have offered any resistance or challenged the chowkidars armed with weapon. Concededly, though the accused perceived JK as a thief and had chased him but that could be no justification to inflict vigorous stick blows which could cause fatal injuries as noticed in the postmortem report. Therefore, the conclusion reached by the High Court that it was a case of causing murder of the deceased, albeit by accused DB, an offence liable to be punished u/s. 302 simpliciter is upheld. [Para 6][1102-D-F]

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C 1.4 The mere presence of the three appellants-BB, AB and HR, at the scene of crime, cannot be the basis to record a finding of guilt against them by applying Section 34 IPC. The proved chain of circumstances is not enough to establish their complicity in causing the two fatal injuries to the deceased to which he eventually succumbed. The prosecution, however, unerringly established the involvement of DB, on the basis of the circumstances discerned from the record as concurrently found by the trial court and the High Court. Further, it is not a case to convert the offence of murder to one under Section 304 (II) IPC. Appellants BB, AB and HR are acquitted of the offence u/s. 302/34 by giving them benefit of doubt. The judgment and order passed by the trial court and the High Court is set-aside qua them. However, the conviction and sentence of DB u/s. 302 is upheld. [Paras 7, 8][1102-F-H; 1103-A-B]

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F CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 164 of 2011.

From the Judgment and Order dated 04.01.2008 of the High Court at Gauhati in Criminal Appeal No. 323 of 2004.

Anil Shrivastav, Adv. for the Appellants.

Debojit Borkakati, Vivek Sonkar, Advs. for the Respondent.

G The Judgment of the Court was delivered by

H **A. M. KHANWILKAR, J.** 1. This appeal takes exception to the judgment and order dated 4<sup>th</sup> January, 2008, passed by the Gauhati High Court in Criminal Appeal No.323 of 2004, confirming the conviction of the four appellants for offences punishable under Section 302/34 of

I.P.C. as recorded by the Additional Sessions Judge, No.2 (Ad-hoc) at Sivasagar in Sessions Case No.27(S-C) 2003. Initially, six accused were tried for the stated offence. Amongst them two accused came to be acquitted by the Trial Court on the finding that no tangible evidence was produced to establish their guilt. The four accused, who are appellants herein, however, came to be convicted by the Trial Court. They preferred an appeal before the High Court which came to be dismissed. The High Court, however, reversed the observation of the Trial Court that PW-5 (Lakhiram Kurmi) was an eyewitness. In that sense, the Trial Court as well as the High Court proceeded on the basis that it was a case of circumstantial evidence to establish the complicity of the appellants. The Trial Court in paragraph 35 recorded the circumstances as follows:

“1). Jugeswar Kurmi visited the house of Lakhiram Kurmi (PW-5) on the night and after having the night meal he left his house at about 08:30 P.M.

2). Lakhiram Kurmi heard that dogs were barking just after departure of Jugeswar Kurmi from his house.

3). Lakhiram heard the sound that the chowkidars are chasing somebody.

4). Lakhiram heard the sound of beating someone by the chowkidars.

5). The chowkidars asked Lakhiram to bring some water for the injured lying on the road inside the garden.

6). In the light of torch light of the accused persons Lakhiram identified Jugeswar.

7). Injured Jugeswar was carried by the accused persons on the carrier of the bicycle belonged to Jiten to the factory of Khagorijan Tea Estate with his two hand tied up with rope.

8). Jugeswar was lying dead in-front of the garden factory.

9). A lathi was recovered and seized from the house of accused Dipankar by the Investigating Officer.”

The High Court affirmed the view taken by the Trial Court that the stated circumstances clearly indicated the involvement of the appellants in the commission of the crime resulting in the death of

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A Jugeswar Kurmi (deceased), and having so held, confirmed the conviction and sentence awarded by the Trial Court qua the appellants.

2. After considering the rival submissions and perusing the record, we have no hesitation in observing that the prosecution case rests on circumstantial evidence. Besides the circumstances noted by the Trial Court and which commended to the High Court, no other circumstance can be discerned from the record. Notably, Lakhiram Kurmi, Manager of the Tea Estate (PW-5) is the only witness who had reached the spot after Jugeswar Kurmi was already assaulted and seen lying on the ground. In his examination, he has stated that Jugeswar Kurmi had visited his house on the same evening and left at about 08:30 p.m. after taking dinner. Later on, he (PW-5) heard some commotion outside his house at around 10:30 p.m. When he went out to see as to why the dogs were barking, he could see from about 300 cubits from where the sound was coming, the chowkidars (all accused) identified by him in court were standing. He asked them whether they were beating any person or cattle. The chowkidars, in return, asked him to bring water and when he went near the spot he found Jugeswar Kurmi lying on the road. He could recognize Jugeswar Kurmi in the light of the torch belonging to accused persons. He has stated that he offered water to Jugeswar Kurmi. Further, the chowkidars told him that he (Jugeswar Kurmi) was stealing tea bushes. Thereafter, the accused took the injured to the factory of the garden on the bicycle of his son, Jiten, and in the morning, he was informed that Jugeswar Kurmi had died.

3. The High Court rightly concluded that Lakhiram Kurmi (PW-5) was not an eyewitness. The question is: whether the circumstances noted by the Trial Court and which commended to the High Court by itself were sufficient to conclude that all the appellants were guilty of offence under Sections 302/34 of I.P.C? Admittedly, there is no evidence regarding common intention of the accused persons or prior meeting of their minds to kill the deceased (Jugeswar Kurmi). The evidence of PW-5, at best, mentions about the mere presence of all the appellants at the spot where Jugeswar Kurmi was seen lying on the ground. He does not state that all the appellants were wielding lathis at the relevant time. Nor has he spoken about any disclosure made by the appellants regarding the sequence of events resulted in causing fatal injuries to the deceased. Thus, there is no evidence to indicate as to how appellants Bikas Bora, Atul Bora and Haren Rautia could be made accountable for the fatal

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injuries caused to the deceased to which he eventually succumbed. In the postmortem report conducted by Dr. Udayaditya Rajkonwar (PW-8), he has noted the following injuries on the dead body of Jugeswar Kurmi:

- “1). Haemoatoma over left side of head with fracture of frontal bone and separations of front parietal and temporal structure.
- 2). Bruise over left lower laterachest wall with fracture of 10<sup>th</sup> rib.
- 3). Abrasion over left chin measuring 1. cm.
- 4). Two abrasions over left lateral abdominal wall above iliac crest, each 1. cm.”

He has stated that the first two injuries, in his opinion, individually, could have caused death in the ordinary course of nature. Jugeswar Kurmi died due to shock and hemorrhage from ante mortem injuries caused by a blunt weapon.

4. We are of the considered opinion that even if all the nine circumstances are taken as it is, the same do not clinchingly establish the complicity of appellants Bikash Bora, Atul Bora and Haren Rautia. There is no tittle of evidence to show that they were wielding lathis or had assaulted the deceased (Jugeswar Kurmi) by lathi so as to hold them responsible by applying Section 34 of I.P.C. At best, the chain of proved circumstances would point finger only towards appellant Dipankar Bora, from whose house lathi used to assault the deceased, was recovered. Further, the two fatal injuries, in the opinion of Dr. Udayaditya Rajkonwar (PW-8), could be caused by a blunt weapon like lathi. Accordingly, for want of clinching evidence to indicate the complicity of three appellants, namely, Bikash Bora, Atul Bora and Haren Rautia, it would be difficult to sustain their conviction by applying Section 34 of I.P.C., which was the charge framed against them. As a result, they deserve to be acquitted by giving them the benefit of doubt.

5. Reverting to the case of appellant Dipankar Bora, the nine circumstances noted by the Trial Court and affirmed by the High Court would certainly establish his involvement in the commission of crime, and in particular, on account of recovery of the weapon from his house, which was used to assault Jugeswar Kurmi. He has not offered any explanation except claiming to be innocent. The medical evidence does

A indicate that the two injuries were fatal and each of them was sufficient to cause death in ordinary course of nature. PW-8 has deposed that a patient with such injuries can survive up to one hour and beyond that possibility of survival is minimal. The Trial Court as well as the High Court were right in relying upon the evidence of PW-5 and PW-8 to hold that the nine circumstances were duly established. That being a possible view, we would be loath to interfere with the same. The proved circumstances clinchingly point towards the involvement of appellant Dipankar Bora in the commission of the stated offence of murder. Thus, we agree with the concurrent conclusion reached by the two courts about the finding of guilt against the appellant Dipankar Bora in the commission of the crime and for causing the death of Jugeswar Kurmi.

6. The next question is: whether the offence of Section 302 of I.P.C. can be converted to Section 304 (II) of I.P.C. The fact that only two fatal injuries have been noticed during the postmortem of the dead body of deceased (Jugeswar Kurmi) would not bring the case within any exception to hold that it was a case of culpable homicide not amounting to murder. The High Court has found that the deceased (Jugeswar Kurmi) was not armed and could not have offered any resistance or challenged the chowkidars armed with weapon. Concededly, though the accused perceived Jugeswar Kurmi as a thief and had chased him but that could be no justification to inflict vigorous stick blows which could cause fatal injuries as noticed in the postmortem report and proved by PW-8. Therefore, we are not inclined to disturb the conclusion reached by the High Court that it was a case of causing murder of Jugeswar Kurmi (deceased), albeit by accused Dipankar Bora, an offence liable to be punished under Section 302 of I.P.C. simpliciter.

7. Accordingly, we conclude that the mere presence of the three appellants namely, Bikash Bora, Atul Bora and Haren Rautia, at the scene of crime, cannot be the basis to record a finding of guilt against them by applying Section 34 of I.P.C. The proved chain of circumstances is not enough to establish their complicity in causing the two fatal injuries to the deceased (Jugeswar Kurmi) to which he eventually succumbed. The prosecution, however, has succeeded in unerringly establishing the involvement of accused Dipankar Bora, on the basis of the nine circumstances discerned from the record as concurrently found by the Trial Court and the High Court. Further, it is not a case to convert the offence of murder to one under Section 304 (II) of I.P.C.

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8. In view of the above, the appeal partly succeeds. The three appellants namely, Bikash Bora, Atul Bora and Haren Rautia are acquitted of the offence under Section 302/34 of I.P.C. by giving them benefit of doubt. The judgment and order passed by the Trial Court and the High Court is set-aside qua them. However, the appeal filed by the appellant Dipankar Bora stands dismissed by upholding his conviction and sentence punishable under Section 302 of I.P.C. simpliciter. His bail bond stands cancelled. He shall surrender within four weeks from today to undergo the remaining sentence, failing which the concerned police station must proceed against him forthwith as per law. The appeal is disposed of in the above terms.

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Nidhi Jain

Appeal disposed of.