

ANIL PHUKAN  
v.  
STATE OF ASSAM

MARCH 17, 1993

[DR. A.S. ANAND AND N.P. SINGH, JJ.]

*Indian Penal Code, 1860 :*

*Sections 302 and 34—Appellant and his brothers inflicting blows on deceased—Prosecution case that words and abuses exchanged between appellant and deceased regarding repayment of loan—Later assault ensued—Medical evidence consistent with theory that deceased assaulted by only one person—Whether conviction can be based on the testimony of sole eye witness—Held accused entitled to benefit of doubt.*

The prosecution alleged that the appellant borrowed a sum of Rs. 450 from the deceased and had executed two hand notes Ex. 7 and Ex. 8, promising to repay the amount on 21.3.1976. On the said date the deceased accompanied by his nephew, PW.3 proceeded to the village of the appellant and as he was getting late, PW.3 carried with him a torch light. The distance of the house of the deceased from that of the appellant was about one furlong. The appellant was present in the fields in front of his house and on being asked as to why he had not come to return the money, he asked them to wait there and proceeded towards his house. When the appellant did not return for some time, the deceased alongwith PW.3 proceeded towards the house of the appellant when they found him and his two brothers coming towards them variously armed, one had a crowbar while the others had a crooked dao and a kupa dao with them. PW.3 apprehended some danger from the appellant and his brothers, but his uncle told him that since they had done no wrong, they need not be afraid of any assault. On coming near the deceased and PW.3, one of the brothers gave a blow with a crowbar, while the other two brothers assaulted the deceased thereafter. PW.3 pulled the deceased towards his house and implored the accused not to assault him. At the asking of his uncle PW.3 ran away to his house and gave the information to the wife of the deceased and also narrated the occurrence to PW.4. The wife of the deceased went to PW.6, and after telling him as to what had been told to

A her by PW.3 she requested him to accompany her to the place of occurrence. On reaching the place of occurrence, they found him lying on the spot with injuries on his person but he was still alive. Two of the PWs brought a bullock cart and PW.7 after lifting the body with some difficulty brought it to his house and kept it in the verandah. However, before any  
B medical aid could be provided, the deceased succumbed to the injuries at night.

The first information report was lodged at the police station at 12.30 p.m. by PW.2. During the investigation, some weapons including an axe were seized from the house of the accused and on the same day one of the  
C brothers was arrested at 6.45 p.m. and the other two brothers surrendered subsequently in the court. The Investigation Officer prepared a sketch of the place of occurrence and sent the body for post-mortem examination. The appellant alongwith his brothers were tried for offences under section 302/34 IPC for the murder of the deceased, and the Sessions Judge  
D convicted all the three brothers for the said offence and sentenced them for life.

On appeal by the three brothers the Division Bench of the High Court upheld the conviction and sentence of all the three.

E The instant SLP was admitted as regards one petitioner only and notice was issued. The S.L.P. of the second petitioner was dismissed while the third brother did not file any appeal.

Allowing the appeal and acquitting the appellant, this court,

F HELD: 1. Conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the  
G single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded  
H in toto and no amount of corroboration can cure that defect. [393E-F]

2. The instant case, the medical evidence is consistent with the theory that the deceased had been assaulted only by one person and not by all the three brothers as alleged by the prosecution. The possibility, therefore, that Mahendra accused alone had caused injuries on the deceased cannot be ruled out. May be on account of the recovery of the two bonds Ext. 7 and Ext. 8, from the house of Anil, he was also implicated. [395G]

3. The origin of the fight is totally obscure, and the prosecution has not explained the genesis of the origin of the fight either. It is not even the case of the prosecution that Anil had refused to repay the loan or that any hot words or abuses had been exchanged between Anil and the deceased when the later had demanded from him the repayment of the loan.

[395H, 396A]

4. In view of the infirmities of the prosecution evidence it would not be safe to rely upon the testimony of Ajoy PW.3, the sole eye-witness, without looking for independent corroboration and as already noticed, the corroboration furnished by the prosecution, unlike in the case of Mahendra the appellant's brother, is negative in character in so far as the involvement of Anil appellant is concerned. [396B]

5. The appellant, was held entitled to the benefit of doubt and granting him that benefit, his conviction and sentence for the offence under Section 302/34 IPC were set aside. [396C]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 757 of 1985.

From the Judgment and Order dated 6.11.1984 of the Gauhati High Court in Criminal Appeal No. 11 of 1979.

Sunil Kumar Jain, P.D. Tyagi and Vijay Hansaria for the Appellant.

S.K. Nandy for the Respondent.

The Judgment of the Court was delivered by

DR. ANAND, J. Anil Phukan and his brothers Mahendra Phukan and Jojneswar Phukan were tried for an offence under Section 302/34 IPC for the murder of one Trinayan Chandra Baruah on 21.3.1976 at about 8 p.m. The learned Sessions Judge convicted all the three brothers for the said offence and sentenced each one of them to suffer imprisonment for life

- A An appeal was preferred by all the three brothers against their conviction and sentence in the Gauhati-High Court. A Division Bench of that court vide judgment dated 6.11.1984 upheld the conviction and sentence of all the three. A Special Leave Petition (Crl.) No. 561/85, was preferred by Mahendra Nath Phukan, and Anil Phukan, the third brother Jojneswar, however, did not file any special leave petition. On 2.9.1985, the special leave petition as regards Mahendra Nath Phukan was dismissed while notice was issued in the petition as regards Anil Phukan. Subsequently, on 29.10.1985, special leave was granted to Anil Phukan and on 29.4.1986, he was also directed to be released on bail to the satisfaction of the Chief Judl. Magistrate, Golaghat, Assam. We are, therefore, at this stage concerned only with the criminal appeal, by special leave, of Anil Phukan.

- In brief, the prosecution case is that the appellant, Anil Phukan had borrowed a sum of Rs. 450 from Trinayan Chandra Baruah, deceased and had executed two hand notes Ex. 7 and Ex. 8, promising to repay the amount on 21.3.1976. However, he did not repay the amount. On 21.3.1976, the deceased accompanied by his nephew, Ajoy Baruah PW3, proceeded to the village of the appellant and as he was getting late, Ajoy Baruah PW3 carried with him a torch light. The distance of the house of the deceased from that of the appellant is about one furlong. Anil appellant was present in the fields in front of his house and on being asked as to why he had not come to return the money, he asked them to wait there and proceeded towards his house. Later on, when Anil did not return for some time, the deceased alongwith Ajoy PW3 proceeded towards the house of the appellant when they found all the three brothers coming towards them variously armed. Mahendra had a crowbar while jojneswar had a crooked dao and Anil a kupa dao. Ajoy PW3 apprehended some danger from the appellant and his brothers but his uncle told him that since they had done no wrong, they need not be afraid of any assault. On coming near the deceased and Ajoy PW3, Mahendra, who came first, gave a blow to Trinayan on his head with the crowbar, the other two brothers also allegedly assaulted the deceased thereafter. Ajoy PW3 pulled the deceased towards his house and implored the accused not to assault him. At the asking of his uncle, Ajoy PW3 ran away to his house and gave the information to the wife of the deceased PW5 Debayani Baruah, about the occurrence. He also narrated the occurrence to PW4, Bijoy Baruah. the wife of the deceased went to PW6, Punaram Gogoi, and after telling him as to what had been told to her by Ajoy PW3, she requested him to accompany her to the place of

occurrence. On reaching the place of occurrence, they found Trinayan lying on the spot with injuries on his person but he was still alive. PWs Bijoy and Ajoy brought a bullock cart from Sabharam Bora PW7 and after lifting the body of Trinayan with some difficulty brought it to his house and kept it in the verandah. However, before any medical aid could be provided, the deceased succumbed to the injuries at night. The first information report was lodged at Golaghat Police Station the next day in the afternoon at 12.30 p.m. by Surendra Nath Gogoi PW2. During the investigation, some weapons including an axe were seized from the house of Mahendra accused. On the same day, Mahendra was arrested at about 6.45 p.m. The other two brothers Anil and Joyneswar surrendered subsequently in the court. The I.O. prepared the sketch plan of the place of occurrence and sent the body for post-mortem examination. The autopsy revealed that the deceased had two incised injuries on the head besides one swelling and an injury on the inner part of his thigh. The prosecution in all examined 12 witnesses to connect the accused with the crime.

This case primarily hinges on the testimony of a single eye witness Ajoy PW3. Indeed, conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect. It is in the light of these settled principles that we shall examine the testimony of PW3 Ajoy.

Ajoy PW3, on his own showing, is the nephew of the deceased. He had accompanied the deceased to the place of occurrence when the later went to recover the loan from Anil appellant. This witness, therefore, is a relative of the deceased and an interested witness. Of course, mere relationship with the deceased is no ground to discard his testimony, if it is otherwise found to be reliable and trustworthy. In the normal course of events, a close relation would be the last person to spare the real assailant

A of his uncle and implicate a false person. However, the possibility that he  
may also implicate some innocent person along with the real assailant  
cannot be ruled out and therefore, as a matter of prudence, we shall look  
for some independent corroboration of his testimony, to decide about the  
involvement of the appellant in the crime. Since, there are some doubtful  
aspects in the conduct of Ajoy PW3, it would not be safe to accept his  
evidence without some independent corroboration, direct or circumstan-  
tial.

The unnatural conduct of Ajoy PW3 which has come to our notice  
from the record is that though he was present alongwith the deceased at  
the time of occurrence, on 21.3.1976, at about 8 p.m., he made no attempt  
to save his uncle from the assault. He did not even continue to stay there,  
though of course according to him, he ran for his life on being advised so  
by his uncle. He was not assaulted though both he and his uncle were  
unarmed. Even if Mahendra was engaged in assaulting the deceased, Anil,  
who was also allegedly armed neither made an attempt to assault Ajoy PW3  
nor even chased him. PW3 Ajoy did not himself lodge the FIR. Of course,  
he gave information about the occurrence to PW4, PW5, PW7 and others  
immediately after the occurrence describing the manner of assault and the  
names of the assailants but why he did not lodge the FIR has not been  
explained by him. In his testimony in the court, he deposed that after  
Mahendra accused gave blow with the crowbar on the head of the deceased  
"other accused also assaulted him". He did not describe as to on which part  
of the body of the deceased, had Anil and Jojneswar caused the injuries  
and made a general vague statement without assigning any particular injury  
to either of them. When we look to the medical evidence, we find that the  
deceased had suffered two injuries on his head and no other injury on any  
other part of the body. In all, four injuries were recorded in the post-mor-  
tem report. The other two injuries, according to the doctor, could have  
been the result of a fall and indeed looking to the nature of those injuries,  
which are in the nature of a swelling on the back of the interscapular region  
and a lacerated wound on the interior aspect of the right thigh, it is possible  
to agree with the medical witness PW1 Dr. Ganesh Ch. Buragohain, that  
those injuries could have been caused by a fall and were not the result of  
any direct impact with a weapon of assault. Both the head injuries are  
almost of the same dimensions. The possibility, therefore, that both the  
injuries had been caused to the deceased by Mahendra with the crowbar,  
who according to PW3 had hit the deceased on the head cannot be ruled

out. In this connection, it would also be relevant to note that according to the testimony of the Investigating Officer, PW11 Abhiram Taye, all the weapons like the crowbar Ex.M5, a dao, an axe and a hand dag were recovered only from the house of Mahendra. We have it from the testimony of PW3 and the first informant PW2 that all the three brothers lived separately. No recovery was effected from the house of the appellant Anil at all. All that was seized from his house were two bonds Ex.7 and Ex.8, undertaking to repay the loan to the deceased. Unlike Mahendra accused he was not even arrested on the date of the occurrence and the mere *ipse dixit* of the investigating officer, that Anil had absconded is not acceptable, particularly when the investigating officer is totally silent as to where all he had made the search for the appellant and when. He was not questioned under Section 313 Cr. PC about the allegation of absconding either. The deceased was still alive when his wife and the other co-villagers, who have appeared as witness reached the place of occurrence. The deceased did not name the appellant as his assailant before anyone. The crowbar Ex. 5 was recovered from the house of Mahendra and according to the testimony of PW3, it was the same weapon with which Mahendra had hit deceased on his head which position also receives corroboration from medical evidence. The deposition of PW4, who is the sister of PW3 Ajoy to the effect that when Ajoy PW3 came running to the house, he told her that her uncle had been killed by Anil and his brothers does not stand scrutiny because admittedly according to PW3 himself, when he ran from the place of occurrence, the deceased was still alive and as a matter of fact he was alive even when the wife of the deceased and other neighbours reached there and brought him to the house. It was only at the house while the deceased was kept in the verandah that he succumbed to the injuries. There could have been, therefore, no occasion for Ajoy PW3 to have told his sister PW4, that her uncle had been 'killed' by Anil and his brothers. This also shows that Ajoy PW3 has the tendency to exaggerate matters. The medical evidence is consistent with the theory that the deceased had been assaulted only by one person and not by all the three brothers as alleged by the prosecution. The possibility, therefore, that Mahendra accused alone had caused injuries on the deceased cannot be ruled out. May be on account of the recovery of the two bonds Ex.7 and Ex.8 from the house of Anil, he was also implicated. We cannot be sure. The origin of the fight is totally in obscure and the prosecution has not explained the genesis of the origin of the fight either. It is not even the case of the prosecution that Anil had refused to repay the loan or that any hot words

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A or abuses had exchanged between Anil and the deceased when the later had demanded from him the repayment of the loan. In view of the infirmities pointed out above, it would not be safe to rely upon the testimony of Ajoy PW3, the sole eye-witness, without looking for independent corroboration and as already noticed, the corroboration furnished by the prosecution unlike in the case of Mahendra, is negative in character in so far as the involvement of Anil appellant is concerned.

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C In our considered opinion, therefore, it would not be safe to hold that the prosecution has established its case against Anil appellant beyond a reasonable doubt. The appellant, in our opinion, is entitled to the benefit of doubt and granting him that benefit, we set aside his conviction and sentence for the offence under Section 302/34 IPC and consequently the judgment of the High Court in so far as Anil appellant is concerned, is set aside and he is hereby acquitted.

Anil appellant is on bail. His bail bonds shall stand discharged.

N.V.K.

Appeal allowed.