DIBAKER NUNIA & ANR. A

v.

THE STATE OF ASSAM

(Criminal Appeal No. 962 of 2011)

AUGUST 30, 2022 B

[DINESH MAHESHWARI AND BELA M. TRIVEDI, JJ.]

Penal Code, 1860 – ss.302, 34 – Eye-witnesses, when not reliable – Person brutally assaulted, received multiple injuries on vital parts, died – Appellants convicted u/s.302/34 – On appeal, held: Findings in question are based essentially on the testimony of parents of the deceased, PW-2 and PW-3, the alleged eye-witnesses – Allegedly, they saw their son being assaulted by two persons with weapon – PW-2 allegedly fell unconscious after seeing the blood oozing from the body of his son – Thus, it is difficult to appreciate that they would go home, take meal and go to bed without bothering about the welfare of their injured son – Such a conduct in normal course, would be unreasonable and unacceptable, as also observed by High Court – This coupled with the fact that they allegedly narrated the incident to PW-1 (deceased's brother) only when he reached home after having seen his dead body and then the FIR was lodged next morning at 10 a.m – However, the High Court held that since the deceased was involved in several quarrels with other people to the knowledge of his parents and this background of the deceased explained their exit from the place of occurrence and also of their going to sleep – Not accepted – Prosecution case not supported by independent witnesses – Testimony of PW-2 and PW-3 could not have been accepted as that of eye-witnesses to the incident – Hence, the appellants could not be convicted even if named in FIR – Prosecution is expected to prove its case and to substantiate the charge beyond reasonable doubt – Doubts reasonably arising in the matter were brushed aside by High Court – Approach of Trial Court accepting the testimony of PW-2 and PW-3 observing that there was no reason for them to implicate anyone except the real culprit, is based on assumptions – On evidence, difficult to conclude beyond reasonable doubt that appellants alone were the authors of the injuries – Order of High Court and Sessions Court set aside – Appellants acquitted. C D E F G H

A *Criminal Law – Concurrent findings of fact – Interference by Supreme Court – When appropriate – Held: Ordinarily, in an appeal by special leave against concurrent findings of fact, Supreme Court would not enter into re-appreciation of evidence – However, if the assessment of the Trial Court and High Court is vitiated by any error of law or procedure or misreading of evidence or any disregard to the norms of judicial process leading to serious prejudice or injustice, Supreme Court may consider interference in an appropriate case to prevent miscarriage of justice.*

Criminal Law – "reasonable doubt" – What is – Held: A reasonable doubt is not a mere possible doubt but a fair doubt based upon reasons and common sense – It must grow out of the evidence in the case – When a reasonable doubt arises in a matter, benefit of doubt must be given to the accused.

Bhaskar Ramappa Madar & Ors. v. State of Karnataka: **(2009) Cri. L.J. 2422 (SC) – relied on.**

D CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 962 of 2011.

From the Judgment and Order dated 17.09.2009 of the High Court of Gauhati, Gauhati in Criminal Appeal No. 79 of 2006.

E Varinder Kumar Sharma, Parul Sharma, Shantanu Sharma, Advs. for the Appellants.

Debojit Borkakati, Adv., for the Respondent.

The Judgment of the Court was delivered by

F **DINESH MAHESHWARI, J.**

1. This appeal is directed against the judgment and order dated 17.09.2009, as passed by the Gauhati High Court in Criminal Appeal No. 79 of 2006, whereby the High Court has dismissed the appeal filed by the present appellants and has affirmed the judgment and order dated G 16.02.2006, as passed by the Session Court, Cachar, Silchar, Assam in Sessions Case No. 37 of 2003 convicting the appellants of offence under Sections 302/34 Indian Penal Code, 1860 ('IPC') and awarding the sentence of rigorous imprisonment for life and fine of Rs.1,000/- each with default stipulations.

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2. Briefly put, the relevant background aspects of the matter are as follows:

On 01.10.1999, at about 10 a.m., PW-1 Amrit Tanti lodged F.I.R. at the Ghungoor Police Outpost, stating that on the previous day, at about 12:30 midnight, while he was returning home from Sonai after an election campaign, he found a man lying in front of Congress Party's election office near the shop of PW-5 Joynarayan. According to the informant, from the light of an electric lamp, he could identify the man lying on the ground to be his younger brother Amar Tanti. He went home and came to know from his parents that the two accused persons Dibakar and Babul (the appellants) had assaulted the deceased in the evening hours. Hence, PW-1 Amrit Tati 1odged the written FIR whereupon, GD Entry No. 604 dated 01.10.1999 of Ghungoor Police Outpost was recorded and the FIR was forwarded to the Officer-in-Charge of Silchar Police Station. Accordingly, Silchar P.S. Case No. 1362 of 1999 under Section 302/34 IPC was registered.

2.2. The case was investigated mainly by PW-10 Dipen Paul. Inquest was held on the dead body which was sent for postmortem examination. The statements of various persons acquainted with the incident were also recorded. At the conclusion of investigation, charge-sheet was submitted against the accused-appellants.

2.3. In view of the nature of offence, the case was committed to the Court of Sessions. In relation to the charge of offence under Section 302/34 IPC, the appellants pleaded not guilty and claimed trial. In the course of trial, ten witnesses were examined on behalf of the prosecution. The appellants did not examine any witness in defence. However, the statements of appellants were recorded under Section 313 of the Code of Criminal Procedure, 1973. At the conclusion of trial, the accused-appellants were convicted and sentenced as aforesaid.

3. The prosecution case mainly rested on the testimony of PW-2 Sukhram, father of the deceased and PW-3 Menoka Tati, mother of the deceased, both of whom were said to be the eye-witnesses to the occurrence.

3.1. PW-2 Sukhram stated that on the date of occurrence, he was returning home at about 8 p.m. along with his wife from Silchar. At Shilcoorie market, he heard cries of his son Amar and rushed towards the place of occurrence. He saw profuse bleeding from the head of his

A son. He found accused Babul over-powering his son and the other accused Dibakar assaulting him with a dao. Seeing blood from the injuries of his son, this witness fell unconscious and he regained consciousness in the night. The witness stated that he could identify both the accused persons in the street light. He reported the incident to his son (PW-1) in the night of occurrence.

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In cross-examination, this witness PW-2 stated that though some persons came to the place of occurrence, they left immediately. He stated that though Silchar Medical College Hospital was at a distance of about 5 k.m. from the place of occurrence, he could not remove his son there as he was unconscious.

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3.2. PW-3 Menoka Tati is the wife of PW-2 and step-mother of the deceased. She stated that at the time of occurrence, she was coming home from Silchar town with her husband. While they arrived Shilcoorie market at about 7/8 p.m., they heard the deceased crying for help. Along with her husband, she went to the place of occurrence and saw the

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accused Babul holding the hands of the deceased and the other accused Dibakar assaulting him by means of a dao. Her husband tried to resist, but the accused persons did not pay any heed to it. She further stated that she witnessed the incident from a distance of about 16 feet and could properly identify the accused persons in the electric lights. This

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witness also stated that seeing the blood from the body of the deceased, her husband fell unconscious and she took her husband home. This witness also stated that on the night of occurrence itself, she reported the incident to PW-1 at about 3 a.m. when PW-1 returned home with police.

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This witness stated in the cross-examination that she saw the quarrel between the accused persons and the deceased. She denied the defence suggestion that the deceased always remained intoxicated and used to keep himself involved in quarrel with other persons. She stated that she saw about 100/150 persons at the place of occurrence in the electric light.

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4. So far the injuries on the person of the deceased are concerned, they were established by the testimony of PW-7 Dr. Homeswar Sharma who testified to the postmortem report, wherein the injuries were stated in the following manner:

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"Injuries:

1) Incised wound on the neck in the upper part placed obliquely measuring 11 x 6 x 6 cms cutting all the structures from the skin upto the second cervical vertebrae which is completely cut alongwith the blood vessels on the right side (see diagram).

2) Incised wound- two numbers- placed parallel to each other and 0.5 cm apart over the left temple measuring 5 x .5 x 1 cm each.

3) Punctured wound of semi-lunar shape measuring 4 x .5 x thoracic cavity deep over the left side of the thorax at inferior angle of the scapula.

4) Incised wound 4 cm long skin deep only over the anterior surface of the right shoulder.

5) Two incised wounds placed 1 cm apart measuring 5 x .5 x 1.5 cm over the left temporal region cutting upto the outer table of temporal region cutting upto the out table of temporal bone and the wounds placed obliquely. Larynx found incised and exposing the vocal cord under injury No.1.

Rest of the organs in the body were healthy and pale."

5. The other alleged private witnesses did not support the prosecution case but, the Trial Court proceeded to rely upon the statements of PW-2 and PW-3 while, inter alia, observing as under:

"22. ……There is clear evidence of P.W .2 and P.W .3 that there was profuse bleeding from the body of the deceased, at the sight of which P.W .2 fell down on the ground being unconscious. There are many people who cannot see nascent human blood and gets fainted. This situation happened in case of P.W.2. Some how he was removed home and he regained his senses at the dead of night and he reported the incident to P.W.1. Upon careful perusal of the evidence of P.W.2 and P.W.3 I find no ground to disbelieve their testimony. Their evidence has been properly accepted by the defence through cross-examination to be that of eye-witnesses. Hence, the clear finding is that P.W.2 and P.W.3 were the actual eye- witnesses to be occurrence.

23. There is no ground of false implication by P.W.2 and P.W. 3. There is no defence case that the two witnesses had any inimical relationship with the accused persons. There was no previous grudge with the accused persons. They had no axe to grind due to

A such previous grudge. There is no suggestion in this respect from the defence of P.W.2 and P.W. 3. The deceased was their own son, though P.W. 3 was the step mother. They would not go to implicate the innocent persons by exonerating the real culprits. Thus, there is no plea of giving false evidence by P.W. 2 and P.W.3, and I find that being actual eye-witnesses to the occurrence the parents of the deceased came forward to rope in the real culprits and the assailants of their son.

24. It is a fact that there were many people in the market and shop keepers were there when the incident took place at about 8 p.m. in the light of electricity. It has been submitted that none of those perons came to support the prosecution case. Through such a submission the defence has admitted that there was sufficient light at the place of occurrence to clearly identify the accused persons. Hence, identity of the accused persons through P.W. 2 and P.W. 3 is not a matter of doubt or dispute.

D 6. The Trial Court rendered the finding against the appellants in the following manner:

"31. From what has been discussed above, I find that on the evening of 30.09. 99 the two accused persons Dibakar and Babul, attacked the deceased at Shilcoorie bazar under Silchar P.S. with deadly weapon. It was witnessed by the parents of the deceased who were P.W. 2 and P.W. 3. The deceased died of these injuries soon after the incident. The accused persons have been well identified by prosecution witnesses. The accused persons in furtherance of their common intention, due to previous dispute, attacked the deceased with deadly weapon over the vital parts. So, they clearly intended to cause the death of the deceased. One of the accused caught hold of the deceased so that there was no scope for the deceased to escape from the place of occurrence, and the other accused attacked him mercilessly. The defence failed to discard the prosecution witnesses - particularly P.W. 2 and P.W .3 in any manner. So, this is a clear case of murder of the deceased by the accused persons.

32. However, I find that as per evidence of P.W. 2 and P.W.3, at first there was a quarrel between the deceased and the accused persons. But the deceased was totally unarmed and the accused

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persons were armed with deadly weapons. There is no evidence that the accused persons were first attacked by the deceased. They were the accused persons who without any ground attacked the deceased. There was no provocation from the deceased at the place of occurrence. Hence, I find that this is a clear case of murder punishable U/S 302 I.P.C. The defence failed to bring the case to any of the exceptions U/S 300 I.P.C. There is no excuse or exception for the accused persons in committing the crime. They attacked the deceased on the public road with deadly weapons over the vital parts of the body. As such, they intended to cause the death of the deceased and caused the same.

7. Before the High Court, the reliability of PW-2 and PW-3 was seriously put to question. The High Court, however, rejected the contentions urged on behalf of the appellants in the following manner:

"16. It is correct, as contended by the learned counsel for the appellants, that PW.2 in his statement before the police had stated that after the incident he along with his wife (P.W.3) had gone home and had taken their meal, whereafter, they had gone to bed. Such conduct, in the normal course, would have been unreasonable and unacceptable, particularly when the son of P.W 2, and P.W.3 was facing assault by the two accused-appellants who were armed with 'dao'. However, the aforesaid aspect of the matter is capable of - being understood by the defence version offered in the cross-examination of P.W.3 which is to the effect that the deceased used to be in a state of intoxication and he had been involved earlier in several quarrels with other people. If that be so, the exit/ departure of P.W.2 and P.W.3 after the quarrel and even after seeing the assault is fully understandable. That apart, it is in the evidence of P.W.3 that on seeing the deceased smeared in blood P.W.2 had fallen unconscious, whereafter, he was taken home and had regained his senses while at home. The departure of P.W. 2 and P.W. 3 from the place of occurrence and their going to sleep can also be explained and reasonably understood on the aforesaid testimony of P.W.3. It is, therefore, our considered view that notwithstanding what has been contended on behalf of the accused- appellants, the evidence of P.W.2 and P.W.3, on the most material part of the incident is acceptable and we are inclined to act on the basis of the testimony of the two eye witnesses."

A 8. Learned counsel for the appellants has strenuously argued that the Sessions Court as also the High Court in this matter have proceeded on irrelevant considerations and have ignored significant shortcomings in the prosecution case. According to the learned counsel, conviction of the appellants is essentially based on the testimony of PW-2 and PW-3 but their statements not only carry serious contradictions but also carry B inherent improbabilities; and while taking their version on face value, it is against the natural and normal conduct for any person to go home after having seen his son in pool of blood on being assaulted by two persons and then, to take the meal and go to sleep.

9. Learned counsel has contended that this unnatural conduct of C the parents of the deceased has been ignored by the learned Sessions Judge altogether. Further, the High Court has provided justification to this unnatural conduct with reference to the fact that the deceased had allegedly been involved in quarrels with other people. Learned counsel would contend that even if it be assumed that the deceased was involved D in quarrels, his parents would not be so unconcerned about their son when he had been assaulted by two persons and was badly injured with blood oozing from his head.

10. Learned counsel would further argue that when testimony of PW-2 and PW-3 is removed out of consideration for being of entirely unnatural conduct, the fact of the matter remains that none of the E independent witnesses have supported the prosecution story. In this view of the matter, the appellants deserves to be acquitted. Learned counsel has also argued that the incident took place at about 7-8 p.m. on 30.09.1999 whereas the FIR was lodged only on 10 a.m. on 01.09.1999 by PW-1, brother of the deceased. This inordinate delay in FIR had remained F unexplained and the prosecution case could not have been believed on such an FIR.

11. The learned counsel for the State has duly supported the judgment and order impugned and has submitted that when the totality of circumstances are taken into account, the statements of PW-2 and G PW-3 cannot be said to be totally unreliable and the concurrent findings based on the said statements call for no interference.

12. We have heard learned counsel for the parties and have examined the material placed on record.

13. In this case, both the Trial Court and the High Court have H agreed in their appreciation of evidence and have arrived at concurrent

findings of fact; and ordinarily, in an appeal by special leave against concurrent findings of fact, this Court would not enter into reappreciation of evidence. However, if the assessment of the Trial Court and the High Court is vitiated by any error of law or procedure or misreading of evidence or any disregard to the norms of judicial process leading to serious prejudice or injustice, this Court may consider interference in an appropriate case so as to prevent miscarriage of justice.

14. After having examined the present matter in its totality, we are impelled to consider interference herein because the findings as returned by the Trial Court and the High Court apparently suffer from an entirely erroneous approach leading to miscarriage of justice.

15. As noticed, the findings in question are based essentially on the testimony of PW-2 and PW-3, who were alleged to be the eye-witnesses to the incident. No other independent witness has testified in support of the prosecution case. The High Court took note of the fact that PW-2 in his statement before police had stated that after the incident, he along with his wife PW-3 went home, took their meal and slept. The High Court had rightly observed that such a conduct in the normal course, would have been unreasonable and unacceptable, particularly when the son of these witnesses was facing assault by two persons. However, the High Court took into account the facts emerging on record that the deceased had been involved in several quarrels with other people to the knowledge of his parents. According to the High Court, such background of the deceased would explain the exist/departure of PW-2 and PW-3 from the place of occurrence and also of their going to sleep. With respect, we are unable to accept this approach.

16. As per the assertion of PW-2 and PW-3, they had seen their son being assaulted by two persons with weapon. PW-2 had allegedly fallen unconscious after seeing the blood oozing from the body of his son. In that situation and scenario, it is difficult to appreciate that these witnesses would go home, take meal and go to bed without bothering about the welfare of their injured son. This aspect is coupled with the fact that they had allegedly narrated the incident to PW-1 only when he reached home after having seen the dead body of his brother. Then, the FIR was lodged next day morning at 10 a.m.

17. Taking all the circumstances into account, in our view, testimony of PW-2 and PW-3 could not have been accepted as that of eye-witnesses to the incident from any standpoint. Moreover, PW-4 Biren Patra, PW-

A 5 Joynarayan Kalewar, PW-8 Dilip Kheira and PW-9 Sudama Bari, who were projected by the prosecution as independent witnesses, did not support the prosecution case at all.

18. Aforesaid being the position, the appellants, even if named in the FIR, could not have been convicted in this case.

B 19. It remains trite that in such a criminal case, the prosecution is expected to prove its case and to substantiate the charge beyond reasonable doubt. A reasonable doubt is not a mere possible doubt but a fair doubt based upon reasons and common sense. It must grow out of the evidence in the case[1]. When a reasonable doubt arises in a matter, benefit of doubt must be given to the accused. In the present case, the C doubts reasonably arising in the matter had been brushed aside by the High Court on the logic that itself remains unacceptable. The approach of the Trial Court in accepting the testimony of PW-2 and PW-3 with the observations that there was no reason for them to implicate anyone except the real culprit, again, remain that of assumptions which are not D compatible with the given set of facts and circumstances.

20. It is true that the deceased had been brutally assaulted and had received multiple injuries on vital parts but, on the evidence as adduced by the prosecution, it is difficult to conclude beyond reasonable doubt that the appellants alone were the authors of such injuries. In view of E above, we find it to be a fit case for interference in the concurrent findings of the Trial Court and High Court.

21. Accordingly and in view of the above, this appeal succeeds and is allowed.

22. The impugned judgment and order dated 17.09.2009, as F passed by the Guahati High Court in Criminal Appeal No. 79 of 2006 as also the judgment and order dated 16.02.2006, as passed by the Sessions Judge, Cachar at Silchar in Sessions Case No. 37 of 2003 are set aside; and the appellants are acquitted as such. If the appellants are in custody, they be released immediately.

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Divya Pandey Appeal allowed.
(Assisted by: Deepak Panwar, LCRA)

[1] Vide: Bhaskar Ramappa Madar & Ors. v. State of Karnataka: (2009) Cri. L.J. 2422 H (SC) (at pg. 2431)